A PERSONALITY CRISIS: THE TRADE UNION ACTS, STATE REGISTERED UNIONS AND THEIR LEGAL STATUS

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INTRODUCTION

Since the passage of the *Trade Union Act* in the United Kingdom in 1871 with its amending legislation of 1876 and the adoption in Australia of these statutory provisions soon afterwards, one would think that the question of legal personality of unions under these Acts would have been resolved and that a clear and precise outline of the legal status of unions would have been delineated. However, the legal status of trade unions is a problem with which the courts have continued to grapple over the last century. The problem has arisen in relation to trade unions at common law, unions which are registered under industrial legislation in different states and unions which are registered under the *Conciliation and Arbitration Act* 1904 (Cth.).

Before the enactment of the *Trade Union Acts* 1871 and 1876 (U.K.)[1] and the adoption of these Acts by Australian States,[2] unions at common law appeared to be in the same position as clubs and voluntary organizations, with the courts expressing a reluctance to intervene in their internal affairs.[3] At common law, a trade union was an association which consisted

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1 The *Trade Union Act* 1871 (U.K.) and the *Trade Union Act Amendment Act* 1876 (U.K.) were repealed by the *Industrial Relations Act* 1971 (U.K.) which in turn was repealed by the *Trade Union and Labour Relations Act* 1974 (U.K.) which now, inter alia, defines the status of trade unions. Section 2(1) provides that a trade union shall not be a body corporate but it shall have certain powers, for example, it can make contracts, the property is to belong to trustees, it is capable of suing and being sued and judgments are to be enforceable against any property held in trust for a trade union.

2 These were the *Trade Unions Act* 1958 (Vic.); *Trade Union Act* 1881 (N.S.W.); the *Trade Union Act* 1876 (S.A.); *Trade Unions Act* 1902-1924 (W.A.); *Trades Unions Act* 1889 (Tas.); *Trade Union Act* 1915 (Qld.). The *Trade Union Act* 1876 (S.A.) was repealed by the *Industrial Conciliation and Arbitration Act* 1972 (S.A.) and the *Trade Union Act* 1915 (Qld.) was repealed by the *Industrial Conciliation and Arbitration Act* 1961 (Qld.).

3 Most statements that trade unions were voluntary associations arose in the context of the courts' unwillingness to interfere in the internal affairs of the associations, unless some right of a proprietary nature existed. See *Booreman's* case March N.R. 177 pl. 235; 82 E.R. 464; *R.* v. *The Benchers of Gray's Inn* (1780) 1 Doug. L. 353; 99 E.R. 227; *R.* v. *The Benchers of Lincoln's Inn* (1825) 4 B. & C. 855; 107 E.R.

of members who had agreed to be bound by a set of rules. This association had no separate legal personality from its members, it could neither hold property nor contract in its own name and it could not sue or be sued in its own name.[4] This position was altered by statutes providing for the establishment of systems of conciliation and arbitration and for the regulation of unions. A State union which was registered under the *Industrial Arbitration Act* 1912 (W.A.), the *Industrial Conciliation and Arbitration Act* 1972 (S.A.) or the *Industrial Conciliation and Arbitration Act* 1961 (Qld.) had corporate status specifically conferred on it by the legislation.[5] Similarly, a union which was registered under the *Conciliation and Arbitration Act* 1904 (Cth.) had corporate status, for that Act provides that it can sue and be sued in its registered name, can hold and deal with property and has perpetual succession and a common seal.[6]

The position of unions registered under the *Trade Union Act* 1881 (N.S.W.), the *Trade Unions Act* 1958 (Vic.), the *Trades Unions Act* 1889 (Tas.) and *Trade Unions Act* 1902-1924 (W.A.) is less clear.[7] These

1277; *Rex* v. *The College of Physicians* 2 Show. K.B. 178; 89 E.R. 874; *Rigby* v. *Connol* (1880) 14 Ch.D. 482; *Amos* v. *Brunton* (1897) 18 N.S.W.R. (E.) 184. See also *Yorkshire Miners' Association* v. *Howden* [1905] A.C. 256 per Lord Lindley at 279; *Russell* v. *Amalgamated Society of Carpenters and Joiners* [1912] A.C. 421.

[4] See generally J. H. Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958) 11-33; D. W. Smith, *The Legal Status of Australian Trade Unions* (Butterworths, 1975) 12-23; M. A. Hickling, *Citrine's Trade Union Law* (3rd ed., Stevens and Sons Limited, 1967) 177-81. A union at common law might have had difficulty in enforcing agreements and trusts if its purposes were in restraint of trade.

[5] Ss. 13 and 15 *Industrial Arbitration Act* 1912 (W.A.) [The *Industrial Arbitration Bill* 1979 was introduced into Parliament in Western Australia on 16 October 1979 and when enacted will repeal the *Industrial Arbitration Act* 1912 (W.A.). However, by cl. 60 of the Bill, corporate status will be conferred upon unions registered under that Act]; ss. 138 and 139 the *Industrial Conciliation and Arbitration Act* 1972 (S.A.); s. 69 the *Industrial Conciliation and Arbitration Act* 1961 (Qld.).

[6] The *Conciliation and Arbitration Act* 1904 (Cth.), ss. 136 and 146. On the similarities between companies incorporated under Companies Acts and federally registered organizations, see *Allen* v. *Townsend and Ors* (1977) 16 A.L.R. 301, 348-50, per Evatt and Northrop JJ. in the Federal Court of Australia.

[7] In New South Wales, registration under the *Trade Union Act* 1881 (as amended) is necessary before there can be registration as an industrial union under the *Industrial Arbitration Act* 1940 (N.S.W.). Registration under the latter Act enables a union to participate in the state system of arbitration, but it does not specifically confer corporate status on unions. In Western Australia, it is possible for a union to be registered under the *Trade Unions Act* 1902-1924 (W.A.) without that union also being registered and therefore expressly incorporated as an industrial union under the *Industrial Arbitration Act* 1912 (W.A.). However, registration of a union under the *Industrial Arbitration Act* 1912 (W.A.) is necessary for unions to participate in that State's arbitration system. Registration of unions in Victoria and Tasmania is less important because there is no requirement upon unions to register in order to take part in the State Wages Board systems. On 26 September 1979, the *Industrial Relations Bill* 1979 was introduced into the Victorian Parliament. At the time of writing it had not been passed. The bill provides, inter alia, for a system of recognition of associations of employers and employees to enable those associations to participate in the State's system of wage fixing. This system does not confer any corporate status on recognized unions. See cl. 53-6 *Industrial Relations Bill* 1979.

Acts, which I shall call collectively the *Trade Union Acts*, were basically a re-enactment of the *Trade Union Acts* 1871 and 1876 (U.K.) and affected the status of trade unions. Briefly, the thrust of these Acts was as follows:

(1) they purported to prevent any agreement with or trust set up by a trade union being void or voidable because the purposes of the union were in restraint of trade, and also to avoid liability for criminal conspiracy because its purposes were in restraint of trade. These provisions applied to any union defined by the Acts, whether registered or not;[8]

(2) they provided for a system of registration of trade unions and the issuing of a certificate of registration;[9] for the scrutiny of accounts of registered unions[10] and for procedures for amalgamation of unions;[11]

(3) they enabled land and buildings for a registered trade union to be purchased or leased in the names of trustees of the union,[12] and the vesting of the property, both real and personal, of the registered union in the name of trustees;[13] and

(4) they gave the trustees a limited right to sue and be sued in matters concerning union property.[14]

None of these Acts specifically provided for the incorporation of unions registered under them. The fundamental question which faced the courts was whether the *Trade Union Acts* so altered the status of unions at common law that legal personality was conferred upon unions registered under them. It seems that a state union registered under these Acts may have a type of legal personality which falls somewhere between that of an unincorporated association and a corporation, being either an unincorporated association which for convenience can sue or be sued in its own name, or being a "quasi-corporation" which is not a corporation in the

[8] S. 4 *Trade Unions Act* 1958 (Vic.); ss. 2 and 3 *Trade Union Act* 1881 (N.S.W.); s. 3 *Trades Unions Act* 1889 (Tas.); ss. 3 and 4 *Trade Unions Act* 1902-1924 (W.A.). However some agreements with trade unions remained unenforceable at common law. See s. 5 *Trade Unions Act* 1958 (Vic.); s. 4 *Trade Union Act* 1881 (N.S.W.); s. 4 *Trades Unions Act* 1889 (Tas.); s. 5 *Trade Unions Act* 1902-1924 (W.A.). For a recent discussion of unenforceable agreements and the "unlawfulness" of unions, see C. P. Mills, "Trade Unions in Court" (1979) 53 *A.L.J.* 752.

[9] Ss. 7 and 16 *Trade Unions Act* 1958 (Vic.); ss. 6 and 14 *Trade Union Act* 1881 (N.S.W.); ss. 6 and 15 *Trades Unions Act* 1889 (Tas.); ss. 8 and 17 *Trade Unions Act* 1902-1924 (W.A.).

[10] S. 23 *Trade Unions Act* 1958 (Vic.); s. 18 *Trade Union Act* 1881 (N.S.W.); s. 22 *Trades Unions Act* 1889 (Tas.); s. 29 *Trade Unions Act* 1902-1924 (W.A.).

[11] S. 20 *Trade Unions Act* 1958 (Vic.); ss. 22 and 22A *Trade Union Act* 1881 (N.S.W.); s. 19 *Trades Unions Act* 1889 (Tas.); s. 25 *Trade Unions Act* 1902-1924 (W.A.).

[12] S. 8 *Trade Unions Act* 1958 (Vic.); s. 7 *Trades Unions Act* 1889 (Tas.); s. 9 *Trade Unions Act* 1902-1924 (W.A.).

[13] S. 8 *Trade Union Act* 1881 (N.S.W.); s. 9 *Trade Unions Act* 1958 (Vic.); s. 8 *Trades Unions Act* 1889 (Tas.); s. 10 *Trade Unions Act* 1902-1924 (W.A.).

[14] S. 10 *Trade Unions Act* 1958 (Vic.); s. 9 *Trade Union Act* 1881 (N.S.W.); s. 9 *Trades Unions Act* 1889 (Tas.); s. 12 *Trade Unions Act* 1902-1924 (W.A.).

true sense but rather is akin to a corporation and is an entity which is separate and distinct from its members.

A review of cases on trade union legal personality generally shows that it is possible for unions to have one of four types of legal status. These are:

(a) *Unincorporated Association* (Type I)
A union falling within this category is not a legal entity. It is an unincorporated association which can neither hold property nor contract in its own name, which cannot sue or be sued in its own name and which cannot commit, or be injured by, torts as a body.[15] It has no existence separate from its members, its property belongs to its members and it can exist so long as there are members.[16]

(b) *Notional Entity* (Type II)
This type of union has "limited" legal personality. It is not a corporation but can sue or be sued in its registered name and it can hold property by trustees. It is not an entity which is distinct from its members but the registered name of such a union is, rather, a collective name for members and a convenient means for suing and being sued, as it avoids the procedural difficulties normally associated with suing an unincorporated association. Perpetual succession of such a union is *not* implied, for the organization is not separate from its members and can exist only so long as there are members.

(c) *Quasi-corporation* (Type III)
A union in this category also has "limited" legal personality. It is able to hold property by trustees, to act by agents and to sue and be sued in its own name. Although this type of union is not a corporation, it is called a "quasi-corporation" because it is an *entity* which is separate from its members. This implies that it has perpetual succession.

(d) *Corporation* (Type IV)
This category of organization is a corporation. The distinction between types III and IV may be queried but it is a distinction the courts have sought to draw. An organization which falls under type III has many

[15] There are various ways of attaching liability for acts purported to be committed by the association: (i) the committee members may be sued (*Bradley Egg Farm* v. *Clifford* [1943] 2 All E.R. 378; *Carlton Cricket and Football Social Club* v. *Joseph* [1970] V.R. 487; *Smith* v. *Yarnold* [1969] 2 N.S.W.R. 410); (ii) those members who authorized committee members or other persons to act may be sued; (iii) recovery of damages from the common fund may be made, by first proceeding under the rules of State Supreme Courts which provide for representative actions; see for example, *Rules of the Supreme Court of the State of Victoria* Order 16, Rule 9 (*Ideal Films* v. *Richards* [1927] All E.R. Rep. 271).

[16] For the law relating to unincorporated associations, see generally H. A. J. Ford, *Unincorporated Non-Profit Associations* (Reprint of the Edition Oxford 1959, Clarendon Press, Oxford 1977); R. Baxt, "The Dilemma of the Unincorporated Association" (1973) 47 *A.L.J.* 305; L. C. B. Gower, *The Principles of Modern Company Law* (3rd ed., Stevens & Sons, London, 1969).

aspects of 'corporateness' but is not a corporation in *strictu sensu*, the courts preferring the term "quasi-corporation" for type III legal status.[17]

A union then at common law and before the intervention of statute appeared to have type I legal status,[18] whilst a union registered under the industrial arbitration legislation[19] has corporate status, that is, type IV. Uncertainty remains as to the status of a union registered under the *Trade Union Acts*, for a final judicial pronouncement of the legal status of such a union has not been made. It is undesirable that such a fundamental conceptual matter should still lack certainty today. That it is possible for Gibbs J. to make the following remarks as recently as July 1979 in *Egan* v. *Shop Distributive and Allied Employees' Association*[20] on the *Trade Union Act* 1881 (N.S.W.) points to the need for clarity and certainty of the status and capacity of unions and the rules surrounding them:

"Although some further provision as to trade unions is made by the Industrial Arbitration Act, the law as to the status and capacity of trade unions, and their ability to amalgamate, is still mainly to be found in the Trade Union Act, which reproduces, with a few amendments, the provisions of the Trade Union Acts 1871 and 1876 (U.K.). It is somewhat surprising that statutory rules formulated a hundred years ago, when trade unions had a much less secure and influential position in society than they do today, should be thought to be still suitable to meet modern needs, particularly since not all of the doubts and difficulties engendered by those provisions have yet been resolved."[21]

LEGAL PROCEEDINGS AND THE LEGAL STATUS OF UNIONS UNDER THE TRADE UNION ACTS

The question of the legal status of unions registered under the *Trade Union Acts* has arisen in legal proceedings involving trade unions in a variety of situations. These proceedings have arisen in the context of industrial disputes between unions and employers, and internal union conflict involving questions of whether a union member and an expelled member can sue his union. Questions have arisen as to whether a trade union can bring an action in defamation and this has involved the question

[17] These four types of legal status are derived from a general review of cases concerning trade union legal personality. The cases include those to be discussed in this article in relation to state unions registered under the *Trade Union Acts* (relating to types II, III and IV); cases listed in fn. 3 supra (for type I); and *Edgar* v. *Meade* (1916) 23 C.L.R. 29; *The Australian Workers' Union* v. *Coles* [1917] V.L.R. 332; *Australian Tramways Employees' Association* v. *Batten* [1930] V.L.R. 130; *Williams* v. *Hursey* (1959) 103 C.L.R. 30 (for type IV).

[18] Fn. 3 supra.

[19] Ss. 13 and 15 *Industrial Arbitration Act* 1912 (W.A.); ss. 138 and 139 *Industrial Conciliation and Arbitration Act* 1972 (S.A.); s. 69 *Industrial Conciliation and Arbitration Act* 1961 (Qld.); ss. 136 and 146 *Conciliation and Arbitration Act* 1904 (Cth.).

[20] (1979) 25 A.L.R. 257.

[21] Ibid. 274.

of whether the union has a character capable of being defamed. Legal proceedings have also arisen out of disputes as to the role of a union in the political arena and, more particularly, whether a union has the capacity to sponsor candidates in Parliament.

These cases have provided some insight into the legal status of unions registered under the *Trade Union Acts* and they will be discussed in the context of the following questions:

(a) Can a registered trade union be sued in its name?
(b) Can a registered trade union bring legal proceedings in its name?
(c) Does a registered trade union have capacity to make contributions for political purposes?
(d) Can an expelled member of a registered trade union bring legal proceedings against his trade union to seek injunctive relief and/or damages?

(a) *The trade union as a defendant: Can a registered trade union be sued in its name?*

It was not until some thirty years after the enactment of the *Trade Union Acts* 1871 and 1876 (U.K.) that the first civil action necessitating a decision on the effect of registration of a union under the Act was brought. An examination of *The Taff Vale Railway Company* v. *The Amalgamated Society of Railway Servants (Taff Vale)*[22] provides a striking example of the uncertainty surrounding the question. Although it may be reasonable for the first leading case not to resolve that question, subsequent cases have done little to clarify finally the uncertainties thrown up by *Taff Vale.*

Employees of the Taff Vale Railway Company were involved in a strike and the company brought an action in tort against the Amalgamated Society of Railway Servants, a society registered under the *Trade Union Acts* 1871 and 1876 (U.K.), and against two trade union officials, seeking injunctive relief and any further relief that the court might direct. The defendant society sought to have its name struck out on the ground that it was not a body capable of suing or being sued.

Farwell J., hearing the case at first instance, was faced squarely with the question of the status of the registered union, when the defendant society argued that the society, being neither a corporation nor an individual, could not be sued. He agreed that a trade union was not a corporation, an individual, or a partnership. He examined the *Trade Union Acts* 1871 and 1876 (U.K.) as a whole and was of the opinion that:

> "... although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals

[22] [1901] A.C. 426.

> which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. . . . The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature."[23]

The real question, then, became one of whether the legislature had made legal an association capable of owning property and acting by agents but which could not incur tortious liability for its acts. Farwell J. seemed to treat this primarily as a matter of policy for he stated:

> "It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil . . ."[24]

without them taking responsibility for their wrongs. His Lordship held that the society could be liable in tort for the acts of its agents and it was appropriate to bring the action against the society in its registered name. He granted an interim injunction against the society.

It is submitted that, although there is a subsequent judicial opinion to the contrary,[25] Farwell J. adopted a type II concept of legal status, for he did not seem to view the union as being separate from its members—he referred to it as being "an association of individuals",[26] although not a corporation or partnership.

The Court of Appeal, however, set aside the orders of Farwell J. and considered that a trade union could not be sued in its registered name. The Taff Vale Railway Company appealed successfully to the House of Lords which held that the union could be made liable in tort in its own name.

The Lord Chancellor, Earl of Halsbury, concurred with Farwell J., on similar policy reasons—that if the legislature had created a thing which could own property etc. it must impliedly have given it capacity to be sued in court for any injuries it might inflict. It could be inferred that the Lord Chancellor, like Farwell J., adopted a type II concept of trade union status.

Lord Macnaghten also considered that a trade union was not above the law. It could, he said, be sued in a representative action and it could be sued in its registered name. Although not a corporation, he considered its registered name was a collective name for all its members, so it would seem that he gave type II status to a trade union registered under the Act.

Similarly, Lord Shand thought that the power of a trade union to sue and be sued was necessarily implied by the provisions of the statute, so that the Society could be sued in its registered name. Lord Lindley agreed

[23] Ibid. 429.
[24] Ibid. 431.
[25] E.g., Lord Morton in *Bonsor* v. *Musicians' Union* [1956] A.C. 104.
[26] [1901] A.C. 426, 429.

that trade unions were not corporations, adding that they were unincorporated societies which could be sued in their own names merely as a convenient way of proceeding against unions. This was a clear adoption of type II legal status. Lord Lindley added the qualification that if an order for payment of money was sought, it could only be enforced against the union's property and to reach union property, the trustees must be sued.

Lord Brampton held that a trade union could be sued in its registered name but his view of legal personality was certainly type III, for he considered that a union, although not a corporation, that is a full legal person, was a:

> "newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name."[27]

This was the first time a type III concept was clearly enunciated.

In an early Australian case, *Egan* v. *Barrier Branch of the Amalgamated Miners' Association and others*,[28] the question of whether a registered trade union could be sued for conspiracy was discussed in the New South Wales Supreme Court. Cullen C.J. concurred fully with the approach of Farwell J. in the *Taff Vale* case and quoted parts of his judgment with approval:

> ". . . I may remark that although our own statute law is not quite the same as the English law, and some observations in the *Taff Vale Case* are not applicable to our own situation, the reasoning of the learned Judge has full applicability to the matters now presented for our consideration."[29]

He considered that:

> ". . . a union can be sued in its trade name for a tort committed by its agents, at all events in relation to matters which its very status as a trade union implied to be within its capacity and objects. . . ."[30]

In reply to the defendant's argument that a conspiracy could not be alleged between a union and some of its members because the individuals would then have conspired with themselves, the Chief Justice said that such an argument "ignores the principles on which the *Taff Vale Case* is decided".[31] He considered the latter case decided that registered unions had "quasi-corporate status"[32] and were separate from the members who comprised them. He seemed to be enunciating a type III concept and to be drawing this concept from *Taff Vale*. This may be reading more into the *Taff Vale* concept of union status than is warranted from the judgments in that

[27] Ibid. 442.
[28] (1917) 17 S.R. (N.S.W.) 243.
[29] Ibid. 257.
[30] Ibid.
[31] Ibid.
[32] Ibid.

case. Ferguson J. had a similar view of union status. Relying on *The Brisbane Shipwrights' Provident Union* v. *Heggie*[33] he found it was implied that "a trade union has some kind of corporate entity distinct from the members that compose it",[34] and hence a trade union could conspire with its members.[35]

Therefore, as the cases were ultimately decided, both the English and Australian courts were unanimously of the view that a registered trade union could be sued in its registered name, despite the apparent spectrum of views as to the characteristics of the legal status of such a union.

(b) *The trade union as a plaintiff: Can a registered trade union bring legal proceedings in its name?*

In 1945, the issue in *Taff Vale* came before the courts for consideration once more, this time in the context of whether a registered trade union could sue in its registered name. The question arose in *National Union of General and Municipal Workers* v. *Gillian*[36] when the plaintiff, a registered union, brought an action in libel in its registered name. Birkett J. in the Kings Bench Division considered that, on the basis of *Taff Vale*, a registered union could certainly sue in its registered name and that "the 1871 Act did in fact create a new legal entity, namely, a registered trade union . . .".[37] He was of the opinion that the *Taff Vale* case held that a union could sue for purposes beyond those set out in the 1871 Act and thus it could sue for libel.

It seems that the view of Birkett J. of legal personality was that the union was a body distinct from its members (type III or even type IV). He cited with approval *Spencer Bower on Actionable Defamation* which classified a trade union as a 'body of persons' defined as:

". . . any association of persons which, whether incorporated for all

[33] (1906) 3 C.L.R. 686.

[34] (1917) 17 S.R. (N.S.W.) 243, 263.

[35] The third member of the court, Sly J., was content to follow *Heggie's* case without any discussion of the status of unions. In two earlier cases, an English case, *Giblan* v. *National Amalgamated Labourers' Union* [1903] 2 K.B. 600 and a case before the Supreme Court of South Australia, *Nolan* v. *S.A. Labourers' Union* [1910] S.A.L.R. 85, the courts had permitted registered unions to be sued without discussing the question.

[36] [1945] 2 All E.R. 593. The question whether the trade union could be a plaintiff had also surfaced in *Cotter* v. *National Union of Seamen* [1929] 2 Ch. 58 where the plaintiffs, members of the National Union of Seamen, a registered trade union, had sued the union and some of its officials, seeking (i) a declaration that the special general meeting was invalidly convened and some of the resolutions passed by the meeting were invalid, and (ii) an injunction to restrain the union from carrying the resolutions into effect. The plaintiffs brought the action on behalf of themselves and union members other than the officials. The Court of Appeal, in refusing the relief sought by the plaintiffs, considered that the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461; 67 E.R. 189 applied to a registered trade union so that any irregularities could be rectified by the union itself. Lord Hanworth M.R. considered the union was a "legal entity" and "analogous to an incorporated company" ([1929] 2 Ch. 58, 103-4) and Russell L.J. implied that the union itself would be the only possible plaintiff in such an action.

[37] Ibid. 600.

> purposes or not, has a continuous identity, apart from the individuals composing it, and a corporate or collective name conferred or recognized by law, and which, by statute . . . is expressly made capable, or is not expressly made incapable, of suing or being sued in such corporate or collective name . . .".[38]

Similarly, when the defendants argued that the trade union had no character which could be defamed, he held that the 1871 Act had created a "new persona" which had all the rights of a natural person, so long as these were not inconsistent with the position of a corporation, and could be sued for defamation.[39] It is arguable that Birkett J. considered a union to be 'more of a legal person' than those set out in type III. It could be queried whether he attributed to a registered union full corporate status, that is, legal status type IV.

The defendants' appeal to the Court of Appeal was unsuccessful. They invited the court to answer the following questions in the negative:

(i) Can a trade union sue for tort?

(ii) If so, can it sue for libel?

(iii) If some trade unions can sue, can this union sue for the libels set out in the statement of claim?

The Court of Appeal held that (i) generally a trade union could sue in tort (ii) there was no reason to exclude the action for defamation and (iii) this union could therefore bring the action in defamation.

Scott L.J., whilst agreeing with Birkett J. in the lower court, added some comments of his own. He stated that a registered trade union "has some existence: and it is something".[40] Parliament, by the 1871 Act "expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality"[41] that it must have intended the union to be a *persona juridica.* He said that the Act aimed to encourage and validate trade unions exercising certain functions in the industrial relations sphere and gave trade unions many aspects of legal personality (for example, the right to own property, and the right to call itself by a registered name). These meant that Parliament had intended to give legal personality to trade unions and "many of those things which are inherent in the legal concept of personality".[42] He saw then, no reason to limit any of the powers normally accompanying legal personality. A trade union had "all powers of a *persona juridica* except (*a*) those solely characteristic of a natural person and (*b*) those which are expressly excepted by the creating or enabling statute".[43]

[38] From *Spencer Bower on Actionable Defamation* (2nd ed.) 2 quoted in *Gillian's* case, ibid. 600.
[39] Ibid. 602.
[40] Ibid. 603.
[41] Ibid.
[42] Ibid.
[43] Ibid. 604.

Uthwatt J. added some comments on legal personality of registered unions. He thought that the decision in *Taff Vale* that a registered union could be sued in its own name meant that it was:

> ". . . recognized by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation: but it is very like one. The association is not merely the aggregate of the persons who compose it and the presence of the corporate fiction is not necessary to secure its individuality. In an age of neologism it might be called a 'near-corporation'."[44]

He too took a type III approach to a registered union's legal status. But *quaere* whether he was correct in deducing from *Taff Vale* that the court there considered the trade union to be an entity separate from its members, for only Lord Brampton adopted in clear words a type III concept whilst Lord Lindley at least specifically adopted a type II and, by inference, the other judges took a similar approach in considering the legal status given was type II.

The capacity of a union to sue was the issue in the recent High Court case of *Egan* v. *Shop Distributive and Allied Employees' Assoc.*[45] (the *A.W.U.* case). In 1974 the plaintiff Australian Workers' Union (which shall be called the new A.W.U.) had been formed as a result of an amalgamation between two unions, the Australian Workers' Union (the old A.W.U.) which was registered as a state union under the *Trade Union Act* 1881 (N.S.W.) and the Shop Assistants and Warehouse Employees' Federation of Australia, New South Wales (S.A.W.E.), also registered under the *Trade Union Act*. Notice of the amalgamation was lodged with the New South Wales Registrar of Trade Unions, the Registrar entered the amalgamation in the Register and later issued a certificate certifying that the amalgamation of the two unions was registered under the *Trade Union Act*. A certificate of registration of the union as an industrial union under the *Industrial Arbitration Act* 1940 (N.S.W.) was also issued.

The defendants challenged the competence of the new A.W.U. to bring legal proceedings in tort. The trial judge held that the plaintiff had no capacity to sue, and the Supreme Court of New South Wales Court of Appeal upheld his decision.[46]

When the matter came on appeal to the High Court, the court had to consider three points:

(i) whether the two unions had validly amalgamated in accordance with section 22A[47] of the *Trade Union Act* 1881;

[44] Ibid.
[45] (1979) 25 A.L.R. 257.
[46] *Australian Workers' Union and another* v. *Shop Distributive and Allied Employees' Association and others* [1978] 1 N.S.W.L.R. 387.
[47] Section 22A of the *Trade Union Act* 1881 (N.S.W.) provided:
"A trade union shall not change its name, nor shall it become amalgamated together as one union with another union or unions except upon a vote or resolution of the authority empowered by its rules to alter such rules; . . ."

(ii) whether registration of the notice of amalgamation under section 23[48] of the Act amounted to registration of the new amalgamated union; and

(iii) whether the certificate of amalgamation under the Act was a certificate of registration under section 14(5)[49] of the Act.

The majority of the High Court (Barwick C.J., Gibbs, Mason and Stephen JJ.) answered all three questions in the negative, so that the new A.W.U. was not a competent plaintiff.

The questions which mainly concerned the court were whether the union had validly amalgamated and whether the new A.W.U. had registered as a separate union, but it followed from the judgments of the majority that had the union validly amalgamated and registered in accordance with the *Trade Union Act* 1881, it would have capacity to bring legal proceedings. Gibbs J. stated this explicitly when he concluded that the union was not registered and thus "had no existence as a legal entity, and had no capacity to bring the present proceedings".[50] Further Stephen J. stated that,

> "[h]ad the amalgamated union been duly registered, it is common ground that, despite the absence from the Act of any specific grant of corporate personality, there would have been no question of its competence to sue at common law."[51]

The assumption underlying this case regarding the capacity of registered unions to sue is in accordance with *Gillian's* case. However, there was no detailed discussion of the precise nature of union legal status by the High Court, although the New South Wales Court of Appeal considered that a registered trade union would have "quasi-corporate status as a registered trade union".[52] Further, the status of the union was not altered by subsequent registration as an industrial union under the *Industrial Arbitration Act* 1940.

As might be expected, given the conclusions in part (a), the courts

[48] Section 23 of the *Trade Union Act* 1881 provided:
"Notice in writing of every change of name or amalgamation . . . shall be sent to the office of the Registrar and registered there and until such change of name or amalgamation is so registered the same shall not take effect."

[49] Section 14 of the *Trade Union Act* 1881 provided:
"With respect to the registry under this Act of a trade union and of the rules thereof the following provisions shall have effect—
. . .
(5) The Registrar upon registering such trade union shall issue a certificate of registry which certificate unless proved to have been withdrawn or cancelled shall be conclusive evidence that the regulations of this Act with respect to registry have been complied with."

[50] (1979) 25 A.L.R. 257, 281.

[51] Ibid. 283.

[52] [1978] 1 N.S.W.L.R. 387, 420. *Taff Vale* case, *Egan* v. *Barrier Branch of the Amalgamated Miners' Association, Williams* v. *Hursey* (1959) 103 C.L.R. 30 and *Moore* v. *Doyle* (1969) 15 F.L.R. 59 were cited as authority for this proposition. For a full discussion of the N.S.W. Court of Appeal decision and its implications, see C. P. Mills, "Trade Union Status" (1979) 7 *A.B.L.R.* 335.

have clearly held that a registered trade union may bring an action in its registered name. However, the judges have preferred a type III or even type IV status, in contrast to a preference for type II or type III, when the question of the union as defendant has been considered. Unfortunately the scarcity of cases makes it difficult to analyse these differences and it is sufficient to note the diversity of opinion.

(c) *The capacity of the trade union: Does it have capacity to make contributions for political purposes?*

Attacks on the legality of the existence of trade unions having been finally defeated by the *Trade Union Acts* of 1871 and 1876, a question which then arose was the scope of the activities of such bodies and in particular whether rules empowering the raising of levies to seek parliamentary representation were valid. The House of Lords answered this question in the negative in 1910 in *Amalgamated Society of Railway Servants* v. *Osborne*[53] (the first *Osborne* case). The majority of the House of Lords viewed the *Trade Union Act* 1871 as a charter of incorporation, considering that a union did not have power to raise money for such purposes.

The Earl of Halsbury stated that although a trade union was legalised by the Act, limits were placed on its powers, such limitations being inherent in the nature of a trade union as defined by the Act. "[T]axing the members beyond the purposes for which the trade union exists"[54] was therefore a power the union did not have and any rule purporting to levy the fee was ultra vires and illegal. He thus applied the doctrine of ultra vires, a doctrine which had developed in relation to corporations. This notion of the capacity of unions seems consistent with type IV legal status.

Lord Macnaghten looked to the Act to ascertain whether trade unions could use funds for political purposes and decided that it could not be "reasonably inferred" that unions "were ever meant to have the power of collecting and administering funds for political purposes".[55] He viewed unions as being unincorporated and described them as associations "formed for purposes recognized and defined by an Act of Parliament", placing themselves under the Act and thereby obtaining "some statutory immunity or privilege".[56] It is to be noted that at least in some respects the union whether registered or not gains 'privileges' from the *Trade Union Acts*.

Lord Atkinson, however, described registered unions as "quasi-corporations", which were more like railway companies incorporated by statute than voluntary associations and they had no power to raise money for political purposes. He would appear to follow the type III approach.

[53] [1910] A.C. 87.
[54] Ibid. 93.
[55] Ibid. 97.
[56] Ibid. 94.

The court thus adopted an approach to the capacity of a registered trade union which relies on implications from the *Trade Union Acts*. It might be suggested that it was not necessary to find such a limitation as the members would have agreed to the rules upon joining. The case also shows that a member of a union can bring an action against the union in its registered name.

Osborne's case was adopted in Australia in *Allen* v. *Gorton*,[57] although its effect as to the making of political contributions has been reversed in New South Wales by legislation.[58]

(d) *Member vs. union: Can an expelled member of a trade union bring legal proceedings against his trade union?*

After Osborne's success in the first *Osborne* case, the Amalgamated Society of Railway Servants took action to expel him from membership. This resulted in proceedings which went to the House of Lords, and which threw further but insufficient light on the problem. In *Osborne* v. *Amalgamated Society of Railway Servants*[59] Osborne brought proceedings to seek a declaration that he was entitled to be a member of the union, on the basis that his expulsion was ultra vires and void. The main arguments before the court were the preliminary objections by the defendant that first, the Society was an unlawful association because its rules were in restraint of trade and second, the court had no jurisdiction to hear the action because of a provision in the *Trade Union Act* 1871 which excluded the jurisdiction of the court in respect of some types of actions.[60] The court rejected both these arguments and although it did not discuss the legal personality of the Society, the court considered that the Society was a lawful association and permitted an action by an expelled member against the Society itself.

Could a member obtain injunctive relief and/or damages in proceedings against the union? This question arose in *Kelly* v. *National Society of Operative Printers and Assistants and others*,[61] where Kelly, a member of the registered union, was expelled for acting in a way detrimental to the union's interests (by being employed in a newspaper's printing office at night and by a firm of carriers during the day). The plaintiff sought an injunction and damages and it was held that he was entitled to an injunc-

[57] (1918) 18 S.R. (N.S.W.) 202.

[58] S. 107 *Industrial Arbitration Act* 1940 (N.S.W.). The effect of *Osborne's* case has also been reversed in Queensland (see s. 65 *Industrial Conciliation and Arbitration Act* (Qld.)). The High Court in *Williams* v. *Hursey* did not follow *Osborne's* case in respect of unions registered under the *Conciliation and Arbitration Act* 1904 (Cth.).

[59] [1911] 1 Ch. 540.

[60] These are specified in s. 4 of the *Trade Union Act* 1871 (U.K.). In particular, the defendant Society argued that the action was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of s. 4(3) of the Act.

[61] (1915) 31 T.L.R. 632; (1915) 84 L.J.K.B. 2236.

tion, for the union purported to expel him under a rule which did not empower anyone to expel him and there was no evidence of any misconduct. As to damages, Swinfen Eady L.J. said that no member "of a voluntary unincorporated association could recover general damages against the association as such for a breach of the rules or of the contract contained in the rules".[62] Phillimore L.J. explained that the plaintiff would in effect be suing himself. Nevertheless an injunction, in effect against himself on the reasoning of Phillimore L.J., was granted.

Scrutton L.J. in *R.* v. *Cheshire County Court Judge and United Society of Boilermakers*[63] later pointed out this anomaly but refused to express an opinion on it. It would seem that judicial opinion in *Kelly's* case was that the union was *not* separate from its members (type II). The question of whether damages could be awarded to be paid by a union to one of its members was not resolved until the 1950s in *Bonsor* v. *Musicians' Union.*[64]

Until *Bonsor's* case the trend of judicial thought on the legal personality of unions appeared to waver between type II and type III. The House of Lords in *Bonsor* v. *Musicians' Union* did nothing to terminate this uncertainty when it was faced squarely with the question of whether a member can bring an action against his union and claim damages, as opposed to injunctive relief. Bonsor, a member of the Musicians' Union, a registered union, had been expelled from the union by its secretary purporting to act under a rule dealing with members whose subscriptions were in arrears. Bonsor sought a declaration as to his rights, an injunction and damages. The union claimed that Bonsor's expulsion was in accordance with the rules and that he had no right to damages. Upjohn J. in the Chancery Division held that the branch secretary had no power to expel Bonsor under the rule and had acted in breach of the rules. The expulsion, therefore, was null and void and an injunction restraining the union from acting on the expulsion was granted. Nonetheless, on the authority of *Kelly's* case, damages were not awarded.

On appeal by both parties, the Court of Appeal held unanimously that the expulsion, being in breach of the union's rule, was null and void, and by a majority, that *Kelly's* case was binding. Bonsor's widow, as administratrix (Bonsor having died), appealed by leave to the House of Lords. In upholding the appeal and granting damages, the House of Lords once again enunciated a variety of views on legal personality.

Lord Morton of Henryton saw no grounds for distinguishing *Kelly's* case but considered that it was wrongly decided on the question of damages. He stated that the union in *Kelly's* case was an entity distinct from its individual members and so a member could bring an action for breach of contract by the union. The problem of the member in effect suing

[62] (1915) 31 T.L.R. 632, 633.
[63] [1921] 2 K.B. 694, 709-10.
[64] [1956] A.C. 104.

himself would not arise on this view that the union was a distinct legal entity. Lord Morton found support for this view in *Taff Vale*, for he interpreted the majority of the House of Lords (with the exception of Lords Lindley and Macnaghten) as deciding that a registered trade union had type III legal status. To adopt the minority view, that the union was a collective name for all its members, would lead to grave difficulties,[65] so on the basis of *Taff Vale*, the *Osborne* cases[66] and *Gillian's* case, he concluded that the union "though it is not an incorporated body, is capable of entering into contracts and of being sued as a legal entity, distinct from its individual members".[67] Bonsor had made a contract with the union, the union was in breach of that contract, and damages should be awarded. Lord Morton accepted a type III concept of legal personality. Lord Porter's judgment was similar and he unequivocally adopted type III legal status for unions.

Lord MacDermott differed in his approach. He looked at the *Trade Union Act* as a whole and was of the opinion that the legislature had granted certain rights and privileges but had not intended to create a trade union with legal personality. Of *Taff Vale* he said:

> "the decision was not founded on the proposition that a registered union is a juristic person."[68]

Further

> "It seems . . . that, far from attributing a separate personality to such a union, the reasoning [of Farwell J.] recognizes the absence of such a personality and amounts in its substance to this—that although Parliament has not gone far enough to make the registered union other than an association of individuals, it has legalized its purposes and endowed it with powers and qualities to such an extent that an intention to fix it with corresponding responsibilities, enforceable by proceedings brought against it in its registered name, ought to be implied."[69]

He considered that only Lord Brampton had taken the view that the union was an entity separate from its members. The ability to be sued in its registered name, he argued, was granted not because the union was a legal person, but to remove any procedural difficulties in suing, and any damages must be paid from the fund of the union, not the individual members' assets. His Lordship thus characterized a union's status as type II.

In regard to the problem of a union member suing a union which is not

[65] Ibid. 124. "For instance, the membership of a trade union is constantly changing, as old members die and new members come in. If the suit is to be regarded as having been brought against the individual members, it must have been brought against those who were members at the time when the writ was issued. Yet some of these persons may not have been members at the time when the tort was committed, and the tort cannot therefore have been committed by their agents."

[66] *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87; *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540.

[67] [1956] A.C. 104, 127.

[68] Ibid. 139.

[69] Ibid. 140.

an entity separate from its members, he circumvented *Kelly's* case by saying:

> "[t]he right of a member so to sue for a declaration and injunction regarding his expulsion is now well settled and I do not see how a claim for damages can be distinguished in this respect."[70]

Also, to say that in expelling a member the union was acting on behalf of that member was not in keeping with reality.

Lord Somervell of Harrow also adopted a type II concept. *Taff Vale*, he considered, had not held that a registered trade union was incorporated. The majority, rather, "had proceeded on the basis that a trade union remained a voluntary association of members . . .".[71] He took a similar view of the attitude of Lord MacDermott to *Kelly's* case but added that in a claim for damages the trustees should also be sued.

The approach enunciated by Lord Keith of Avonholm cannot be categorized easily. Lord Keith "chose a course which appears to hover uncertainly between the two extremes".[72] Lord Keith adopted first a type II concept by considering that a trade union was a voluntary association of individuals but could sue and be sued in its registered name. However, he tended towards type III legal status when he said:

> "It differs from an unincorporated association in that it is unnecessary to consider who were the members at any particular time. . . . The registered trade union may be said to assume collective responsibility for all members past, present and future, in respect of any cause of action for which it may be made liable, irrespective of the date of cause of action."[73]

He then said that these attributes of a union:

> "differentiate it from other voluntary associations and may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals. As an association its membership is constantly changing but as a registered trade union it has a permanent identity and represents its members at any moment of time. It would not, I think, be wrong to call it a legal entity."[74]

It would seem that Lord Keith viewed registration as conferring on a trade union something less than incorporation but something to differentiate it from ordinary voluntary associations; thus this concept appears to lie somewhere between types I and IV. The apparent uncertainty could be explained by saying that what he calls an "entity" does not refer to a body *distinct from* its members but rather a body *composed of* its members and representative in some way of membership over time. Hence it is able to

[70] Ibid. 147.
[71] Ibid. 155.
[72] R. M. Martin, "Legal Personality and the Trade Unions" in L. C. Webb (ed.), *Legal Personality and Political Pluralism* (Melbourne University Press, 1958) 92, 98.
[73] [1956] A.C. 104, 149-50.
[74] Ibid. 150.

sue and be sued in its registered name and the problem of changing membership normally accompanying unincorporated associations disappears. If this approach is accepted, Lord Keith could be said to be tending to a type II concept, although Martin thinks otherwise.[75] However, it is open to debate and the true status of registered unions remains doubtful.

The High Court in *Williams* v. *Hursey*[76] commented on both *Taff Vale* and *Bonsor's* case and these dicta are important as an indication of the attitude of the High Court on legal personality. In that case, the two Hurseys who were father and son and members of the Hobart branch of the Waterside Workers' Federation of Australia, brought an action for conspiracy against the Hobart branch (which was not registered as a trade union), the Federation itself and some individuals. Fullagar J. seemed to consider that Farwell J. in *Taff Vale* adopted a type III concept of the legal status of registered unions for he had given the union the "essential characteristics of a distinct juristic person",[77] without actually calling it a corporation. The view of Fullagar J., then, was in accordance with that of Lords Morton and Porter in *Bonsor's* case in considering a registered union to have the elements of type III rather than type II legal status. He said:

> "With all respect to what is said by some of the learned Lords in *Bonsor* v. *Musicians' Union*, one would think that a registered trade union either had or had not a personality distinct from that of its members. . . . The holding of the property of a union by trustees is in no way inconsistent with the possession by that union of true corporate personality. It could not give rise to any difficulty in enforcing a judgment against the union by recourse to that property, and it surely cannot be right to say that a judgment against a union, if it is capable of being sued as such, can be enforced against the property of its individual members."[78]

He would not seem to agree that the type II classification correctly described the status of a trade union registered under State legislation.

Dixon C.J. and Kitto J. did not deliver separate judgments but concurred with Fullagar J. Whether their concurrence embraced his view on the legal status of State registered unions is uncertain. Menzies J., however, specifically agreed with a type III concept. He quoted with approval Cullen C.J. in *Egan's* case[79] who, it will be recalled, had interpreted *Taff Vale* as deciding

[75] Martin, op. cit. 92, 98. Cf. E. Campbell, "Legal Personality, Trade Unions and Damages for Unlawful Expulsion" (1956) 3 *W.A.L.R.* 393, 410, who argued: "When he speaks of a 'legal entity', Lord Keith is probably not using the term in the same sense as Lords Morton and Porter, i.e. in the sense of 'a legal person'." Wedderburn considered that Lord Keith adopted a similar view of union status to Lords MacDermott and Somervell. See K. W. Wedderburn, "The Bonsor Affair: A Post-Script" (1957) 20 *M.L.R.* 105, 111 and K. W. Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 *M.L.R.* 62, 66.

[76] (1959) 103 C.L.R. 30.

[77] Ibid. 53.

[78] Ibid.

[79] *Egan* v. *Barrier Branch of Amalgamated Miners' Association* (1917) 17 S.R. (N.S.W.) 243.

that a registered union was a body distinct from its members, having 'quasi-corporate', i.e. type III, legal status.

Persons expelled from registered trade unions have thus been permitted to obtain declaratory and injunctive relief and damages in the courts, despite the absence of any general consensus on whether a registered union has some legal status separate and distinct from members of the association. The only indication by the High Court of Australia as to which one of the two lines of judicial thought on legal personality in *Bonsor's* case it preferred was two decades ago in *Williams* v. *Hursey.*

OTHER JUDICIAL PRONOUNCEMENTS ON UNION LEGAL STATUS

Judicial expressions of opinion on union legal status in Australia have also arisen outside the four questions canvassed above. For example, in *Moore* v. *Doyle & Ors.*,[80] a case now famous for focusing attention on the problems of registration under both State and federal systems and multiple incorporation, the Commonwealth Industrial Court considered the legal status of a union registered as a trade union and industrial union under the New South Wales legislation,[81] although this was not necessary for its decision. The court, after reviewing the decisions on the matter, concluded that the union "is a separate legal entity with a legal personality of its own distinct from its members at any particular time".[82] This could be regarded at the very least as type III status, and perhaps even type IV.

This view of the then Commonwealth Industrial Court in *Moore* v. *Doyle* can be contrasted with the earlier view of the same court when it was doubted that a New South Wales branch of a federally registered union, when separately registered under New South Wales Acts, would be a separate legal person from the members comprising the branch.[83] The *Moore* v. *Doyle* view of trade union status now seems to be the preferred view in Australia. The New South Wales Court of Appeal in the *A.W.U.* case[84] recently adopted this view and the question arose in the Supreme Court of Queensland just after *Moore* v. *Doyle*, in *Allingham and Others* v. *Australian Workers' Union.*[85] The court had to consider whether the plaintiffs were members of the Australian Workers' Union (federally

[80] (1969) 15 F.L.R. 59.
[81] The union was registered as a trade union under the *Trade Union Act* 1881 (N.S.W.) and as an industrial union under the *Industrial Arbitration Act* 1940 (N.S.W.).
[82] (1969) 15 F.L.R. 59, 116.
[83] *Costello* v. *Gietzelt* (1960) 1 F.L.R. 446; *Hoolahan* v. *Gietzelt* (1960) 1 F.L.R. 469; *Murphy* v. *Applebee* (1959) 3 F.L.R. 361. The New South Wales Industrial Commission had however considered that a State registered union was a separate legal entity: see e.g. *Lasbies* v. *Mackay* [1945] A.R. (N.S.W.) 562; *McQuillan* v. *Bodkin* [1960] A.R. (N.S.W.) 373.
[84] [1978] 1 N.S.W.L.R. 387.
[85] (1971) 21 F.L.R. 228.

registered), the Queensland branch of the union or the Australian Workers Union of Employees, Queensland. Although the *Industrial Conciliation and Arbitration Act* 1961 (Qld.) repealed the *Trade Union Act* 1915 (Qld.), there was provision made in it for continuity of organizations registered under the *Trade Union Act*. The branch of the A.W.U. had been registered under the latter Act and later under the *Industrial Conciliation and Arbitration Act* 1961. The Supreme Court considered that a trade union was "a legal entity, with a legal personality of its own, separate and distinct from that of its members, and from that of the federal organization",[86] but not incorporated. Again, at least a type III concept of legal personality seems to be enunciated.

It could be inferred, then, that the preferred view of the legal status of State registered unions may be type III.

THE TRADE UNION ACTS AND UNREGISTERED UNIONS

So far the question of the status of registered unions has been discussed, but the question remains of the effect of the *Trade Union Acts* upon unions which fall within the definition of 'trade union' in the Acts but which are not registered thereunder. What is the status of a union at common law today? Is it registration under the *Trade Union Acts* which makes a union some form of legal person?

The status of a union which is not registered under the *Trade Union Acts* is not an insignificant question, because such a union might fall into one of three categories:

(a) a union which is not, and has not been, registered under the *Trade Union Acts* or other industrial arbitration legislation;

(b) a de-registered union, that is, a union which has had its registration under the arbitration legislation in Western Australia, Queensland or South Australia or the *Conciliation and Arbitration Act* 1904 (Cth.) cancelled[87] and which is not also registered under the *Trade Union Acts*; or even

(c) a Victorian union which is unregistered but which becomes a recognized union under the new Victorian industrial relations legislation when enacted.[88]

The intention behind recent legislative amendments to both the *Conciliation and Arbitration Act* 1904[89] and the Western Australian legislation[90]

[86] Ibid. 252.
[87] The provisions for cancellation of registration are: s. 29 *Industrial Arbitration Act* 1912 (W.A.); s. 73 *Industrial Conciliation and Arbitration Act* 1961 (Qld.); s. 132 *Industrial Conciliation and Arbitration Act* 1972 (S.A.); s. 143 *Conciliation and Arbitration Act* 1904 (Cth.).
[88] *Industrial Relations Bill* 1979 (Vic.).
[89] S. 16 *Conciliation and Arbitration Amendment Act* 1979 (Cth.) inserting s. 143A into the *Conciliation and Arbitration Act* 1904 (Cth.).
[90] Cl. 73 *Industrial Arbitration Bill* 1979 (W.A.).

is to provide for easier procedures for deregistration of unions. If the legislatures' intention is realized, then there may be an increase in the number of deregistered unions. Victorian 'recognized unions' will also be important because, assuming the *Industrial Relations Bill* 1979 is enacted in its present form, unions will have to apply to be recognized as an association under the Act in order to participate in the State system of wage determination. At first blush, a recognized union would appear to have the status of an unregistered union because the legislature has carefully avoided conferring any corporate status on such unions. It remains to be seen whether these recognized unions become legal persons by virtue of judicial interpretation, in the same way as unions registered under the *Trade Union Acts.*

The cases which have so far been considered dealt only with registered unions, so that a strong argument can be put that it is registration which makes a union a body with more than type I legal status.

Two judges in the High Court in *Stevens* v. *Keogh and others*[91] considered that an unregistered trade union had type I legal status. McTiernan J. considered that an unregistered union would "be a voluntary association without any legal status conferred by any Act",[92] whilst Williams J. considered that if the union in the case was not registered it could not be sued because it would be "an unincorporated voluntary association".[93] Lord MacDermott in *Bonsor's* case had no doubt that an unregistered union was not a "juridical person" but rather a "voluntary association of individuals".[94]

In the English case of *Hodgson* v. *National and Local Government Officers Association and others*,[95] Goulding J. considered that the defendant association, being unregistered, was an unincorporated association and "it has no power to sue or be sued in its own name".[96] The High Court in the *A.W.U.* case proceeded on the assumption that valid amalgamation and registration would have given the union capacity to sue.[97]

On the other hand, it could be argued that policy arguments advanced in *Taff Vale* for making unions liable in tort apply alike to registered and

[91] (1946) 72 C.L.R. 1.
[92] Ibid. 29.
[93] Ibid. 34.
[94] [1956] A.C. 104, 134.
[95] [1972] 1 All E.R. 15.
[96] Ibid. 17.
[97] The High Court in *Williams* v. *Hursey* held that the unregistered Hobart branch of the federally registered Waterside Workers' Federation was not a legal person and could not be sued. However, this case does not provide an answer to the question of the status of unregistered unions because, on the facts of the case, the court considered that the branch was not even an association but rather was an integral part of the federally registered body. See Dr C. Jessup, "Moore v. Doyle: Some Post Sweeney Report Problems", paper delivered 14 July 1979 at a seminar entitled *"Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends"*, Transcript, (Monash Uni., Faculty of Law, 1979) 60.

unregistered unions. It should be noted that Stephen J. was careful to point out in his concluding remarks in the *A.W.U.* case:

> "It being common ground that want of status as a registered union involves want of capacity to sue, it follows that this appeal should be dismissed. In saying this I should make one matter plain: if in the course of this judgment I have proceeded, without question, upon the view that registration as a trade union alone confers the relevant capacity to sue, and that non-registration necessarily results in incapacity, I have done so because I have understood that to be the basic assumption upon which the arguments of all parties, both before this court and, I believe, before the courts below, have proceeded."[98]

The weight of judicial authority seems to be strongly in favour of unregistered unions having type I legal status.[99] As registration of a union is necessary to convert the union from type I status to some type of legal entity, then as a result of the *A.W.U.* case it becomes important for a union to ensure strict compliance with procedures for amalgamation and registration in the *Trade Union Acts*—otherwise the very capacity of a union to sue or be sued is in doubt. This case has highlighted the precarious position of amalgamated unions whose legal existence and capacity to sue could be the subject of challenge by parties to the litigation, as in the *A.W.U.* case, or even by factions within the new amalgamation.[100]

CONCLUSION

It has been seen that a State union registered under the *Trade Union Acts* may have a legal status of types II, III or IV. A registered union is something more than a voluntary association, because it can sue and be sued in its registered name, members as well as third parties can take legal proceedings against the union, damages can be awarded against such a union with liability being satisfied by the common fund and it can hold property by trustees.

If a member of an association can successfully claim damages from the union itself in respect of his expulsion, even by courts which adopt a strict type II classification of legal status, perhaps the distinction between types II and III becomes less important. If unions have the characteristics outlined above, at the present stage of judicial thought on the matter, it is submitted that the distinction between types II, III or IV legal status becomes less significant from a pragmatic viewpoint. However, this pragmatic result

[98] (1979) 25 A.L.R. 257, 290.

[99] The weight of non-judicial comments is also in favour of this view. See e.g. M. A. Hickling, op. cit. 177-90; M. A. Hickling, "Legal Personality and Trade Unions in the British Isles" (1965) 4 *West. Ont. L.R.* 7, 45-6; D. W. Smith, op. cit. 47.

[100] The case also leaves open the questions whether an invalidly amalgamated union which does seek and obtain fresh registration as a union is safe from any challenges to its legal capacity and whether a new union's registration could be challenged in the same way—that is, the conclusiveness of a s. 14(5) certificate of registration has not yet been determined.

has been reached with no clear statement on legal personality, although the Australian courts have so far preferred type III legal status. One would have thought, as Fullagar J. pointed out in *Williams* v. *Hursey*, that a union has or has not a separate legal personality from its members.