FEDERAL LEGAL PERSONS AND DUAL CITIZENSHIP

This paper concerns some implications of the decision of the High Court of Australia in *Williams* v. *Hursey* (1959) ;[1] the somewhat inflated title indicates for indexing purposes the most important general problem raised in the paper, but the writer does not promise a comprehensive treatment of the special difficulties which federal systems create in relation to "artificial" legal persons. The discussion will also involve some consideration of the limits of incidental or implied powers.

Omitting many details and some issues (mainly in the law of torts) not relevant for present purposes[2] we can summarise the case as follows. In 1956, Hursey was a member of the Hobart branch of the Waterside Workers' Federation (here called the Union), which in that year decided to impose a special levy on its members to assist the Australian Labour Party at a forthcoming *State* election. Such levies were required to be paid at the same time as ordinary annual union dues.[3] Hursey belonged to a rival political party and objected to paying the special levy; the Union would not accept payment of the regular dues without the levy, and when Hursey in consequence became "unfinancial," the Union executive and other members treated Hursey as having become automatically a non-member; if the special levy had been properly imposed, then the Union rules justified this step. The executive and members of the Union then forcibly prevented Hursey from entering the roads and wharves where he would otherwise have obtained work as a stevedore. Hursey sued in the Supreme Court of Tasmania naming as defendants the Union, the Hobart branch of the Union, and various individual officers and members actively concerned in these events. He claimed declarations that the special levy was invalidly imposed and that he had remained at relevant times a member of the Union; he claimed damages for various common law torts, and for breach of statutory rights arising from the Commonwealth (federal) Stevedoring Industry Acts governing employment on the wharves in connection with interstate and overseas shipping. After a long trial

1. [1959] A.L.R. 1383; 33 A.L.J.R. 269, herein referred to as *Hursey*.

2. For a comprehensive account of all the issues raised in the case, see *per* Dr. E. I. Sykes in (1959) 1 *Tasmanian Univ. L.R.* 175. Dr. Sykes's account was written before the appeal to the High Court and deals only with the judgment of Burbury C.J. in the Supreme Court of Tasmania, but in a most remarkable fashion it anticipated all the major points on which the High Court differed from Burbury C.J.; it is an indispensable introduction to the High Court's treatment of the issues concerning inducement of breach of contract, conspiracy to injure and infringement of statutory rights which are ignored in this paper.

3. The Union also made regular contributions to the A.L.P., with which it was affiliated, and the presence of this component in the ordinary union due played some part in the negotiations between Hursey and Union officials, but this can be neglected for the present purpose.

before Burbury C.J. in the Supreme Court of Tasmania, the latter gave judgment in favour of Hursey as follows : there was no constitutional or statutory obstacle to prevent the Union from imposing a special levy for political purposes, but the Union rules did not authorise this and so the levy was invalid; hence Hursey remained a member of the Union; independently of the membership issue, the Union, the Hobart branch and a number of the individual defendants were liable in damages to Hursey on most of the grounds of tort and invasion of statutory right which he had pleaded.[4] On appeal to the High Court, the judgment in favour of Hursey on the declarations relating to the levy and membership of the union was reversed; the judgment for damages was reversed in the case of the Hobart branch of the union, but sustained for a reduced amount in the case of the other defendants. In the High Court, five Justices sat; Dixon C.J. and Kitto J. concurred in the opinion of Fullagar J., so that this opinion contains the court's ratio decidendi. Taylor and Menzies JJ. delivered separate assenting opinions; Taylor J. followed substantially the same reasoning as Fullagar J., but Menzies J. differed from Fullagar J. on some points of importance to the present article. The High Court differed from Burbury C.J. on the declaration counts only to the extent that they regarded the Union rules as authorising the special levy, with the consequence that Hursey had not been justified in his refusal to pay and had therefore automatically become a non-member. This view on the declaration issues itself went in mitigation of the damages under the other claims, but in addition the High Court regarded some of those claims as being in any event unjustified.[5] However, the court held that there had been common law assaults and deprivation of access to public places which entitled Hursey to damages independently of the other issues.

We must now examine the setting of constitutional and statutory law in which the case arose. The Commonwealth of Australia Constitution Act, based in this respect on the Constitution of the U.S.A., gives specific powers to the Commonwealth (federal) parliament and government, and leaves the undefined residue of powers with the six States. The Commonwealth has no direct power with respect to employment conditions, industrial associations or the ordinary law of torts. Its interstate trade and commerce power[6] has been interpreted

4. This judgment is unreported. I am indebted to Sir Stanley Burbury for providing me with a copy. The opinion runs to 261 typescript pages, of which about 138 are devoted to analysing the facts.

5. In particular, the High Court rejected the view that the circumstances constituted either an inducement of breach of contract or the invasion of a right created by statute.

6. Constitution s.51(l). In the rest of this paper, unless otherwise indicated "s.—" refers to the sections of the Constitution, which constitutes clause 9 of the Commonwealth of Australia Constitution Act.

by the High Court in a narrower fashion than that of the U.S. Congress;[7] this power gives the Commonwealth some competence concerning employment conditions, and indeed was the constitutional basis for the Stevedoring Industry Acts, relevant to some of the claims in this case, but it can be assumed that the power was not relevant to the main question as to the competence of the Union to subsidize political activities. Hence the only Commonwealth powers directly relevant in the case were the power to make laws with respect to conciliation and arbitration of industrial disputes extending beyond the limits of any one State,[8] and the "incidental" power.[9]

The Commonwealth's interstate industrial arbitration power, exercised principally in the Commonwealth Conciliation and Arbitration Acts (herein called the Arbitration Acts), has had an expansive judicial interpretation. In particular, it was held from 1908 on that it was "incidental" to this power to provide for the organisation of employers and workers, in order to facilitate negotiations with each other, and to facilitate their appearance before the former Commonwealth Court of Conciliation and Arbitration, and now before two bodies — the Commonwealth Industrial Commission (which makes awards in settlement of industrial disputes) and the Commonwealth Industrial Court (which polices the system in a manner involving the exercise of judicial power).[10] In the foundation case, *Jumbunna Coal Mine* v. *Victorian Coal Miners Association,*[11] the High Court expressed itself with care and upheld the validity of provisions in the Arbitration Acts for the registration and incorporation of industrial organisations only insofar as this was conducive to the principal purpose of the Acts — namely the prevention and settlement of interstate industrial disputes. Griffith C.J. said : "It is plain that communication with all the individual disputants or probable disputants would be impracticable... It would, therefore, be expedient, and indeed necessary, to make provision for representation. And I can see no reason why the parliament should not...authorise the constitution of new organizations for the specific purposes of the Act. And they might confer upon such organizations . . . such powers as are incidental to the discharge of these functions . . . And since the powers and functions of every corporation are limited

7. Article 1, s.8(3).

8. S.51 (xxxv).

9. S.51 (xxxix); in the present context, common law implications from a statutory power would probably reach the same result as s.51 (xxxix).

10. The splitting up of the original court into these two bodies became necessary because of the decision of the Privy Council in the *Boilermakers'* case [1957J A.C. 288 which established that the same body might not exercise the quasi-legislative function of making industrial awards and the judicial one of interpreting and enforcing the awards and hearing prosecutions under the Acts.

11. (1908) 6 C.L.R. 309.

by its constitution, it follows that the parliament cannot confer upon a corporation created by it powers or functions for the exercise of which alone it could not create a corporation." [12]

In the course of time, an elaborate system of regulation of organizations has been created to ensure that their internal affairs are free from corruption, and that the giant power of modern unionism is not exercised so as to oppress individual union members.[13] All of this, however, is directly referable to the principal constitutional purpose of having available, for conciliation and arbitration of industrial disputes, genuine and efficient representative organs which can negotiate, appear before tribunals, own property and employ officials to the extent necessary for these purposes.

The first main criticism of the decision in *Hursey* is that it treats the Union as being authorised by *federal* law to carry on an activity *(viz.* assisting a political party at a State election) which, in the words of Griffith C.J., is not a function "for the exercise of which alone" the Commonwealth parliament could create a corporation. Furthermore, it is difficult to see how except in the most remote fashion the election of persons of particular political views to the parliament of Tasmania could be considered incidental to arbitration of interstate industrial disputes.[14] Even political activity in the federal sphere would be, it is submitted, too remote from the purposes of the interstate arbitration power to justify a finding that the Commonwealth could specifically and in direct terms authorise industrial organizations formed under that power to expend their funds in connection with Commonwealth elections.

In the interpretation of "incidental" powers, the Privy Council and the High Court have often drawn attention to the rule that "incidentality" under the express provision in section 51 (xxxix) is confined to matters *arising in the execution* of the relevant power.[15] This is not a very precise concept, but it does indicate a necessity for some reasonably close connection between "principal" and "incident," and common law authorities concerning the scope of statutory powers similarly suggest that in all such contexts one must pay careful regard

12. 6 C.L.R. at p. 334.

13. See, generally, Portus, *Development of Australian Trade Union Law,* ch. xiv, and for an illustrative case upholding such provisions, *Federated Ironworkers' Association* v. *Commonwealth* (1951) 84 C.L.R. 265.

14. The only possible impacts of the Tasmanian parliament on Commonwealth legislation in such fields are the reference of powers by Tasmania to the Commonwealth under s.51 (xxxvii) — a very rare event — and the appointment by the State parliament of a Senator in the event of a casual vacancy in the upper house of the Commonwealth parliament (s.15) — also a rare event.

15. See especially the *Royal Commissions* case [1914] A.C. 237; *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481.

to the nature and purpose of the principal provision.[16] In the present case, the High Court appears to have fallen into the fallacy of first treating the power to incorporate and regulate industrial organizations, which is itself merely an incidental power, as if it constituted instead a separate express power of the parliament; once this "incidental" provision is treated as itself a principal one, then it is an easy step to show by reference to the history of trade unions in England and Australia that participation in political activities had long been regarded as an ordinary accompaniment of trade union organization.[17] It is suggested with respect that the court might not have fallen into this error if it had asked itself a question in the language of Griffith C.J. cited above.

Probably one of the reasons for the startling decision that the Commonwealth parliament can thus directly control questions relating to State political activity was the insidious way in which legislative provision and judicial treatment have combined to conceal a change in the rule making power of unions registered under the Arbitration Acts. This leads us into the problem area indicated by the title of this paper. When enacting the original Arbitration Act in 1904, the Commonwealth parliament assumed what was and is a matter of common knowledge, namely, the existence of a large number of trade unions, organized until that time under State laws; these unions possessed many objectives irrelevant to Commonwealth power, such as the provision of health benefits, and this assumption was reflected in the provision made as to organization rules. The Act required that those rules should contain a number of specific provisions designed to ensure that the organization was run in an orderly and businesslike way, but it also provided as follows : "the rules of an association may also provide for any other matters not contrary to law."[18] It is improbable that anybody then regarded this provision as bringing within the scope of *Commonwealth authorisation* the provisions which it might cover; on ordinary principles of interpretation in a system of distributed constitutional powers, this section was clearly

16. Notice the cautious treatment of "incidental" power in *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87 — the foundation case on "political contributions" in England, which was much canvassed in *Hursey*. See also Broom's *Legal Maxims,* 10th ed., pp. 310-314.

17. See especially *per* Fullagar J. at [1959] A.L.R. p. 1395. This author regrets having to criticise a decision in which the High Court, rather uncharacteristically, calls in aid general social history and cites works by several highly respected academic colleagues in the course of doing so. The method of interpretation would be admirable if the only issue had been the construction of a statute in a unitary system.

18. Sched. B. In the *Hursey* case the High Court treated this provision (which now appears in regulations under the Act) as requiring only that an organization rule brought in under it should *at the time of registration* not be *illegal* (as distinct from void or unenforceable).

meant merely as a negative condition, indicating matters (mainly thought not necessarily non-federal) which the organization might provide for without thereby disentitling from registration. But the presence of rules dealing with these "other matters" in the charter instrument of a body which acquired corporate status solely by reason of a Commonwealth Act raises a very difficult question of corporate theory. If the "other matters" have no relation to any Commonwealth power, then can they be regarded as in any sense part of the corporate structure? Can the corporation, as a corporation, be regarded as deriving its *personality*[19] from federal law, but some of its *capacities* from State law? Or do we have a federal corporation whose structure does not in any way contain the non-federal "other matters" and an altogether separate State organization (which may be an unincorporated association, or may be a corporation created under *State* industrial arbitration Acts) whose activities, so long as not actually inconsistent with federal activities, are no concern of federal law? The possibility of some sort of "dual personality" was adumbrated by Griffith C.J. in the *Jumbunna* case[20] but His Honour did not advance any theory as to the way in such a situation should be managed.

The question did not give rise to any practical difficulties until in 1928 what is now section 141[21] of the Arbitration Act was introduced. This empowered the Court of Conciliation and Arbitration and now the Commonwealth Industrial Court to "make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules." The court has exercised these powers more and more freely with the passing years. In 1929, shortly after the section was enacted, Beeby J. said that the court should not intervene in the purely domestic affairs of unions "unless there are allegations of fraud or of some violent breach of the rules which may disturb the peace of the industry or prevent the organization properly functioning under the Act;"[22] but in 1944, Kelly J. in the same

19. Or "personateness," to use the expression suggested by Professor Derham in *Legal Personality and Political Pluralism* (ed. Webb), p. 15. Derham's essay was referred to approvingly by Fullagar J. in *Hursey*.

20. 6 C.L.R. at p. 336. "Whether a trade union can at one and the same time both be a corporation under the Act and also not be a corporation qua trade union, is an interesting and novel question. Possibly it is analogous to the case of a corporation sole." Probably His Honour had in mind the common-law corporation sole, in which the separation between the "natural person" incumbent and the incorporated office was very imperfectly achieved. See Maitland, *Selected Essays,* chaps. 1 and 2.

21. Originally s.58E, later s.81.

22. *Griffin* v. *A.S. Carpenters, etc*., 27 Commonwealth Arbitration Reports (cited C.A.R.).

jurisdiction[23] showed by reference to many subsequent cases that the court had intervened to an increasing extent with such "domestic" matters as the proper conduct of elections, admission or exclusion of members and the imposition of levies and dues, where there was neither fraud nor "violence," and this trend has continued.[24] Occasionally the court has declined to intervene because it thought the matter in question could be dealt with effectively only in other (usually State) jurisdictions.[25]

In all these Arbitration Court decisions, the judgments fully recognise that quite apart from any question of policy or discretion, there were constitutional limits to the power which the court could be given in this connection, and that in particular an organization rule dealing with a question quite beyond the position of the organization in the federal industrial arbitration system could not be enforced by the machinery of section 141 of the Act. Nevertheless, one can see through these cases a progressive expansion of what was considered "incidental" to the industrial arbitration function. In the 1929 case, Beeby J. did not say whether the self-denying ordinance he proposed was based on constitutional grounds, or on desirable policy in the handling of trade unions, but his opinion is consistent with the view that he thought such a restriction necessitated by constitutional limitations. But the 1944 opinion of Kelly J. advanced the broad proposition that confidence in the government and administration of trade unions is necessary to the effectiveness of those unions as registered organizations in the federal arbitration system; pushed to its logical conclusions, such a view would justify federal intervention in any activity of the registered organization whatever — *i.e.*, including non-federal "other matters" under its rules — because any malpractice in relation to such matters could clearly affect the solvency of the union, the reputation of its officials and the standing of the organization in public esteem.

It seems then that although the federal arbitration tribunals have acknowledged in words their possibly limited authority in relation to organization rules, they and the High Court of Australia may have slipped into a position of accepting the whole range of an organization's activities as being federally authorised and subject to federal regulation.

23. *Wilson* v. *Heydon,* 53 C.A.R. 482.

24. See *R.* v. *Spicer, ex p. Foster* [1958] A.L.R. 385.

25. See *Carling* v. *Platt* (1954) 80 C.A.R. 283, but note the strong dissent of Dunphy J. This case was in effect an application for the taking of an equitable account in respect of moneys received by a union officer as fiduciary agent of the union. Only Foster J. was dubious on purely jurisdictional grounds; he and McIntyre J. also held there was no prima facie case for an inquiry. If s.41 can be used for purposes such as this, then federal control of the union structure in all its aspects would indeed become complete.

Thus in *Barrett* v. *Opitz* (1945)[26] the question was whether the power to issue an order under section 141 of the Arbitration Act (then section 58E) gave rise to a matter "arising under" a law made by the parliament, so as to be a subject of federal jurisdiction under section 76(ii) of the Constitution. The High Court answered this question affirmatively. Latham C.J. said :[27] "The rules, as registered, are what are binding. It is not necessary or relevant in order to discover what the rules are to make any inquiry into any agreement by any of the members. In my opinion, the rules as rules of the organization derive their force from the Act, and therefore, a controversy as to the observance or performance of the rules is a matter arising under the Act." Dixon J. paid more attention to the argument that section 141 (as it now is) attempted to deal with matters some of which were governed by State law.[28] But a careful reading of His Honour's remarks shows that he was not considering the difference between the rules of an organization directly relevant to its arbitration functions, and rules relating to "other matters." He was merely considering the general argument that the *basic obligation* of all the rules taken together had to be found not in the federal incorporating statute, but in the initial agreement of particular persons to form the trade union in question, an agreement which could derive validity only from State law. It is this view of the bearing of State law on the federal organization which (like Latham C.J.) he rejects.

Dixon J. also said : "The enforceable rights which, under State law, result to members of trade unions from the adoption of rules or by-laws are by no means coextensive with what may be covered by a complaint under section 58E."[29] One might have expected His Honour to proceed to say that what can be raised under federal law was *less extensive* than what could be raised under section 58E, because (apart from questions of inconsistency) the State power on the question was unlimited and could deal with all aspects of the organization's activities. But instead he went on to point out that section 58E was *more extensive* in its scope than enforcement of organization rules under the general unenacted law of the State systems, because the latter suffer from the well-known weaknesses of English law concerning unincorporated associations — need for a property or contractual basis, refusal to give damages for attempted expulsion etc. It can be seen that this way of looking at it assumes that there are no limitations to

26. 70 C.L.R. 141.
27. At p. 151.
28. See especially pp. 164-5.
29. Now s.141.

the kind of rules which can be enforced under the present section 141.[30] Dixon J. later said: [31] "Section 58E . . . undertakes a further step in the regulation and control of the internal affairs of registered industrial organizations. It does so not for the purpose of protecting the civil rights of individuals and of enforcing social contracts. The purpose is to further the ends of the Arbitration Act as an industrial measure and supervise the administration of the rules, the adoption of which it is part of the plan of that act to require. It is, we may assume, within the legislative power granted by section 51 (xxxv) and (xxxix) to deal with the rules of organizations and, *when it appears conducive to the ends of the arbitration power to do so,*[32] to see that the rules are observed." This passage contemplates the possibility that observance of some organization rules may not be "conducive to the ends of the arbitration power." Probably as a matter of form section 141 applies distributively so that a potentially invalid exercise of the power could be "severed" leaving the residue valid, though this separation would rather resemble a kind of "severance as the occasion arises" which the High Court has previously rejected.[33] But the difficulty is that the court gives no indication as to the kinds of rule, or the kinds of observance, which might be regarded as not relevant to the federal power, and the general tenor of the decision supports the view that *prima facie* any registered rule will come within the scope of federal statutory authorisation.

The actual dispute dealt with in *Barrett* v. *Opitz* concerned the validity of an election for office in the State branch of a registered organization. As in all the cases of this type, it could be claimed that this was a question necessarily falling within the scope of the federal power, because it is basic to the operation of these organizations, merely as representative bodies in federal arbitration tribunals, that the identity of their office holders should be clearly established. But the same necessity arises in relation to the activities of such organizations outside the federal field. The admission of such a wide degree of federal control of organizations thus creates an extension of federal

30. This notwithstanding that Dixon J. quoted from the court's decision in *Edgar* v. *Meade* (1916) 23 C.L.R. 29. In this case, Isaacs J. treated organization rules as in effect creating statutory rights, but the case related to questions which were clearly incidental to aspects of the organization of the trade union relevant to arbitration purposes, and did not call for any consideration of the standing of rules as to "other matters"; Isaacs J. clearly recognised the need for a specific relation between the organization question involved and the industrial arbitration power.

31. P. 169.

32. My italics.

33. See the notes to *Huddart Parker* v. *Commonwealth* in this writer's *Australian Constitutional Cases,* 2nd ed., p. 41.

power somewhat similar to that created under the doctrine of "commingling" in U.S. constitutional law.[34]

But a second cause for this tendency to bring all aspects of trade union activity under federal control, once an organization is registered under the federal act, stems from an apparent unwillingness of the courts to admit the possibility of the "dual personality" contemplated by Griffith C.J. This is the second basic criticism of the decision in *Hursey*. Before Burbury C.J. it was strongly argued that the Union had a "State" as well as a "federal" personality. One aspect of this argument of particular importance to the case concerned the separate claim against the Hobart branch of the Union. Tasmania has adopted the English system of trade union regulation embodied in the English Acts of 1871 and 1876,[35] but neither the Union nor its Hobart branch were registered under that legislation.[36] Hence if the Hobart branch were to be an independent defendant, this could be only as an unincorporated association; some rules of the Tasmanian Supreme Court were intended to overcome the well-known procedural difficulties in the way of suing such bodies and executing judgments against them, and Burbury C.J. was prepared (somewhat unwillingly) to enter judgment against the Hobart branch under these provisions. At the same time, he described the view that the union had a double personality as a "schizophrenic fantasy."[37] In the High Court, it was doubted whether the Supreme Court rules did solve the procedural difficulties, but in any event the court rejected the view that the Hobart branch could be regarded as having any separate juristic existence. In doing this, the court relied partly on the rules of the Union, which suggested that there was in fact only one union with a number of branches — not a federation or confederation of "branches" which could themselves be regarded as separate entities. But the court also relied on its own decision in *Hall* v. *Job* (1952)[38] which dealt with the structure of a fraternal Lodge in New South Wales. In that case it was held similarly that a branch of the Lodge could not be regarded as a separate entity; hence when the branch ceased to exist, its property became vested in the parent Lodge, not in the surviving members of the branch.

34. See Freund, Sutherland, etc., *Constitutional Law Cases,* vol. 1, pp. 258 *ff*., and especially pp. 283-5. Note also Fullagar J.'s approval ([1959] A.L.R. 1390) of two Victorian decisions holding that a federal union might conduct a newspaper. The Victorian decisions related only to a purely "domestic" journal, but it would be almost impossible in practice to decide when a journal ceased to have this character.

35. Tasmanian Trade Union Act, 1889.

36. Four Australian States have industrial arbitration Acts under which trade unions may register and acquire a corporate status as in the federal sphere, but there is no such system in either Tasmania or Victoria.

37. Typescript, p. 29.

38. 86 C.L.R. 639.

The difficulty with this reluctance to treat the union as having some sort of "dual personality" is that it ignores both the history of the organization in question and the logical necessities of a federal constitutional system. As a matter of history this union was formed in 1902 by the federation of previously existing State unions on wharves. The federation registered as a federal organization in 1907,[39] and for many years its constitution reflected an originally very loose federal structure. It is surprising that more of this history was not proved before Burbury C.J., or even in the High Court, since it is readily accessible. Indeed, the High Court itself had heard actions concerning this Union at various stages of its development; note especially *W. W. F.* v. *Burgess Bros.* (1916),[40] where the Hobart branch had carried on boycotts, inducement of breach of contract, etc. without the authorisation of the federal executive of the Union, and the Union in consequence was held not liable to plaintiffs injured by the activities of the State branch. Isaacs J. mentioned the independent origin of the Hobart branch and the possibility of regarding it as a separate State union in respect of such local disputes as did not affect the members of the federal organization. He pointed out that the Union rules themselves contemplated the possibility of a dispute originally purely local developing into an interstate one within the competence of the federal courts.[41]

The operation of federalism necessarily creates juristic "schizophrenia." In the case of natural persons, one has little difficulty in distinguishing between the rights and duties determined by federal law, and those determined by State law. But as Professor Derham has pointed out[42] the situation with respect to "natural" legal personality is in principle indistinguishable from that of "artificial" personality. The management of the "artificial" cases only seems difficult because of the pervasive superstition that "personateness" is one and indivisible, either exists or does not exist, and is either naturally or logically prior to and independent of particular "capacities." This view is put by Fullagar J. in *Hursey* as follows :[43] "The notion of qualified legal capacity is intelligible, but the notion of qualified legal personality is not." His Honour then expressed puzzlement at the provision in section 146 of the Arbitration Act that incorporation of organizations and their liability to suit etc. is "for the purpose of the Act." The

39. In the judgments in *Hursey*, references are made to the Hobart branch not being separately registered. This however is a pointless observation because the Arbitration Act makes no provision for the separate registration of branches, and I am informed by the Registrar that he would not accept an application for such registration.

40. 21 C.L.R. 129.

41. Pp. 138-9.

42. *Legal Personality and Political Pluralism,* p. 3.

43. [1959] A.L.R. 1390.

true view, it is submitted, is that legal personality is merely the sum of legal capacities.[44]

There is legal "personateness," to borrow Professor Derham's expression, *if for any legal purpose at all* some specified thing is treated as a unit of legal calculation — the bearer of a right, duty, power or privilege. But unless there is *at least one* capacity, then there is no "persona." If this "personateness" is created so as to operate (within specified capacity limits) with respect to legal system A, then one can quite conveniently say that the "legal personality" is restricted to that system and that there is no necessary creation of any "persona" as to legal system B.

This is to some extent concealed in the ordinary administration of law because there is a very strong tendency even as between separate sovereignties for the legal persons created by one system to be recognised in other systems, as a matter of comity, and this tendency is even stronger as between the members of a federal system.[45] Also it is a convenient method of thought in juristic reasoning, and of procedure for such persons as parliamentary draftsmen, to proceed in two steps; first, is there a "persona," and second what are its capacities?[46]

But when considering a federal distribution of powers, it is necessary to adhere firmly to the view that not merely the *capacity,* but also the "personateness" of artificial legal persons is to be restricted to the competence created by the federal distribution of power. Under the Australian system, the Commonwealth parliament lacks authority to create "legal persons" having an indefinite potential capacity. It is not merely that that Commonwealth parliament may not create *capacities* beyond the range of federal powers; the very existence of the legal unit of calculation is restricted to that range of capacities.

This does not mean that the federal "persona" is without significance for State law. Probably it is an inference from the High Court's decision in *Huddart Parker* v. *Moorehead* (1908)[47] that the Commonwealth

44. Certainly one cannot say without contradiction that X is both a legal person and not a legal person, which is what some of their Lordships appear to say in *Bonsor* v. *Musicians' Union* [1956] A.C. 104. However, there is no necessary contradiction in enabling plaintiffs to reach *both* the corporate "kitty" *and* the private assets of the members of a corporate body; provision for this was sometimes made in early commercial incorporations. See this author's paper in *Legal Personality and Political Pluralism* at pp. 164-5, and for the term "kitty" the paper by Dr. S. Stoljar, *ib*. at p. 43.

45. See especially *Chaff and Hay Acquisition Committee* v. *J.A. Hemphill & Sons Pty. Ltd.* (1947) 74 C.L.R. 375.

46. A further convenience of the habit is that under any particular system, personateness may be taken to imply some minimum degree of capacity, so that the task of specifying capacity is simplified.

47. 8 C.L.R. 330.

could not under its incidental power create all the law of contracts, property, torts, crime etc. needed to regulate the relations between registered organizations and other persons which must incidentally occur even if the organization acts only in a limited sphere of federal competence. In practice, the Commonwealth has not attempted to do so. Hence whether or not a registered organization has made, *e.g.*, a valid contract to buy the paper needed to prepare the "logs" and "plaints" by which it may ultimately obtain an award of the Commonwealth Industrial Commission must usually be determined by State law. Generally speaking, federal corporations have to work in a setting of State law, unless their activities are confined to federal territories. But the State law so applied is brought in only so far as relevant to the federally authorised activity, and involves treating the federal corporation as a person only in relation to that activity.

It was inappropriate for the High Court in *Hursey* to attach so much importance to the decision in *Hall* v. *Job;* that case concerned inference from what had been done wholly within a unitary legal structure — that of the State of New South Wales. When considering similar problems in a setting where federal and State law interact, one cannot make the same simple assumptions. Quite apart from the history of such organizations as the Union, mentioned above, the assumption of validity and the desire to give effect to consensual arrangements make it desirable for the courts to treat State branches of Australia-wide organizations as potentially independent organizations. Only thus can one ensure to the members the full range of activities which they wish to pursue.

Menzies J. had no difficulty in contemplating the possibility of "an association registered as an organization pursuant to federal law" having "capacities which it might be beyond federal authority to confer." He referred to the common practice by which unions register both under the Commonwealth Act and under the various State trade union or industrial arbitration Acts.[48] His opinion, however, is ambiguous on the critical question whether in the circumstances the federal organization is juristically separate from the association given capacity under the State law, or whether the federal organization is an extension of a State "persona," or whether the State-determined competence is an extension of the federal "persona." It has hitherto been assumed by industrial tribunals, Commonwealth and State, that the first solution is correct, but Spicer C.J., in the Commonwealth Industrial Court, has now observed that *Hursey* makes the matter doubtful.[49] The thesis of this paper is that only the first solution can conveniently be fitted into the general assumptions of a federal system.

48. [1959] A.L.R. 1434.

49. *Murphy* v. *Applebee,* 23rd November, 1959 (not yet reported).

Fullagar J. also raised the question of the possible inconsistency between State laws affecting federal organizations, and the federal laws under which they are created. In the case of such a conflict, section 109 of the Constitution gives supremacy to the federal law, and the High Court has attributed a wide meaning to the concept of "inconsistency."[50] As Fullagar J. points out, it would clearly be "inconsistent" for a State law to attempt to deprive a validly created federal corporation of any corporate *power* (which probably includes in this context *capacity)* conferred by federal law. This is sound in principle, but Fullagar J. appears to go too far when he says : "Organizations registered under the Commonwealth Act are simply no concern of the States."[51] Previous decisions of the court have established even in relation to Commonwealth government authorities that *prima facie* "federal persons" can have their activities *regulated* by State law.[52] No doubt the possibility must always remain of a Commonwealth law "empowering" its creations in such a way as to override State law, where this is incidental to the exercise of the federal power. But surely in the management of these personalities, it must be left open to the States to regulate the *exercise* of their capacities to some extent, and possibly an attempt by the Commonwealth to rescue its creations from such interference might in some circumstances lead to a "disguised" law, one invalid as a matter of characterization.[53]

Supposing that Tasmania enacted a law requiring all persons (including corporations) who make contributions to the funds of political parties engaged in State elections, for the purpose of such elections, to report their contributions in a specific way. Is it a consequence of *Hursey* that this law could not be enforced in respect of a federally created corporation such as the Union? The argument comes full circle; to say that the supposed restriction on State power is absurd is another way of saying that the implication of so extended a federal power goes beyond reasonable "incidentality." Supposing, however, that a State law simply prohibited any *corporation* or any *trade union* from making political contributions. Surely this too should be regarded as a law with whose operation federal law should not interfere. Perhaps such a conclusion could be reached

50. See this author's *Australian Constitutional Cases,* 2nd ed., pp. 90-102.

51. [1959] A.L.R., p. 1402.

52. *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170, and see *per* Dixon J. in *Melbourne* v. *Commonwealth* (1947) 74 C.L.R. 31, at pp. 78, 82. There is, however, a group of High Court Justices anxious to restore an earlier view that Commonwealth governmental authorities as such are immune from State law; see *Bogle's* case (1953) 89 C.L.R. 229, especially at pp. 259-60.

53. See *per* Evatt J. in *West* v. *Commissioner* (1937) 56 C.L.R. 657, at pp. 687-8.

by the High Court on an application of the revised conception of implied intergovernmental immunities established in *Melbourne* v. *Commonwealth*.[54] But a more satisfactory basis would be denial that federal implied power can go so far as to give organizations under the Arbitration Acts an immunity in respect of activities so remote from the purposes of federal power.

The conclusion of these arguments, then, is that the High Court should not have held that the political levy was authorised by federal law. The court should also have held that the Hobart branch of the Union could be regarded as a separate unincorporated association, governed wholly by State law, so far as its activities were not pursuant to valid federal law. It would then have been necessary to decide whether the political levy was authorised by State law, as to which there was some difference of opinion between Fullagar J. and Menzies J.[55] But decisions along this line would not necessarily have affected the liability of the federally-registered union, because whatever the origins of the dispute, torts were committed which the federal union authorised in respect of activities that had a direct connection with the proper sphere of action of the federal organization.[56]

54. Cited *sup*., n. 52.

55. This aspect of the case, together with all the other detailed questions of the law of contracts, torts and statutory duties, and some aspects of the problem dealt with in this paper, will be discussed by Dr. Sykes in two forthcoming articles in the *Australian Law Journal*. There is one point of general theory which may be mentioned here. A step in the reasoning of Fullagar J. as to the position under State law was that the notion of "ultra vires" could have no application to a natural person, and hence none to an unincorporated association which was merely an aggregation of natural persons ([1959] A.L.R. pp. 1399-400). It is suggested with respect that there is no logical absurdity in the idea of natural persons lacking capacity; it is the position of slaves, infants, bankrupts and married women in many old and contemporary legal systems. Nor is there any logical reason why the law should not deny capacity to an association of natural persons, even though those persons individually have unlimited capacity. Fullagar J. is confusing the habits of thought of English lawyers with logical necessity, and those habits of thought have to give way to what competent legislators choose to do. This, however, does not solve the difficult question as to whether the *Osborne* case [1910] A.C. 87 applies to unregistered trade unions or not; the truth is that on that point the case lacks a clear *ratio decidendi*.

56. There is the same theoretical incongruity in attributing tortious liability to a federal corporation as there is in the case of any corporation, but the incongruity is no greater. In Australia, it has been dealt with along the lines indicated by *Campbell* v. *Paddington Corporation* [1911] 1 K.B. 869; see *James* v. *Commonwealth* (1939) 62 C.L.R. 339.

Summarising the more general propositions concerning the relation of federally-created legal persons to the complex system of interrelated Commonwealth and State law, they are as follows. Federal legal personality must be limited to the capacities incidental to the relevant federal (express) powers. What is incidental to such personality must be related to the relevant constitutional power, not to the existence of a personality considered in isolation. If the natural persons constituting a federal corporation engage in activities which are in point of fact regarded by them as merely incidental to the federally-authorised activity, but which in point of law cannot be authorised by federal law, then those activities must be attributed to a distinct entity whose legal status and capacity is governed by State law. Federal legal personality cannot be employed as a basis for attributing State-determined capacities. Federal corporations are *prima facie* subject to State laws dealing not with capacity, but with the substantive validity or legality of particular transactions. Federal law can grant immunity from such State laws so far as reasonably incidental to relevant heads of Commonwealth power, but the protection must be to a federally-relevant capacity or transaction, and cannot be granted merely to the personality of the federal corporation abstractly considered.

GEOFFREY SAWER. *

* B.A., LL.M. (Melbourne); of Victoria, Barrister-at-Law; Professor of Law in the Australian National University.