HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

COMMUNICATIONS, ELECTRICAL,
ELECTRONIC, ENERGY, INFORMATION,
POSTAL, PLUMBING AND ALLIED SERVICES
UNION OF AUSTRALIA & ORS PLAINTIFFS

AND

QUEENSLAND RAIL & ANOR DEFENDANTS

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail
[2015] HCA 11
8 April 2015
B63/2013

ORDER

The questions asked by the parties in the special case dated 6 August 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Is the first defendant (Queensland Rail) a corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer

It is unnecessary to answer this question.

Question 2

If so, is Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer

Yes.

Question 3

If so, does the Fair Work Act *2009 (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act *2013 (Q)] or the* Industrial Relations Act *1999 (Q) or both?*

Answer

Except to say that the Fair Work Act *2009 (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that*

(a) *ss 69, 72 and 73 of the* Queensland Rail Transit Authority Act *2013 (Q) and*

(b) *ss 691A-691D of the* Industrial Relations Act *1999 (Q)*

are to that extent inconsistent with the Fair Work Act *2009 (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.*

Question 4

What relief, if any, are the plaintiffs entitled to?

Answer

Questions of relief should be determined by a single Justice.

Question 5

Who should pay the costs of the special case?

Answer

The first defendant.

Representation

J K Kirk SC with H El-Hage for the plaintiffs (instructed by Hall Payne Lawyers)

P J Dunning QC, Solicitor-General of the State of Queensland with S E Brown QC and G J D Del Villar for the first defendant (instructed by Crown Law (Qld))

Submitting appearance for the second defendant

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with K E Foley for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

S G E McLeish SC, Solicitor-General for the State of Victoria with G A Hill for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with R Young for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

M G Evans QC with C Jacobi for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail

Constitutional law – Constitution, s 51(xx) – "[T]rading or financial corporations formed within the limits of the Commonwealth" – *Queensland Rail Transit Authority Act* 2013 (Q) established right and duty bearing entity which "is not a body corporate" – Functions of entity included provision of labour hire services – Functions to be carried out as a commercial enterprise – Whether entity a trading corporation formed within the limits of the Commonwealth.

Words and phrases – "is not a body corporate", "trading corporation".

Constitution, s 51(xx).
Queensland Rail Transit Authority Act 2013 (Q), s 6.

FRENCH CJ, HAYNE, KIEFEL, BELL, KEANE AND NETTLE JJ.

The issue

1 The *Queensland Rail Transit Authority Act* 2013 (Q) ("the QRTA Act") established[1] the Queensland Rail Transit Authority ("the Authority"). The Authority is now called[2] Queensland Rail. The Authority can create and be made subject to legal rights and duties, which are its rights and its duties[3]. It can sue and be sued in its name[4]. It can own property[5].

2 The QRTA Act provides[6] that the Authority "is not a body corporate". The QRTA Act provides[7] that the Authority does not represent the State, and it follows from this provision, coupled with the provisions which give the Authority separate legal personality, that the Authority is not, and is not a part of, the body politic which is the State of Queensland[8].

3 The Authority operates as a labour hire company, providing labour used by Queensland Rail Limited ("QRL") to operate railway services in Queensland. QRL is a company governed by the *Corporations Act* 2001 (Cth). Pursuant to s 67 of the QRTA Act, the Authority holds all the shares in QRL.

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1 s 6(1).

2 s 63.

3 s 7.

4 s 7(4).

5 s 7(1)(b).

6 s 6(2).

7 s 6(3).

8 No party or intervener, other than the Attorney-General for Victoria, submitted that the Authority is part of the body politic which is the State of Queensland.

4 Is the Authority a "trading or financial corporation formed within the limits of the Commonwealth" within the meaning of s 51(xx) of the Constitution? If it is, the relations between the Authority and its employees are governed by federal industrial relations legislation. If it is not, State industrial relations legislation applies.

5 The Authority accepts that it is an artificial legal entity formed within the limits of the Commonwealth. It submits that it is not a trading or financial corporation. Rather, it submits, it is an entity which is not a "corporation" and which is not a "trading or financial" corporation. These submissions should be rejected. The Authority is a trading or financial corporation within the meaning of s 51(xx).

The litigation

6 The plaintiffs are all associations or organisations of employees. Some are registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth); some are registered under the *Industrial Relations Act* 1999 (Q) ("the Queensland Industrial Relations Act"). Members of the State organisations are also members of the federal associations.

7 In a proceeding brought in the original jurisdiction of this Court, the plaintiffs allege that the Authority is a trading corporation within the meaning of s 51(xx) of the Constitution. They allege that it follows that the Authority is a "constitutional corporation" as defined in s 12 of the *Fair Work Act* 2009 (Cth)[9], and a "national system employer"[10] for the purposes of that Act. The plaintiffs allege that provisions of the QRTA Act[11] (which apply the Queensland Industrial Relations Act to the Authority's employees and treat some federal enterprise agreements as certified under the Queensland Industrial Relations Act) are inconsistent with the *Fair Work Act* 2009 and invalid to the extent of that inconsistency by operation of s 109 of the Constitution. The plaintiffs also allege that ss 691A-691D of the Queensland Industrial Relations Act (which apply to certain industrial instruments applying to "the employment of persons in a

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9 "[A] corporation to which paragraph 51(xx) of the Constitution applies".

10 s 14(1)(a).

11 ss 69, 72 and 73.

government entity"[12]) are inconsistent with the *Fair Work Act* 2009, and thus invalid by operation of s 109 of the Constitution so far as they purport to apply to the Authority, its employees or two identified industrial instruments[13].

8 The second defendant to the proceeding (the Queensland Industrial Relations Commission) filed a submitting appearance.

9 The plaintiffs and the Authority (as the active defendant in the proceeding) agreed in stating questions of law for the opinion of the Full Court in the form of a special case based upon certain agreed facts. The first two questions ask whether the Authority is a "corporation" within the meaning of s 51(xx) and, if so, whether it is a "trading corporation". Question 3 asks whether the *Fair Work Act* 2009 applies to the Authority and its employees to the exclusion of the QRTA Act or the Queensland Industrial Relations Act or both. Questions 4 and 5 relate to relief and costs.

Section 51(xx)

10 The questions stated by the parties assume that it is useful to direct separate attention to what is a "corporation" and what is a "trading corporation" within the meaning of s 51(xx). The validity of the assumption was not directly challenged by any party or intervener and it is convenient to proceed without examining that issue. But this must not obscure the obvious importance of recognising that the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". And neither the word "corporations", where twice appearing, nor the collocation "trading or financial corporations formed within the limits of the Commonwealth" is to be construed without regard to the context within which the expression appears.

The competing submissions

11 The chief point of difference between the plaintiffs and the Authority was whether the Authority is a "corporation" within the meaning of the second limb

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12 s 691B(1).

13 QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011.

of s 51(xx). The plaintiffs submitted that "an entity established under law with its own name, and with separate legal personality and perpetual succession, is a corporation within the meaning of s 51(xx)". The Attorney-General of the Commonwealth, intervening, proffered a generally similar description of what is a corporation: "any juristic entity with distinct, continuing legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) that is not a body politic reflected or recognised in the Constitution".

12 By contrast, the Authority (with the support of the Attorneys-General for New South Wales and Victoria) submitted that not all artificial entities having separate legal personality are corporations. The Authority submitted that "the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express words or by necessary implication". Hence, so the Authority submitted, the express provision, by s 6(2) of the QRTA Act, that the Authority "is not a body corporate" is especially significant because it reveals the intention of the Parliament and requires the conclusion that the Authority is not a "corporation".

13 The Attorney-General for Victoria submitted that a State has broad scope to create bodies which have a separate legal existence as right and duty bearing entities but which are, or are not, corporations. The submission proffered no criterion for identifying the characteristics that are necessary or sufficient to identify the entity as a "corporation", other than to submit that "[i]f Parliament intended to establish a corporation, it may be expected in a modern statute that express terms of incorporation would be used". Hence, the submission appeared to go no further than the Authority's submission that it is the "intention" of the enacting Parliament which is determinative.

14 The Authority further submitted that, even if it is a "corporation", it is not a "trading or financial corporation". No party or intervener suggested that the Authority is a financial corporation and that aspect of the second limb of s 51(xx) may be left aside from further examination. The Authority accepted that, apart from the case where a corporation is dormant or has barely begun to trade, an "activities" test[14] determines whether it is a "trading corporation". But it submitted that its activities do not warrant it being classed as a trading

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14 cf *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; [1979] HCA 6.

corporation because its only activity is to provide employees to a company not at arm's length (QRL) for an amount which yields no profit for the Authority.

A "corporation"?

15 For the purposes of deciding this case, it is not necessary to attempt to state exhaustively the defining characteristics of a corporation (whether a "foreign corporation" or a "trading or financial corporation"). Whether the Authority is a trading corporation can be answered without attempting that task.

16 The QRTA Act creates the Authority as a distinct entity. The Authority can have rights and duties. It is, therefore, a separate legal entity: one of those "basic units" of the legal system which "possess the capacity of being parties to the claim-duty and power-liability relationships"[15].

17 At the time of federation[16], and for centuries before that time[17], the only artificial persons in English law were corporations, and corporations were either aggregate or sole. The development of the trust in English law had permitted the establishment and maintenance of arrangements about property and its use without the interposition or creation of any separate artificial legal entity. And in this respect English law differed markedly from systems of law such as that provided by the German Civil Code[18] under which "the advantage of corporateness could be acquired by societies of divers sorts and kinds"[19].

18 The Authority is neither a corporation sole nor a corporation aggregate of a kind that existed at the time of federation. It bears no resemblance to any of the

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15 Paton, *A Text-Book of Jurisprudence*, 3rd ed (1964) at 351-352.

16 See, for example, Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335 at 335.

17 Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton*, (1628) at §1, 2a, §413, 250a.

18 Maitland, "Trust and Corporation", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 321.

19 Maitland, "The Making of the German Civil Code", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 474 at 482.

ecclesiastical[20] or other forms[21] of corporation sole then known, and it has no corporators who join, or are joined, together to form the separate entity. (The QRTA Act provides[22] expressly that "the Authority is not constituted by the members of the board".)

19 But the Authority expressly disclaimed any argument that "corporation" as used in either limb of s 51(xx) should be read as restricted to corporations of a kind that were known to foreign law or to English or colonial law at the time of federation. And the Authority was right to do so. It is not to be supposed that the only kinds of "foreign corporations" and "trading or financial corporations" with respect to which s 51(xx) gives legislative power are bodies constituted and organised in the way in which corporations of those kinds were constituted and organised in 1900.

20 Foreign corporations are constituted and organised according to the law of another jurisdiction. That law may, and commonly will, differ from Australian law, sometimes markedly. Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the laws of a State. (No party or intervener challenged *New South Wales v The Commonwealth* (*The Incorporation Case*)[23].) Hence, often, the entities with which s 51(xx) deals are entities which owe their existence and form to a law other than a law of the federal Parliament.

21 Before and after federation, there were many radical changes to the legislation (both English and colonial) under which corporations could be constituted and were regulated. Relevant nineteenth century developments were

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20 See Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335.

21 See, for example, *Fulwood's Case* (1591) 4 Co Rep 64b [76 ER 1031] (concerning the Chamberlain of the City of London as a corporation sole) and *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a [77 ER 960] (concerning the King as a corporation sole). See also *Financial Administration and Audit Act* 1977 (Q), s 43 and *Financial Accountability Act* 2009 (Q), s 53 (preserving, continuing and constituting the Treasurer of Queensland as a corporation sole for some purposes).

22 s 14(2).

23 (1990) 169 CLR 482; [1990] HCA 2.

described in *New South Wales v The Commonwealth* (*Work Choices Case*)[24] and need not be repeated here. It is enough to observe that issues about corporations and their regulation had been in "legislative and litigious ferment"[25] in the later years of the nineteenth century and, after initial hesitation, were seen as warranting the grant of national legislative power.

22 There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation. To read the provision in that way would hobble its operation. The course of events in the nineteenth century described in the *Work Choices Case* points firmly against reading the provision as so restricted. And there is no textual or contextual reason to conclude that the Parliament's power with respect to trading or financial corporations formed within the limits of the Commonwealth should be frozen in time by limiting the power to entities of a kind that existed at federation. Nor is there any textual or contextual reason to conclude that the Parliament should have legislative power with respect only to those entities constituted and organised under the laws of foreign states which are entities of a kind generally similar to those that existed or could be formed under foreign law as it stood in all its various forms in 1900.

23 Accepting, then, that the Authority was right to disclaim an argument that a "corporation" must be an entity of a kind known in 1900, what is it that marks an artificially created legal entity as a "trading or financial corporation formed within the limits of the Commonwealth"? As has been noted, the Authority sought to answer this question by reference only to whether the Parliament providing for the creation of the entity "intended" to create a "corporation". But this answer gave no fixed content to what is a "corporation". The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a "corporation". Hence the "intention" to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.

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24 (2006) 229 CLR 1 at 90-98 [96]-[124]; [2006] HCA 52.

25 *Work Choices Case* (2006) 229 CLR 1 at 95 [113].

Section 6(2)

24 The Authority's submissions about "intention" were closely related to, even dependent upon, s 6(2) of the QRTA Act and its provision that the Authority is not a "body corporate". But how is s 6(2) to be construed, and what is the work that it does?

25 The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (that is not a body politic) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression.

26 The assumed division of artificial legal entities that are not bodies politic between "corporations" or "bodies corporate" on the one hand, and "other artificial legal entities" on the other, cannot be made. No criteria which would differentiate between the two supposed classes of entities were identified. Neither s 6(2) itself, nor the QRTA Act more generally, supports a division of that kind. The premise for the Authority's submissions is not established.

27 If s 6(2) does not support (or make) a division of artificial legal entities between "corporations" or "bodies corporate" and "other artificial legal entities", what is the purpose or effect of its provision?

28 Taken as a whole, the QRTA Act makes plain that it proceeds on the footing that the Authority's relations with its employees are not governed by the *Fair Work Act* 2009. It may be accepted, therefore, that one purpose of the QRTA Act was to create an entity which would provide labour to QRL in circumstances where the relations between employer and employee would be governed by State industrial relations law. If s 6(2) were to be understood as intended to do no more than take the Authority outside the federal industrial relations law, by taking the Authority outside the reach of s 51(xx), it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power. More particularly, it would be necessary to observe that whether an entity is a corporation of a kind referred to in s 51(xx) presents an issue of substance, not mere form or label. But s 6(2) has a larger purpose than

simply attaching a label designed to avoid the application of an otherwise applicable federal law.

29 Providing that the Authority "is not a body corporate" engages other Queensland statutory provisions. In particular, although the Authority is what the *Government Owned Corporations Act* 1993 (Q) ("the GOC Act") calls a "government entity"[26], the Authority is not a government entity that is "established as a body corporate under an Act or the Corporations Act"[27]. Because that is so, the Authority cannot be declared[28] by regulation to be a "government owned corporation" for the purposes of the GOC Act. In addition, it may be that the provision that the Authority is not a body corporate could be said to deny the application of s 46 of the *Acts Interpretation Act* 1954 (Q). Section 46 provides that a provision of an Act relating to offences punishable on indictment or summary conviction "applies to bodies corporate as well as individuals". Whether s 6(2) of the QRTA Act does have the effect of denying the operation of s 46 of the *Acts Interpretation Act* need not be decided.

30 The exclusion of the application of the GOC Act by s 6(2) of the QRTA Act providing that the Authority is not a body corporate means that the provision is more than mere labelling. Section 6(2) takes its place, and is to be given its meaning and application, in the context provided by the Queensland statute book generally and the GOC Act in particular. Understood in that context, s 6(2) provides that the entity which the QRTA Act creates is one with which other provisions of Queensland law engage in a particular way. Section 6(2) is not to be understood as providing that the entity created is one of a genus of artificial legal entities distinct from what s 51(xx) refers to as "corporations".

The decided cases

31 Reference was made in argument to a number of decisions which it was suggested throw light on whether the Authority is a "corporation". Particular emphasis was given to this Court's decisions in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd*[29] and *Williams v*

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26 s 4(b).

27 s 5(a).

28 s 5(b).

29 (1947) 74 CLR 375; [1947] HCA 20.

Hursey[30], as well as some of the cases about the status of trade unions in the United Kingdom[31]. But neither of the cases in this Court decided any issue about the reach of the legislative power conferred by s 51(xx) and, of course, the British trade union cases were even further removed from the issues which must be decided in this case. Not only are the British trade union cases about issues far removed from the issues in this case, they are decisions which were very much the product of their times and the legislation which then governed the organisation of labour and liability for trade disputes. They offer no useful guidance to the resolution of the present issues. It is, however, necessary to say something about each of the decisions of this Court and the decision of the Supreme Court of the United States in *Liverpool Insurance Company v Massachusetts*[32], which was referred[33] to in *Chaff and Hay Acquisition Committee*.

32 The issue in *Chaff and Hay Acquisition Committee* was whether the committee, a statutory body created under South Australian legislation, was a legal entity which the courts of New South Wales should recognise as competent to sue or be sued in its own name. This Court held that the committee had an independent legal existence which should be recognised. It rejected arguments that recognition should not be given to the committee because it was "to operate as a Crown agent"[34] or that it had but a temporary existence[35]. As the Full Court of the Supreme Court of New South Wales did[36], this Court noted[37] that the

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30 (1959) 103 CLR 30; [1959] HCA 51.

31 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *National Union of General and Municipal Workers v Gillian* [1946] KB 81; *Bonsor v Musicians' Union* [1956] AC 104.

32 77 US 566 (1870).

33 (1947) 74 CLR 375 at 388 per Starke J.

34 (1947) 74 CLR 375 at 379.

35 (1947) 74 CLR 375 at 384.

36 *J A Hemphill & Sons Pty Ltd v Chaff and Hay Acquisition Committee* (1946) 47 SR (NSW) 218 at 220.

37 (1947) 74 CLR 375 at 385 per Latham CJ, 388 per Starke J.

statute constituting the committee had not used express words of incorporation[38] and that the committee was not "created a corporation according to the requirements of English law in force in South Australia"[39]. But neither of those observations was treated as determinative of the issue that was before the Court: could the committee sue and be sued in its own name? Understood in the light of that issue, what was said in *Chaff and Hay Acquisition Committee* gives no direct assistance in deciding this case. In particular, and contrary to the tenor of the Authority's submissions, *Chaff and Hay Acquisition Committee* does not support drawing a distinction between corporations of the kind or kinds referred to in s 51(xx) and other forms of artificial legal entity that are not bodies politic.

33 In *Liverpool Insurance Company*, the Supreme Court of the United States decided[40] that, despite declarations in the English statutes constituting the insurance company that it was not a corporation, "[s]uch local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body". Especially was that so when, as the Supreme Court rightly observed[41], what was said in the relevant English statutes was directed to denying that the members of the insurance company had limited liability and did not detract from what the Court called the "true character" of the company.

34 The decision in *Liverpool Insurance Company* offers no guidance about the reach of the legislative power given by s 51(xx). It does emphasise, however, the need to examine the reasons for, and effect to be given to, a legislative declaration that a body is or is not a "body corporate" or a "corporation".

35 *Williams v Hursey* concerned the liability of an organisation of employees to damages for the tort of conspiracy and directed particular attention to whether the Waterside Workers' Federation and its Hobart "branch" could sue or be sued. The Federation was an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth); the Hobart branch was not registered under that Act or the *Trade Unions Act* 1889 (Tas), which reproduced the English *Trade Union*

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38 cf *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 534.

39 (1947) 74 CLR 375 at 388 per Starke J.

40 77 US 566 at 576 (1870).

41 77 US 566 at 576 (1870).

Acts of 1871 and 1876. Members of the Hobart branch were also members of the registered organisation.

36 Fullagar J, with whose reasons Dixon CJ and Kitto J agreed, made two points of present relevance. First, he said[42] that the *Conciliation and Arbitration Act* 1904 gave the Federation, as a registered organisation, "what I would not hesitate to call a corporate character – an independent existence as a legal person". Second, Fullagar J said[43] that "[t]he notion of qualified legal *capacity* is intelligible, but the notion of qualified legal *personality* is not" (emphasis added). Hence, the section of the *Conciliation and Arbitration Act* 1904 which provided that every registered organisation "shall for the purposes of the Act have perpetual succession and a common seal, and may own possess and deal with any real or personal property"[44] was, without more, "quite enough to give to a registered organization the full character of a corporation"[45]. Neither the particular statutory root of incorporation nor the particular capacities which the body was given were treated as determining whether it had "the full character of a corporation". Rather, independent existence as a legal person, which is to say recognition as a right and duty bearing entity, was the determinative consideration.

37 *Williams v Hursey* points firmly against accepting the Authority's submissions that corporations, or bodies corporate, form a class of statutorily created right and duty bearing entities distinct from another class of statutorily created right and duty bearing entities identified only according to whether the constituting legislation (and legislature) "intended" to create the entity concerned as a corporation. It also points against accepting the submissions of the Attorney-General for Victoria that the power of a State to create artificial legal entities gives it a "broad scope" to create a right and duty bearing entity which is not a corporation for the purposes of s 51(xx).

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42 (1959) 103 CLR 30 at 52.

43 (1959) 103 CLR 30 at 52.

44 (1959) 103 CLR 30 at 52 per Fullagar J, citing s 136 of the *Conciliation and Arbitration Act* 1904.

45 (1959) 103 CLR 30 at 52.

38 Like the Federation considered in *Williams v Hursey*, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation".

A "trading corporation"?

39 As already noted, the Authority submitted that its activities were not such as to make it a trading corporation. In its written submissions, the Authority submitted that it dealt only with a related entity, QRL, and made no profit from those dealings, and that these "peculiar" activities did not make it a trading corporation. The Authority did not elaborate on these matters in oral argument.

40 By contrast, some of the interveners, especially the Attorney-General of the Commonwealth and the Attorney-General for Victoria, advanced detailed submissions about what test or tests should be applied in deciding whether a corporation is a trading corporation. In order to decide this case, however, it is not necessary to examine those submissions in any detail. Instead, it is enough to conclude that no matter whether attention is directed to the constitution and purposes of the Authority, or what it now does, or some combination of those considerations, the Authority must be found to be a trading corporation.

41 The QRTA Act established the Authority as an entity having functions which included "managing railways"[46], "controlling rolling stock on railways"[47], "providing rail transport services, including passenger services"[48] and "providing services relating to rail transport services"[49]. The QRTA Act provides[50] that the Authority is to "carry out its functions as a commercial enterprise". Provision is

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46 s 9(1)(a).

47 s 9(1)(b).

48 s 9(1)(c).

49 s 9(1)(d).

50 s 10(1).

made[51] for the Authority to pay dividends to the State and, to that end, the Authority is obliged[52] to give the responsible Ministers in May each year an estimate of its profit for the financial year. Not only that, the Authority is liable[53] to pay to the Treasurer, for payment into the consolidated fund of the State, amounts equivalent to the amounts for which the Authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.

42 Even if the Authority is treated as now doing nothing more than supplying labour to QRL (a related entity) for the purposes of QRL providing rail services and even if, as the Authority submitted, the Authority chooses to supply that labour at a price which yields it no profit, those features of its activities neither permit nor require the conclusion that the Authority is not a trading corporation. Labour hire companies are now a common form of enterprise. The engagement of personnel by one enterprise for supply of their labour to another enterprise is a trading activity. That the parties to the particular supply arrangement are related entities does not deny that characterisation of the activity. That the prices for supply are struck at a level which yields no profit to the supplier likewise does not deny that the supplier is engaged in a trading activity.

43 In combination, these considerations require the conclusion that the Authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.

Inconsistency of laws

44 Little attention was given in oral argument to the question asked in the special case about inconsistency between the QRTA Act and the *Fair Work Act* 2009 or between the Queensland Industrial Relations Act and the *Fair Work Act* 2009. Instead, argument proceeded on the footing that, if the Authority is held to be a trading corporation, the inconsistency consequences urged by the plaintiffs would follow. The answer which is given to the question about inconsistency of laws follows from the conclusion that the Authority is a trading corporation but

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51 s 55.

52 s 56(1)(a).

53 s 62.

should be framed by reference to the particular provisions which were the focus of the litigation.

Conclusion and orders

45 The plaintiffs are entitled to have the questions asked in the special case answered substantially in their favour. Having regard, however, to what has been said about the parties' assumption that it is useful to ask a separate question about whether the Authority is a "corporation" within the meaning of s 51(xx), it is better to provide no answer to that question and, instead, answer the second question, which directs attention to whether the Authority is a "trading corporation". What relief the plaintiffs should have in the proceedings is a matter better dealt with by a single Justice.

46 The questions in the special case should be answered as follows:

1 Is the first defendant (Queensland Rail) a corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: It is unnecessary to answer this question.

2 If so, is Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: Yes.

3 If so, does the *Fair Work Act* 2009 (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act* 2013 (Q)] or the *Industrial Relations Act* 1999 (Q) or both?

Answer: Except to say that the *Fair Work Act* 2009 (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that

(a) ss 69, 72 and 73 of the *Queensland Rail Transit Authority Act* 2013 (Q) and

(b) ss 691A-691D of the *Industrial Relations Act* 1999 (Q)

are to that extent inconsistent with the *Fair Work Act* 2009 (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.

4 What relief, if any, are the plaintiffs entitled to?

Answer: Questions of relief should be determined by a single Justice.

5 Who should pay the costs of the special case?

Answer: The first defendant.

GAGELER J.

Introduction

47 Commonwealth legislation often refers to entities on which it confers rights or imposes duties as "constitutional corporations" and defines that expression to mean "corporations" to which s 51(xx) of the Constitution applies. The statutory reference is to corporations with respect to which the Commonwealth Parliament is empowered by s 51(xx) to make laws: "foreign corporations" and "trading or financial corporations formed within the limits of the Commonwealth". Questions have often arisen as to whether particular entities constituted under State legislation, not disputed to be "corporations formed within the limits of the Commonwealth", answer the constitutional description of "trading or financial" corporations. The anterior question in this case is whether a particular entity constituted under State legislation answers the constitutional description of a "corporation".

48 That anterior question arises because the *Queensland Rail Transit Authority Act* 2013 (Q), despite establishing "Queensland Rail"[54], conferring on it "all the powers of an individual"[55] (specifically including to "enter into contracts", "acquire, hold, dispose of, and deal with property", "employ staff", "appoint agents and attorneys", and "engage consultants"[56]), and providing that it "may sue and be sued in the name it is given"[57], declares that it "is not a body corporate"[58]. If effective to prevent Queensland Rail answering the constitutional description of a corporation, that declaration would take Queensland Rail outside the operation of the *Fair Work Act* 2009 (Cth), which governs employment by constitutional corporations to the exclusion of State and Territory industrial laws[59]. Removal of Queensland Rail from the operation of the *Fair Work Act* was part of the legislative design of the *Queensland Rail Transit Authority Act*, as is made plain by transitional and other provisions which expressly contemplate

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54 Sections 6(1) and 63.

55 Section 7(1).

56 Section 7(1)(a)-(e).

57 Section 7(4).

58 Section 6(2).

59 Sections 14 and 26 of the *Fair Work Act* 2009 (Cth).

that employment by Queensland Rail would be governed by the *Industrial Relations Act* 1999 (Q)[60].

49 Whatever operation the statutory declaration that Queensland Rail is not a body corporate might have under other Queensland legislation[61], or on any rule of the common law, that statutory declaration is ineffective to prevent Queensland Rail answering the constitutional description of a corporation. It answers that description because it is an entity established by law with capacity to own property, to contract and to sue.

50 Once it is concluded that Queensland Rail answers the constitutional description of a corporation, there can be no doubt that Queensland Rail also answers the constitutional description of a trading corporation. It answers that description because its statutory functions under the *Queensland Rail Transit Authority Act* include the provision of "rail transport services" and "services relating to rail transport services"[62]. Those, on any view, are substantial trading purposes. Queensland Rail also answers that description because it in fact provides the services of its employees under contract to its wholly owned subsidiary, Queensland Rail Limited. That, on any view, is a substantial trading activity.

51 Queensland Rail is therefore a constitutional corporation governed by the *Fair Work Act* to the exclusion, by force of s 109 of the Constitution, of Queensland industrial laws, and in particular to the exclusion of the *Industrial Relations Act*.

Queensland Rail is a corporation

52 Professor Frederic Maitland wrote with accentuated simplicity in 1900[63]:

> "Persons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole."

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60 Sections 69, 73, 74, 75 and 76.

61 Eg s 46 of the *Acts Interpretation Act* 1954 (Q).

62 Section 9(1)(c) and (d).

63 Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335 at 335.

That, Maitland added, "would be an orthodox beginning for a chapter on the English Law of Persons, and such it would have been at any time since the days of Sir Edward Coke"[64].

53 Maitland elsewhere described a legal "person" as "a right-and-duty-bearing unit"[65]. Implicit in that description, often since repeated[66], is the traditional, essentially functional, understanding of legal "personality" as lying in the existence of legally conferred or legally recognised capacity to have or to form legal relations[67]. Implicit also is the traditional understanding of legal personality as unitary: "[t]he notion of qualified legal capacity is intelligible, but the notion of qualified legal personality is not"[68]. To refer to an "artificial" legal person necessarily implies no more than the existence of a unit or entity, not being merely a natural person, in respect of which legal personality has been conferred or recognised[69]. It is not to deny the existence of other units or entities created or recognised by law to have capacities other than to have or to form legal relations, such as those whose capacities are confined to the arbitral[70] or administrative[71]. The particular position of the "state" or the "Crown", controversial in 1900[72] and incompletely theorised even

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64 See Co Lit 2a. See also Blackstone, *Commentaries on the Laws of England*, (1765), Bk 1 at 119.

65 Maitland, "Moral Personality and Legal Personality", (1905) 6 *Journal of the Society of Comparative Legislation* 192 at 193.

66 Eg Paton, *A Text-Book of Jurisprudence*, (1946) at 249; Pound, *Jurisprudence*, (1959), vol 4 at 191-192.

67 Dewey, "The Historic Background of Corporate Legal Personality", (1926) 35 *Yale Law Journal* 655; Smith, "Legal Personality", (1928) 37 *Yale Law Journal* 283.

68 *Williams v Hursey* (1959) 103 CLR 30 at 52; [1959] HCA 51.

69 Pollock, "Has the Common Law Received the Fiction Theory of Corporations?", (1911) 27 *Law Quarterly Review* 219.

70 Eg *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 587; [1983] HCA 29.

71 Eg *Church of Scientology v Woodward* (1982) 154 CLR 25 at 56-57; [1982] HCA 78; *Nair v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 60 at 68 [32]-[34].

72 Maitland, "The Crown as Corporation", (1901) 17 *Law Quarterly Review* 131; Harrison Moore, "The Crown as Corporation", (1904) 20 *Law Quarterly Review*

(Footnote continues on next page)

today[73], can for present purposes be put to one side given that the Constitution, in sustaining the "Commonwealth" and the "States", and in providing for the "government of any territory"[74], "goes directly to the conceptions of ordinary life" in that it "treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities"[75] and enables self-governing Territories to be treated in the same way[76].

54 The orthodox historical understanding that all corporations are either "corporations aggregate" (incorporated groups of co-existing natural persons) or "corporations sole" (an incorporated series of individuals) underlay the common statutory practice in Australia in the nineteenth and twentieth centuries of creating government business enterprises: by declaring the holder of a specified office (frequently a "Commissioner") to be a "corporation sole"[77]; by declaring the holders of a number of specified offices (frequently "Commissioners") to be a "body corporate"[78]; or, as became over time more common, by "establishing" an entity (frequently a "Board", an "Authority", or a "Commission") as a "body corporate" to "consist" of the holders of specified appointments[79]. Not infrequently, cases came before the courts raising issues as to whether such statutory entities, although expressly so incorporated, nevertheless fell within the "shield of the Crown" so as to have immunity from suit. There was in those cases, as was noted more than once, "evidence of a strong tendency to regard a

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351; Jethro Brown, "The Personality of the Corporation and the State", (1905) 21 *Law Quarterly Review* 365.

73 Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24 [74]-[75]; [2003] HCA 6.

74 Section 122.

75 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363; [1948] HCA 7.

76 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 271-273; [1992] HCA 51.

77 Eg *Railway Act* 1863 (Q), s 7; *Railways Act* 1914 (Q), ss 6 and 8, considered in *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22; [1985] HCA 69.

78 Eg *Government Railways Act* 1888 (NSW), s 6.

79 Eg *Australian National Airlines Act* 1945 (Cth), ss 6 and 7, considered in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29; [1945] HCA 41. See generally Sawer, "The Public Corporation in Australia", in Friedmann (ed), *The Public Corporation: A Comparative Symposium*, (1954) 3.

statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant of the Crown"[80].

55 The orthodox historical understanding that all corporations are either corporations aggregate or corporations sole underlay the observation of Quick and Garran in 1901, with reference to the words "the incorporation of banks" in s 51(xiii) of the Constitution, that "[a]n Act of Incorporation is an Act creating an artificial or fictitious person, the peculiarity of which is that it has a legal existence separate and distinct from the individual units of which it is composed"[81]. The same understanding also underlay the scepticism Griffith CJ displayed as late as 1914 when, after noting that Commonwealth legislation established the Commonwealth Bank as a body corporate without corporators, he chose to "pass by the question whether in the nature of things it is competent for the Commonwealth Parliament to declare that such an abstraction disassociated from any material persons shall be regarded as a corporation"[82].

56 The question having been so left, Dixon J later took the opportunity to say that he saw "no reason to doubt" the power of the Commonwealth Parliament "for a purpose within its competence, to create a juristic person without identifying an individual or a group of natural persons with it, as the living constituent or constituents of the corporation"[83]. His Honour continued[84]:

> "In other legal systems an abstraction or even an inanimate physical thing has been made an artificial person as the object of rights and duties. The legislative powers of the Commonwealth, while limited in point of subject matter, do not confine the legislature to the use of existing or customary legal concepts or devices, that is, except in so far as a given subject matter may be defined in terms of existing legal conceptions, as perhaps in some respects may be the case in, for example, pars (ii), (xii), (xiv), (xvii), (xviii), (xxiv) and (xxv) of s 51."

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80 *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654 at 662; [1959] HCA 12; *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291; [1982] HCA 48. See also *State Electricity Commission of Victoria v City of South Melbourne* (1968) 118 CLR 504 at 510; [1968] HCA 49.

81 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 578.

82 *Heiner v Scott* (1914) 19 CLR 381 at 393; [1914] HCA 82.

83 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 361.

84 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 361.

57 His Honour's omission of s 51(xx) from that list of examples of Commonwealth legislative powers unconfined by customary legal concepts or devices can be taken to have been deliberate. The power of the Commonwealth Parliament to make laws with respect to "foreign corporations" (entities on which legal personality has been conferred or recognised under other legal systems), to say nothing of its power to make laws with respect to "trading or financial corporations", would from its inception have been deprived of much of its potential scope and utility were those references to "corporations" confined to categories of corporations known domestically in 1900.

58 The orthodox historical understanding that the only artificial persons are corporations, to which Maitland referred in 1900, was very soon after challenged by the uncertain status afforded to an English trade union in the reasoning of the House of Lords in *Taff Vale Railway v Amalgamated Society of Railway Servants*[85], combined with the emphatic observation of Farwell J at first instance in that case 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 was undoubtedly competent to create by legislation an entity with capacity to form legal relations which was neither[86].

59 The same orthodox historical understanding had earlier been challenged by the emergence in the nineteenth century of a category of joint stock companies, "sometimes said to be *quasi* incorporated"[87], which were associations of stockholders on which legislation expressly conferred capacity (through designated office bearers) variously to contract, to hold property and to sue and be sued, but in respect of which the same legislation also refrained from express incorporation. There were often good commercial reasons for maintaining such a structure notwithstanding the potential for express incorporation under more general statutes[88]. As Professor Geoffrey Sawer explained[89]:

> "It was common form in the early United Kingdom and colonial private Acts creating trading companies to avoid express incorporation (which

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85 [1901] AC 426.

86 [1901] AC 426 at 429.

87 Lindley, *A Treatise on the Law of Companies, Considered as a Branch of the Law of Partnership*, 5th ed (1889) at 7.

88 As to the development of which see *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 90-93 [97]-[106]; [2006] HCA 52.

89 Sawer, "Government as Personalized Legal Entity", in Webb (ed), *Legal Personality and Political Pluralism*, (1958) 158 at 165.

> would have removed personal liability of shareholders altogether and so seriously reduced the company's 'credit rating'), and instead provide that the company might sue and be sued in the name of its chairman or treasurer, and that the liability of shareholders should be some specified amount in addition to their shareholding."

60 Legislation of the New South Wales and Victorian Parliaments which made provision for such *quasi* incorporated companies commonly contained express declarations that "[n]othing herein contained shall extend or be deemed taken or construed to extend to incorporate the [members of the company]"[90]. It was foreseeable in the decade leading to Federation, and was in fact the case, that substantial companies would continue to trade under such structures into the twentieth and even twenty-first centuries[91]. Whilst "it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s 51(xx) from what was said in debate about the power, or from the drafting history"[92], were s 51(xx)'s reference to "trading or financial corporations formed within the limits of the Commonwealth" (as ultimately formulated in the wake of the widespread corporate collapses of the 1890s[93]) to have omitted such *quasi* incorporated companies would have been a somewhat surprising oversight.

61 A relevant example of such legislation of the New South Wales and Victorian Parliaments was that providing for the carrying on of business in those colonies of the "company or partnership" established in England in 1836 by the name of "The Liverpool Fire and Life Insurance Company", the name of which later went through several iterations, one of which was "The Liverpool and London Fire and Life Insurance Company". In conferring capacity on that company through designated office bearers to contract, to hold property and to

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90 See eg *Australian Marine Assurance Company Act* 1832 (NSW), s 6; *Union Assurance Company Act* 1836 (NSW), s 7; *Australian Gas Light Company Act* 1837 (NSW), s 10; *Bathurst Bank Act* 1839 (NSW), s 11; *Melbourne Auction Company Act* 1842 (NSW), s 12; *Australasian Fire and Life Insurance Company Act* 1857 (Vic), s 6; *Union Bank of Australia Act* 1858 (Vic), s 8.

91 Notably the Australian Gas Light Company, the structure of which remained as established by the *Australian Gas Light Company Act* 1837 (NSW) until the *AGL Corporate Conversion Act* 2002 (NSW). See Austin and Ramsay, *Ford's Principles of Corporations Law*, 15th ed (2013) at 43 [2.100].

92 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 97 [119].

93 As to which see *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 94-96 [110]-[116].

sue and be sued, and in also expressly declaring that "nothing [herein] contained shall extend or be deemed construed or taken to extend to incorporate the said [C]ompany", the New South Wales and Victorian legislation substantially replicated legislation earlier enacted by the United Kingdom Parliament[94]. That United Kingdom legislation was considered by the Supreme Court of the United States in holding in *Liverpool Insurance Company v Massachusetts* that the Company, as trading in Massachusetts, was not to be characterised as a mere association of its members, some of whom were citizens of the United States entitled to the protection of the privileges and immunities clause of the United States Constitution, but was rather to be characterised as a corporation, to whom that clause had no application[95]. The Supreme Court noted that the Company, under its deed of settlement as "legalized and enlarged by the acts of Parliament", "possesse[d] many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character"[96]. The Supreme Court stated that "whatever may be the effect" in the courts of the United Kingdom of the express declaration that it was not to constitute a corporation, "it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character"[97]. The significance of *Liverpool Insurance Company v Massachusetts* for present purposes lies in the Supreme Court's recognition that a joint stock company, despite being only *quasi* incorporated by legislation in a form common in England and in the Australian colonies, was nevertheless a corporation for the purposes of the United States Constitution.

62 There can be no doubt that it is open to any Australian legislature, as it may be open to the legislature of the United Kingdom or of any other foreign power, to "provide for the creation of a body which, as distinct from the natural persons composing it, has legal personality, whether or not the legislature chooses to identify its creature by the term 'corporation'"[98]. There can equally be

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94 *Liverpool and London Fire and Life Insurance Company Act* 1857 (NSW); *Liverpool and London Fire and Life Insurance Company Act* 1862 (NSW), s 5; *Liverpool and London and Globe Insurance Company Act* 1865 (NSW), s 8; *Liverpool and London and Globe Insurance Company Act* 1877 (Vic), s 12. See *Liverpool Fire and Life Insurance Company Act* 1836 (UK), s 13; *Liverpool and London Fire and Life Insurance Company Act* 1847 (UK), s 7; *Liverpool and London and Globe Insurance Company Act* 1864 (UK), s 22.

95 77 US 566 at 573, 575-576 (1870).

96 77 US 566 at 574 (1870).

97 77 US 566 at 576 (1870).

98 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 664; [1995] HCA 31, citing *Chaff and Hay Acquisition*

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no doubt that the description which that legislature chooses to give to the body it so creates cannot determine the character of that body for the purpose of s 51(xx) of the Constitution.

63 In words which derive from those of Marshall CJ in *McCulloch v Maryland*[99], and which have come so often to be repeated that their full significance may be overlooked, O'Connor J said in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[100] that "it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve" and continued:

> "For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

64 Murphy J embraced that fundamental tenet of constitutional construction when he said in *R v Federal Court of Australia; Ex parte WA National Football League* ("*Adamson's Case*")[101]:

> "In s 51(xx) of the Constitution, the word, corporations, is not used in any narrow sense. For example, foreign corporations may include syndicates or joint ventures, common in European and other legal systems whose law of incorporation is based on principles different from those of Australian States and England. A corporation is an entity with status as an artificial person; this involves it having its own capacities rights and liabilities which are distinct from those of its members (if it has any members)".

65 The term "corporations" is, and was in 1900, readily capable of encompassing all artificial legal persons; that is to say, all entities, not being merely natural persons, invested by law with capacity for legal relations. There is nothing in the context or in the rest of the Constitution to indicate that any narrower interpretation would best carry out the object and purpose of the

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Committee v J A Hemphill and Sons Pty Ltd (1947) 74 CLR 375 at 384-386, 389-390, 391; [1947] HCA 20.

99 17 US 316 at 407 (1819).

100 (1908) 6 CLR 309 at 367-368; [1908] HCA 95.

101 (1979) 143 CLR 190 at 238-239; [1979] HCA 6.

conferral by s 51(xx) of a national legislative power with respect to both foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The constitutional context, both structural and historical, points in favour of the application of the broad orthodox historical meaning.

66 The constitutional reference to foreign corporations encompasses all artificial entities invested with legal personality under other systems of law. The constitutional reference to corporations formed within the limits of the Commonwealth encompasses all artificial entities invested with legal personality under Australian law.

67 Queensland Rail has legal personality because it is legislatively conferred with capacity to own property, to contract and to sue. It is unnecessary to consider whether any lesser subset of those attributes might suffice. The statutory declaration that Queensland Rail is not a body corporate does not deprive Queensland Rail of any of those attributes.

Queensland Rail is a trading corporation

68 The word "trading" is one descriptor of the class of Australian corporations with respect to which s 51(xx) confers power on the Commonwealth Parliament to make laws. Not being a term of art, but being instead an adjectival form of the noun "trade", "trading" in s 51(xx) is to be interpreted and applied with the same liberality as "trade" in ss 51(i) and 92. There is no reason to consider that "trading" must be descriptive of every "trading corporation" in the same way.

69 Immediately after referring to a corporation as "an entity with status as an artificial person", Murphy J in *Adamson's Case* went on to state that "[t]he constitutional description of trading corporations includes those bodies incorporated for the purpose of trading; and also those corporations which trade"[102]. Those two ways in which his Honour identified the constitutional description of trading corporation as capable of applying to a corporation – by reference to its trading purpose or alternatively by reference to its trading activity – must each be qualified to exclude that which is insubstantial. This is not a case which calls for any examination of that qualification or for any consideration of how purpose and activity might interact in a case where the substantiality of a trading purpose or of a trading activity might be marginal.

70 The basic point that the constitutional description of trading is capable of being applied to a corporation either by reference to its substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose) is sound in principle and is supported by authority. I

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102 (1979) 143 CLR 190 at 239.

would reject on both of those bases the submission made on behalf of the Attorney-General for Victoria which attempts to introduce as a substitute an inquiry into a corporation's "true character", to be evaluated by reference to that corporation's "characteristic activity".

71 In terms of principle, Victoria's submission runs counter to the standard approach to constitutional construction that a subject-matter of Commonwealth legislative power need not be reduced to a single or predominant characterisation. It is enough, for example, that the subject-matter of a law with respect to "lighthouses", made under s 51(vii), be either something designed for use as a lighthouse or something in fact used as a lighthouse; it is not necessary to go on to attribute to that thing the "true character" of a lighthouse.

72 In terms of authority, Victoria's submission does not explain the outcome in *Fencott v Muller*[103] (in which the company held to be a trading or financial corporation had not engaged in any activity at all), and is inconsistent with the rejection of a need to focus on a corporation's predominant or characteristic activity in the reasoning of a majority of this Court in each of *Adamson's Case*[104], *State Superannuation Board v Trade Practices Commission*[105] and *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[106].

73 Looking to its statutory functions, and irrespective of its activities (if any) from time to time, it is sufficient to conclude that Queensland Rail answers the constitutional description of a trading corporation that those functions include the provision of services of and relating to rail transport. Whilst it can be observed that Queensland Rail is statutorily obliged to carry out its statutory functions as a commercial enterprise[107], a profit-making objective is not essential to trade[108].

74 Looking alternatively to its current activities, and independently of any consideration of its statutory functions, it is sufficient to conclude that Queensland Rail answers the constitutional description of a trading corporation

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103 (1983) 152 CLR 570 at 601-602; [1983] HCA 12.

104 (1979) 143 CLR 190 at 208, 236, 237, 239.

105 (1982) 150 CLR 282 at 303-304; [1982] HCA 72.

106 (1983) 158 CLR 1 at 155-157, 179, 240, 292-293; [1983] HCA 21.

107 Section 10(1) of the *Queensland Rail Transit Authority Act* 2013 (Q).

108 *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 648-649; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 305-306.

that Queensland Rail in fact provides the services of its employees under contract to Queensland Rail Limited. It is not to the point that Queensland Rail Limited is its only customer. Nor is it to the point that Queensland Rail Limited is its wholly owned subsidiary. Nor is it to the point that the services are supplied only on a cost recovery basis.

Answers to questions

75 I agree that the questions raised for the consideration of the Full Court should be answered in the manner proposed in the joint reasons for judgment, save that I would answer the first and third questions "Yes".