IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 63 OF 2013**

BETWEEN:

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA
First Plaintiff

THE ELECTRICAL TRADES UNION OF EMPLOYEES QUEENSLAND
Second Plaintiff

AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION
Third Plaintiff

QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES
Fourth Plaintiff

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION
Fifth Plaintiff

AUTOMOTIVE, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND
Sixth Plaintiff

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (FEDERAL)
Seventh Plaintiff

Filed on behalf of the Attorney-General of the Commonwealth by:

Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 2 September 2014

File ref: 14007442

Telephone: 02 6253 7203
Lawyer's E-mail: Gavin.Loughton@ags.gov.au
Facsimile: 02 6253 7303

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (STATE)

Eighth Plaintiff

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, QUEENSLAND BRANCH

Ninth Plaintiff

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, QUEENSLAND BRANCH

Tenth Plaintiff

AND:

QUEENSLAND RAIL

First Defendant

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The Commonwealth does not intervene in support of any party.

PART III LEGISLATIVE PROVISIONS

3. The applicable legislative provisions are those identified in Annexure A of the Plaintiffs' submissions.

PART IV ISSUES AND ARGUMENT

4. Five questions have been stated for the Court's opinion. The Commonwealth makes submissions in relation to the first two.

5. In relation to the first question, the Commonwealth submits that:

   5.1. A 'corporation' within s 51(xx) is an artificial juristic entity with a distinct, continuing legal personality that is not a body politic reflected or recognised in the Constitution.

   5.2. A body without members (in the sense of 'corporators') may be a corporation for the purposes of s 51(xx).

   5.3. The scope of the power under s 51(xx) cannot be restricted by legislation defining what is or is not a constitutional corporation or expressly providing that a specific entity is not a constitutional corporation.

6. In relation to the second question, the Commonwealth submits that the Court should not re-open or narrow the application of the established 'activities test'.

(1) Meaning of 'corporation' in s 51(xx)

7. This Court has not yet conclusively considered the question of what is a corporation for the purposes of s 51(xx). In *New South Wales v Commonwealth* (***Incorporation Case***), the Court considered whether the Commonwealth could legislate under s 51(xx) for the formation of trading and financial corporations (holding it could not),[1] but did not deal with the question of what is a constitutional corporation. In *New South Wales v Commonwealth* (***Work Choices***), the

[1] (1990) 169 CLR 482 at 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

question of what are constitutional corporations did not properly arise for the Court's consideration.[2]

(1)(a) No evidence of framers having a particular conception of 'corporation'

8. There is no evidence that the framers of the Constitution had a particular conception of the meaning of 'corporation' for the purposes of s 51(xx).[3] The majority in *Work Choices* pointed to two significant matters that militate against fixing upon the framers' intentions when understanding the meaning and operation of s 51(xx): first, corporations law 'was still developing in the last decade of the nineteenth century' (including, in November 1896, the landmark decision in *Salomon's Case*); and secondly, corporations have a place 'in the economic life of Australia today [that] is radically different from the place they occupied when the framers were considering what legislative powers should be given to the federal Parliament'.[4]

9. In any event, it cannot be said that the framers intended the power conferred on the federal Parliament by s 51(xx) to be limited, 'not only to facts and circumstances of the kind that existed at federation, but also to whatever kinds of legislative solution had then been devised to address the problems then revealed'.[5] As Isaacs J (in dissent) noted in *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe*,[6] '[a] corporation once created is by common law a "person"',[7] and:[8]

> This is one of the most deeply rooted doctrines of our law and it is the starting-point from which the Courts in England, basing themselves purely on the common law, have by its beneficial flexibility kept abreast in the case of corporations of the general advance of a progressive society.

10. The judgment of Isaacs J contains a valuable survey of developments in legal thought and practice concerning the corporation in its move to recognition as a real person.[9]

11. As will be developed in these submissions, the Court should not regard as indispensable to the concept of 'corporation' that is found in s 51(xx) any particular set of 'corporate' characteristics or incidents, e.g. a common seal, the

---

2 (2006) 229 CLR 1 at 75 [58], 86 [86], 117 [185] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 373 [892] (Callinan J).

3 As stated by the majority in *Work Choices*, '[i]t is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of the operation of s 51(xx) from what was said in debate about the power, or from the drafting history of the provision.' (2006) 229 CLR 1 at 97 [119] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also at 97 [120]-[121].

4 (2006) 229 CLR 1 at 97 [121] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

5 *Work Choices* (2006) 229 CLR 1 at 98 [123] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

6 (1922) 31 CLR 290. His Honour (together with Starke J) dissented in holding that a corporation could be a 'resident' for the purposes of s 75(iv) of the Constitution. See, also, Isaacs J's observations about the changes in understanding the nature of corporations occurring prior to Federation at 308-9.

7 (1922) 31 CLR 290 at 300 (citations omitted).

8 (1922) 31 CLR 290 at 301 (citations omitted).

9 (1922) 31 CLR 290 at 308-312.

power to make by-laws, the presence of corporators, etc. For different conceptions of the 'corporation' have been held at different times; and what are regarded as usual or ordinary characteristics of a 'corporation' changed from time to time. The preferable approach is instead to identify what is fundamental or defining to the concept of the corporation as such.

(1)(b) The focus of the analysis—text of s 51(xx) and Constitution as a whole

12. Section 51(xx) confers legislative power on the federal Parliament with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The drafting of s 51(xx) is distinctive in that 'the power is conferred by reference to persons'—something otherwise only found in s 51(xix) and s 51(xxvi).[10] Moreover, as noted by Gaudron J in *Re Dingjan; Ex parte Wagner* (***Re Dingjan***), 'the power is a plenary power and is to be construed according to its terms and not by reference to implications or limitations which those terms do not require'.[11]

13. Looking to the text, s 51(xx) is (broadly speaking) concerned with two classes of corporations: first, foreign corporations; and secondly, corporations formed within the limits of the Commonwealth. In the *Incorporation Case*, the majority made clear that a foreign constitutional corporation is one that is formed outside the limits of the Commonwealth, while a domestic constitutional corporation is one that is formed within the limits of the Commonwealth.[12]

14. The meaning of corporation for the purposes of s 51(xx) must be broad enough to encompass foreign corporations as well as domestic trading or financial corporations. A purpose of the corporations power is to ensure that the two classes of corporations to which it applies are amenable within the Commonwealth to regulation by the federal Parliament.[13] In *Re Dingjan*, Gaudron J said: 'the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia'.[14] Construing the word 'corporation' for the purposes of s 51(xx) by reference to a particular set of characteristics which, at a particular point in time in England or Australia, were attributed to corporations, rather than by reference to the fundamental quality of a corporation, would unduly restrict the ambit of this limb of the power conferred by s 51(xx).

15. The word 'corporation' should have the same meaning when applied to the words 'foreign corporations' as when applied to the words 'trading or financial

---

10 As noted in *Fontana Films* (1982) 150 CLR 169 at 181 (Gibbs CJ) (Wilson J agreeing), 216 (Brennan J). See, also, *Commonwealth v Tasmania* (***Tasmanian Dam Case***) (1983) 158 CLR 1 at 148, 157 (Mason J), 314 (Dawson J); *Incorporation Case* (1990) 169 CLR 482 at 497 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

11 (1995) 183 CLR 323 at 364.

12 (1990) 169 CLR 482 at 497 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

13 *Work Choices* (2006) 229 CLR 1 at 114 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83] (Gaudron J); *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ) (***St George County Council***).

14 (1995) 183 CLR 323 at 365, cited with approval in *Work Choices* (2006) 229 CLR 1 at 114 [177] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

corporations' in s 51(xx). The differences between the two classes of constitutional corporations are to be found in the words that restrict or qualify each class: the word 'foreign' (in the case of the first limb), and the words 'trading or financial ... formed within the limits of the Commonwealth' (in the case of the second limb). There is no reason to apply two different meanings to the word 'corporation' within the same head of power. This is consistent with the statement of Mason J in the *Tasmanian Dam Case*, that 'it would be irrational to conclude that the [corporations] power is plenary in the case of [foreign and financial corporations], but limited in the case of trading corporations'.[15]

16. It is also necessary to distinguish between 'corporations' (as the word is used in s 51(xx)) and the other, special class of artificial legal persons that are provided for in the Constitution: the bodies politic that are the Commonwealth of Australia and the States. The latter are also legal persons, but legal persons with a special and different quality: they are repositories of the sovereign authority conferred by the Constitution.[16] As noted by Gummow and Bell JJ in *Williams v The Commonwealth (No 1)* ***(Williams (No 1))***, the Commonwealth of Australia is a legal personality, 'the body politic established under the *Commonwealth of Australia Constitution Act 1900* (Imp), and identified in covering cl 6'.[17] The text and structure of the Constitution provides separately and differently for the bodies politic which are repositories of the sovereign authority conferred by the Constitution. The Constitution thereby distinguishes those bodies politic (or 'political units') from the 'corporations' which are the subject of s 51(xx).[18] As noted by French CJ in *Williams (No 1)*, '[t]he Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity'.[19] For present purposes, what is relevant is that, on any understanding of what a constitutional corporation is, the bodies politic reflected in or recognised by the Constitution belong to a different category of artificial legal persons.[20]

17. Bearing in mind the need to read the text of s 51(xx) as a whole, one then turns to consider the meaning of the word 'corporation' itself.

---

15 (1983) 158 CLR 1 at 149.

16 Sometimes, particularly in the older cases and writings, these bodies politic (or 'political units') are referred to as 'the Crown in right of the Commonwealth' or 'the Crown in right of the State': *Sue v Hill* (1999) 199 CLR 462 at 501 [90] (Gleeson CJ, Gummow and Hayne JJ); see also 498 [84]. The use of the word 'Crown' in this context is no longer favoured, but the word does indicate the special quality of those bodies politic to which the Constitution allocates a share of sovereignty (ie legislative, executive and judicial power).

17 (2012) 248 CLR 156 at 237 [154]. See, also, 248 CLR 156 at 254 [205]-[206] (Hayne J).

18 However a corporation, though it is a separate legal person from the body politic that is a State, may nevertheless be 'the State' for some constitutional purposes e.g. within the meaning of s 114: see *SGH Ltd v FCT* (2002) 210 CLR 51 at 65-70 (Gleeson CJ, Gaudron, McHugh and Hayne JJ), 79-85 (Gummow J). See also *State Bank (NSW) v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639; *DCT v State Bank (NSW)* (1992) 174 CLR 219.

19 (2012) 248 CLR 156 at 193 [38].

20 Also included in this different and special category of artificial legal persons would appear to be Territories of the Commonwealth which have been constituted as bodies politic and thus allocated a share of sovereignty (through the operation of s 122 of the Constitution).

(1)(c) The 'corporation'

18. The course of its long and evolving history demonstrates that the key thing that is essential to the concept of the corporation is that it is an artificial juristic entity with its own legal existence, a legal person which 'rests only in intendment and consideration of the law'.[21] Beyond that, the 'corporation' has a protean character. When viewed in the light of history, it is unsafe — and certainly unhistorical — to fix upon any further collection of characteristics attributed to corporations at any particular point in that history as being defining or essential. Maitland, writing just before Federation, made this very point. He described the corporation as 'an elastic because it is, if we may so say, a very contentless idea, a blank form of legal thought...we are not likely to find the essence of a corporation in any one rule of law'.[22]

19. **Roman law.** The legal history of the corporation begins in ancient Roman law.[23] The Roman word most nearly approximating to the English 'corporation' is *universitas*.[24] (As Maitland remarked, 'the one Latin term that answers to our *corporation* has all over Europe been appropriated almost exclusively by one small class of corporations, the universities'.[25]) An alternative word which was also sometimes used by Roman lawyers was *corpus*.

20. Scholars caution against conceiving of the *universitas* or *corpus* of Roman law as an artificial juristic person. They point out that classical Roman lawyers did not trouble themselves to try to work out a fully articulated theory of juristic personality at all.[26] In consequence 'there is a constant tendency to fall back on the conception of a corporation as a mere group of people'.[27] Even so, the Romans came up with many practical devices that allowed for groups of persons to function in law as units.

21. Particular examples of the *universitas* known to Roman private law included: (1) the *municipium* (the town or city), (2) certain kinds of business partnerships that were allowed by statute to form into corporations[28] and (3) certain kinds of *collegia* (clubs or guilds; this sense of the word survives today in phrases such as 'College of Surgeons').[29] These bodies appear to have been permitted by law

---

21 *The Case of Sutton's Hospital* (1613) 10 Co Rep 23a at 32b.

22 Pollock & Maitland, *The History of English Law* (2nd ed, 1898) (**'Pollock & Maitland'**), vol 1, 486-7.

23 Blackstone, *Commentaries on the Laws of England* (4th ed, 1876), Bk 1, Ch 18: 'The honour of originally inventing these political constitutions entirely belongs to the Romans'.

24 The modern English translator of the *Digest* renders *universitas* as 'corporate body': see eg Mommsen, Krueger and Watson (edd & trans) *The Digest of Justinian* (1985) (**'Digest'**) at 3.4.2 and 3.4.7.

25 Maitland, 'The Corporation Aggregate: The History of a Legal Idea' (1893), 10. See also Pollock & Maitland, vol 1, 495.

26 Buckland & McNair, *Roman Law and Common Law* (2nd ed, 1965), 54-5; see also Dowdall, 'The word "person"' (1928) 212 *The Church Quarterly Review* 229, 236.

27 Buckland & McNair, *Roman Law and Common Law*, 56. See also Nicholas, *Roman Law* (1st ed, 1962), 61.

28 *Digest* 3.4.1.pr: 'In a few cases only are bodies of this sort permitted. For example, partners in tax farming, gold mines, silver mines, and saltworks are allowed to form corporations [*corpus habere*].'

29 *Digest* 3.4.1.pr: 'Likewise there are certain *collegia* at Rome whose corporate status has been established *by senatus consulta* [decree of the senate] and imperial *constitutiones* [enactments], for

to sue and be sued, hold property in common, and to act collectively through an attorney.[30] The *Digest* also records that '[a] debt to a corporate body [*universitati*] is not a debt to individuals and a debt of a corporate body [*universitas*] is not a debt of individuals'.[31]

22. **Rediscovery of the corporation by medieval canon lawyers.** In the 12th and 13th centuries civilian and canon lawyers rediscovered the great works of classical Roman law. Italian canon lawyers in particular saw practical use in the *Digest* and *Institutes*. They realised that each of the various kinds of religious community that existed in the medieval church - in particular the cathedral and the monastery[32] - could be conceived of as a *universitas*, or a collegium.[33] So conceived, canon lawyers could draw on Roman law as a resource when grappling with the many practical legal problems that arose in the life of the medieval church.[34] In this way, over the course of two centuries the canon lawyers worked out a law of corporations: 'a legal response to the actual situation and the actual problems that confronted the church'.[35] It was via canon lawyers that the concept of the corporation was eventually introduced into the common law: 'our theory of corporations seems to be mainly derived from medieval interpretations of Roman law'.[36]

23. There is a sign of some English secular lawyers in the 1200s taking an interest in this new learning.[37] The author of the famous treatise on English law, traditionally attributed to the royal judge Bracton, in places helps himself to large portions of texts of Roman law.[38] In consequence we find Bracton writing things that may have had limited relevance to medieval England, but which show that, by copying from a book about Roman law, he has come to learn of the thing called the *universitas*, e.g. 'Things in cities belong not to individuals but to the *universitas*, as theatres, stadia and the like; if there are any such they are the common property of the citizenry'.[39] In other places we find Bracton trying to apply

---

example, those of the bakers and certain others and of the shipowners, who are found in the provinces too'.

30 Justinian's *Institutes*, 2.1.6; *Digest* 3.4.1.1.

31 *Digest* 3.4.7.1.

32 The principal administrative unit in the medieval church was the diocese. Each diocese was ruled by a bishop. The capital of the diocese was the cathedral. A community of clergy (the 'canons') lived and worked at the cathedral under the 'dean' (the priest who was in charge of the running of the cathedral; above the dean was the bishop). These canons, taken together, were called the 'chapter' (the name probably deriving from the chapters in the rule book that governed the life of their community). Within a diocese might also be a monastery at which a community of monks lived and worked, ruled over by an abbott.

33 Pollock & Maitland, vol 1, 509.

34 Says Maitland, 'chapters were quarrelsome' (Pollock & Maitland, vol 1, 509). Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (1983), at 218 gives a long list of examples of the questions that arose for canon lawyers in the 12th century, e.g. 'May a corporation to which property has been given for a particular purpose lawfully decide to use that property for another purpose?'

35 Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (1983), 220.

36 Buckland & McNair, *Roman Law and Common Law*, 54.

37 Pollock & Maitland, vol 1, 495-6.

38 Plucknett, *Early English Legal Literature* (1958), 54.

39 Folio 8. Folio references that follow are to the edition by Thorne (ed and trans) *Bracton on the Laws and Customs of England* (4 vols, 1968). Folio 8 is in vol 2, p 40.

the concept of the *universitas* to English circumstances, such as in the case of a royal grant of rights to a village, city or borough.[40] In an elevated passage Bracton is even able to speak of the realm of England as a *universitas* (*universitas regni*).[41] However, there is a lack of evidence in the cases from this period of a theory of corporations, or (apparently) a felt need for one.[42] Thus when Maitland considered the reign of Henry III (1216-1272) he concluded that 'we can find in our law-books no such terms as *corporation*, *body corporate*, *body politic*'.[43]

24. Even so, it is certainly the case that at this time the common law knew of the existence of groups that held lands in perpetuity (though it did not call them or think of them as 'corporations'): 'dean and chapter' of a cathedral, 'master and scholars' of a university college, 'mayor and burgesses' of a town. The existence of such groups was vexing to the king. The problem was that they never died. In consequence, various feudal entitlements that might otherwise accrue to the king or some other lord on the death of a land-holder would never arise. A gift of lands to a religious house was said to be an 'alienation in mortmain' (literally, putting the property into a 'dead hand'). By a statute of 1279 all alienations 'in mortmain' were forbidden (in practice the King would, for a fee, grant a licence of exemption from this prohibition).[44] The 1279 statute was apparently not sufficiently effective. A second Statute of Mortmain was enacted in 1391[45]. A third, directed at the same mischief, was enacted in 1531.[46]

25. It seems that the prohibition against alienations in mortmain may well have been the great catalyst for the development and articulation, from the 1400s,[47] of an English law of corporations. This came about as follows.

26. There had been a very old practice of the king or a feudal lord granting or confirming to the inhabitants of a certain town or village (often called a 'borough') special legal rights and privileges (*libertates*).[48] These included a court for their town, a special form of tenure for residents of the town, the right to elect a mayor and other officials, and sometimes mercantile privileges such as the right to hold a fair or market free from feudal charges. The *libertates* of a borough could pre-date written records. However in many instances from the 12th and 13th century the *libertates* of a borough are set out in charters and letters patent, being formal

---

40 Folio 56b.

41 Folio 171b.

42 See Reynolds, 'The history of the idea of incorporation or legal personality: a case of fallacious teleology' in her *Ideas and Solidarities of the Medieval Laity* (1995), VI. See also n 47 below.

43 Pollock & Maitland, vol 1, 494.

44 Baker, *An Introduction to English Legal History* (4th ed, 2002), 239-41.

45 *Statutes of the Realm*, vol 2, 80; Stoljar, *Groups and Entities* (1973) 29, 125.

46 Stoljar, *Groups and Entities* (1973), 125.

47 'The term corporation is older than body politic in the Year Books, appearing from 1429, the word corporate from 1408, incorporate from 1439, and the rather redundant "body corporate" (*corps corporate*) in a 1481 report as well as in a statute of 1461, which has the first occurrence of the word corporation in any statute': Seipp, 'Formalism and realism in fifteenth-century English law: bodies corporate and bodies natural' in Brand and Getzler (edd) *Judges and Judging in the History of the Common Law and Civil Law: From antiquity to modern times* (2012), 40.

48 For this paragraph see generally: Hudson, *Oxford History of the Laws of England, Vol II 871-1216* (2012), 813ff; Pollock & Maitland, vol 1, 634ff; and Ballard, *The English Borough in the 12th Century* (1914).

grants or confirmations of rights from the King or a feudal lord.[49] The grants enumerate the various *libertates* that the burgesses are to enjoy.

27. From about the mid-1300s words begin to appear in these charters saying that the men of a such-and-such a town, their heirs and successors, will have a 'community' [*communitas*].[50] In 1440 there is a charter, granted to the town of Kingston-upon-Hull, that says that 'the mayor and burgesses shall be a perpetually corporate commonalty'. This charter expressly confers perpetual succession and a right to sue and be sued in its own name.[51] From this point charters containing formal words of incorporation of a kind that would be recognisable to a lawyer today, including using the word 'corporation' or some very similar term, became common. One scholar speaks of the period from the 1440s to 1460s as 'the classic age of incorporation'.[52] Incorporation now came to assume such an importance that those boroughs whose ancient charters of rights did not contain formal words of incorporation were taken to have been incorporated by prescription, ie by an ancient and (assumed lost) charter.[53]

28. Professor Stoljar suggested, plausibly, that these words of incorporation were first formulated and used in borough charters merely to make it clear that what was being granted included a licence for a borough to hold lands in perpetuity, in other words, an exemption from the statutory prohibition against alienations in mortmain: '[t]he corporation was ... part of a licensing system designed to authorise certain very active groups to hold land in perpetuity'.[54] If that is right then an ostensibly inconspicuous drafting innovation was perhaps a major catalyst in the development of an English law of 'corporations'.

29. *First*, it is perhaps no coincidence that, as Maitland observed, by the late 1400s—ie within decades of widespread formal incorporations of boroughs—lawyers were increasingly framing their arguments in terms of 'corporations'. There are now cases in which submissions about the legal position of 'mayor and commonalty', 'dean and chapter' and 'abbot and monks' were being expressly put using the language of 'corporation', 'body politic' and the like.[55] Further, the different types of perpetual groups were now being brought together in the minds of lawyers. When Sir Robert Brooke's great digest of case law, *La Graunde Abridgement*, was published posthumously in 1576, old year book cases concerning the legal position of 'mayor and burgesses', 'dean and chapter' and

---

49 See Ballard & Tait, *British Borough Charters 1216-1307* (1923).

50 The earliest known such charter appears to be a charter granted to the town of Coventry in 1345: Weinbaum, *The Incorporation of Boroughs* (1937), 48. For another example from 1393 see 57.

51 Weinbaum, *The Incorporation of Boroughs,* 93 (the note). See similarly the charter of 1439 to Plymouth at 64.

52 Weinbaum, *The Incorporation of Boroughs*, Ch IV. See also Baker, *Oxford History of the Laws of England, Vol VI 1483-1558* (2003) 622-623.

53 Weinbaum, *The Incorporation of Boroughs*, 2.

54 Stoljar, *Groups and Entities* (1973), 127. This theory has also been advanced (subsequently) in Reynolds, 'The history of the idea of incorporation or legal personality: a case of fallacious teleology' in her *Ideas and Solidarities of the Medieval Laity* (1995), VI, esp 12, 15-17.

55 See eg Wang, 'The corporate entity concept (or fiction theory) in the Year Book period' (1942) 58 *LQR* 498, 505 (four cases at the top of the note); (1943) 59 *LQR* 72, 77, 81.

'abbot and monks', were all included together under the rubric 'Corporations and Capacities'.

30. *Secondly*, the new wording in the charters seems (perhaps unwittingly) to have made it possible to conceive more clearly of a borough or religious house as a legal 'person' in its own right. The entity was no longer described merely as an aggregate of persons ('the Dean and Chapter of X', 'the mayor and commonalty of Y'), but as a 'perpetually corporate commonalty'—in short, as a *corporation*. Thus in the cases of this period the lawyers seem to be trying to come to grips with the idea that a corporation may have a legal existence separate from that of its members.[56]

31. The fruits of both of the above processes are evident in a passage from Coke's report of *The Case of Sutton's Hospital* (1613) 10 Co Rep 23a at 32b, in which he states dogmatically that a corporation is an artificial juristic person, and cites earlier cases about ecclesiastical groups in support:

> ...the corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal and rests only in intendment and consideration of law; and therefore a dean and chapter cannot have predecessor nor successor.

32. Here is reached something close to the modern understanding of the corporation as an artificial legal person. However, there remained considerable perplexity as to whether a corporation had any other necessary characteristics and, if so, what they might be.[57] The institution had by no means reached a stable form. Lawyers had just come up with the parish parson as the 'corporation sole' (a term soon to be applied to the King himself).[58] In another direction, the age of the great trading corporations (the East India Company, the Hudson's Bay Company, etc) and North American colonial ventures (some of which proceeded by way of chartered corporation) had arrived.[59] And more than 200 years were to pass before the

---

56 Holdsworth, *A History of English Law* (3rd ed, 1923), vol 3, 483, following Maitland, nominates the late 1400s as when 'the corporation was coming to be regarded as a distinct body, separate and of another nature from the men who composed it'. Others say that, at best, lawyers of this period were but starting to come to grips with the notion: Wang 'The corporate entity concept (or fiction theory) in the Year Book period, Part II' (1943) 59 *LQR* 72.

57 '[A]ccording to Serjeant Broke—speaking in Gray's Inn hall in 1519—it would have been such a large task to define the qualities of a corporation that it would have taken an entire vacation': Baker, *Oxford History of the Laws of England, Vol VI 1483-1558* (2003) 623. Blackstone (Bk I, ch 18, section II) endeavoured to distil the usual characteristics of a corporation, these being the characteristics that were later stated by Grant in his *A Practical Treatise on the Law of Corporations* (1850) and then repeated by Starke J *in Chaff and Hay Acquisition Committee v Hemphill* (1947) 74 CLR 375, 388: perpetual succession, a common seal, power to make by-laws etc. However, as Reynolds has observed, these qualities 'did not at first get into the charters [of incorporation] because there was any general consensus about what a corporation was but because prudence dictated putting in everything that one could think of as likely to avoid trouble in future': 'The history of the idea of incorporation or legal personality: a case of fallacious teleology' in her *Ideas and Solidarities of the Medieval Laity* (1995), VI, 13.

58 This is discussed in Maitland's two essays, 'The Corporation Sole' (1900) 16 *LQR* 335 and 'The Crown as Corporation' (1901) 17 *LQR* 131.

59 Many examples of charters of trading companies from this period using the (by then) standard words of incorporation are found in Carr (ed) *Select Charters of the Trading Companies AD 1530-1707* (1913), (Selden Society, vol 28). A few others are reproduced in Appendices II and III of Cawston & Keane *The Early Chartered Companies* (1896).

modern commercial corporation began its rise to ubiquity with the first modern companies legislation in Victorian times.[60] Grant, in his great work of 1850, *A Practical Treatise on the Law of Corporations*, sought to give a definition of 'corporation', but with the qualification that 'corporations are held to be in this country the creatures of the crown or of parliament, and consequently there is scarcely any limit to the variety of forms in which they may be produced'.[61] Maitland, writing in 1898, marvelled at the diversity of corporations and observed that 'we can hardly call one corporation more normal than another and modern legislation is constantly supplying us with new kinds.'[62]

10 33. The Commonwealth Bank of Australia (now the Reserve Bank of Australia[63]) would have answered Maitland's description of a 'new kind' of corporation. It was established under the *Commonwealth Bank Act 1911* (Cth), which provided (by s 6) that '[t]he Bank shall be a body corporate with perpetual succession and a common seal, and may hold land, and may sue and be sued in its corporate name'. Importantly, however, there was no provision specifying any corporators.

34. At the time of its establishment, such an entity was a novelty. There appear to have been no similar bodies created in England or by colonial or State legislatures in Australia before 1911. In *Heiner v Scott*,[64] Griffith CJ considered the absence of corporators to be puzzling,[65] but he did not determine the question
20 of whether 'the Bank is a real entity cognizable by law'.[66]

(1)(d) Essential feature of a constitutional corporation

35. In the Commonwealth's submission, the essence of corporate character is that identified by Fullagar J in *Williams v Hursey* (Dixon CJ and Kitto J agreeing): 'an independent existence as a legal person'.[67] A constitutional corporation is therefore, in its essence, an artificial juristic entity that has a distinct and continuing legal personality,[68] and is not a body politic reflected or recognised in the Constitution.

36. Where a corporation has members, the notion of separate legal personality is generally understood as meaning that the corporation is legally recognised as

---

60 The emergence of the modern commercial corporation is well dealt with in Stoljar, *Groups and Entities*, ch 7.

61 Grant, *A Practical Treatise on the Law of Corporations* (1850), 5-6.

62 Pollock & Maitland, vol 1, 486-7.

63 Section 7 of the *Reserve Bank Act 1959* (Cth) provides that the body corporate established under the *Commonwealth Bank Act 1911* (Cth) and continued in existence under the *Commonwealth Bank Act 1945* (Cth), under the name Commonwealth Bank of Australia, is preserved and continues in existence as a body corporate under the name Reserve Bank of Australia, and that 'the corporate identity of the body corporate shall not be affected'. The Reserve Bank also has no corporators.

64 (1914) 19 CLR 381.

65 (1914) 19 CLR 381 at 392.

66 (1914) 19 CLR 381 at 393.

67 *Williams v Hursey* (1959) 103 CLR 30 (***Williams v Hursey***) at 52 (Fullagar J, Dixon CJ agreeing at 45 and Kitto J agreeing at 86).

68 A real person, as discussed in *Salomon v Salomon & Co Ltd* [1897] AC 22.

having 'a legal existence distinct from that of its members'.[69] However, for reasons explained below, a constitutional corporation does not have to have 'corporators' as such. Where it does not, the corporation's legal personality is distinct in the sense that the entity is, itself, a person which is 'the object of rights and duties'.[70] If an entity has its own legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) it matters not whether that legal personality can also be understood as separate *from* something or someone else. What is relevant is that the entity is, in its own right, recognised at law as being a person which is the object of rights and duties.

37. In the Commonwealth's submission, it would be inconsistent with the purpose of s 51(xx) to attempt to create an exhaustive list of the attributes of legal personality and require an entity to tick every box on the check-list in order to be characterised as a constitutional corporation. Suffice to say, common indicia are perpetual succession, the right to own property and the capacity to sue and be sued.[71] What matters is whether, in any given case, the entity can be said to have a distinct legal personality.

38. In this regard, it is useful to consider this Court's decision in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (***Chaff and Hay***).[72] *Chaff and Hay* concerned whether the appellant Committee, a statutory body created under the *Chaff and Hay (Acquisition) Act 1944* (SA) (the ***Chaff and Hay Act***), could be sued in New South Wales. The Committee contended it was not a legal entity capable of being sued in New South Wales.[73]

39. The Committee was constituted by s 3 of the *Chaff and Hay Act*, and consisted of four members appointed by the Governor.[74] By s 3(4), the Committee was deemed to be an instrumentality of the Crown.[75] Importantly, the *Chaff and Hay Act* did not expressly incorporate the Committee,[76] and no provision was made for a common seal.[77]

40. Moreover, there was no general provision that the Committee could hold property, or enter into contracts. Rather, by s 4, the Committee was empowered to acquire any chaff or hay[78] within South Australia, and to purchase any hay or chaff outside the State.[79] These powers were only exercisable for a limited time period.[80] By s 7 the rights of owners of chaff or hay purchased by the Committee

---

69 *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at [4] (Gleeson CJ).

70 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 361 (Dixon J). Sir Frederick Pollock used the language of 'an artificial person or ideal subject of legal capacities and duties': Pollock, *Principles of Contract* (6th ed, 1894) at 107-8.

71 See, eg, *National Union of General and Municipal Workers v Gillian* [1946] 1 KB 81 at 85 (Scott LJ).

72 (1947) 74 CLR 375.

73 (1947) 74 CLR 375 at 382 (Latham CJ).

74 (1947) 74 CLR 375 at 382 (Latham CJ).

75 (1947) 74 CLR 375 at 382 (Latham CJ).

76 (1947) 74 CLR 375 at 388 (Starke J), 395 (Williams J).

77 (1947) 74 CLR 375 at 395 (Williams J).

78 Or any standing crops capable of being harvested as hay.

79 (1947) 74 CLR 375 at 386 (Starke J).

80 (1947) 74 CLR 375 at 382 (Latham CJ), 387 (Starke J).

were converted into claims for compensation, the amount payable being determined by agreement or in an action for compensation against the Committee.[81] Legal proceedings by the Committee and against the Committee (or any member) with respect to any matter arising out of the *Chaff and Hay Act* were to be in the name of the Committee, however, all orders made by any court against the Committee in any such proceedings were to be satisfied by the Treasurer.[82]

41. At first instance, it was held that the Committee was not a corporation under South Australian law and therefore could not be recognised as a corporation in New South Wales.[83] By majority, the Full Court of the Supreme Court of New South Wales held that although it was not a corporation, it was a legal entity capable of being sued (in South Australia, and elsewhere).[84]

42. This Court dismissed the Committee's appeal. By majority (McTiernan J dissenting), the Court held that the Committee was a distinct legal entity in South Australia and was entitled to recognition outside South Australia in accordance with the principle of comity.[85]

43. Of the majority, Starke J demonstrated the greatest willingness to look beyond whether the Committee satisfied a 'checklist' of characteristics and inquire into whether the Committee's true nature was that of a corporation. Justice Starke observed that the Committee did not possess all the characteristics of an English company (which he considered to be 'perpetual succession, a name, a common seal, authority to hold property in its corporate name, to sue and be sued in that name, and to make by-laws').[86] Nevertheless, in his Honour's view, what mattered was whether the Committee possessed the 'essential characteristics' of an English corporation.[87] That essence, for Starke J, consisted of the entity's status as an 'artificial person'—a juristic entity with distinct legal personality.[88] On this basis, his Honour held the Committee was entitled to recognition in accordance with principles of comity.[89] Justice Starke therefore concluded that the Committee, having this separate legal status, was 'endowed with the essential characteristics and attributes of a body incorporated by English law'.[90] On Starke J's analysis, separate legal status and corporateness are synonymous.

---

81 (1947) 74 CLR 375 at 376-7, 383.

82 *Chaff and Hay Act*, s 14; (1947) 74 CLR 375 at 387 (Starke J), cf 383-4 (Latham CJ), 398 (Williams J)

83 *J.A. Hemphill & Sons v Chaff and Hay Acquisition Committee* (1946) 63 WN (NSW) 270.

84 *J.A. Hemphill & Sons v Chaff and Hay Acquisition Committee* (1946) 47 SR (NSW) 218.

85 (1947) 74 CLR 375 at 384-5 (Latham CJ), 389-90 (Starke J), 396, 399 (Williams J). In dissent, see McTiernan J at 391-2.

86 (1947) 74 CLR 375 at 388.

87 (1947) 74 CLR 375 at 389.

88 (1947) 74 CLR 375 at 389.

89 (1947) 74 CLR 375 at 389.

90 (1947) 74 CLR 375 at 389.

44. Justice Williams also concluded the Committee was 'a separate corporate body'.[91] Like Starke J, Williams J noted that the Committee did not possess all the capacities of an English corporation, so it was not 'a corporation in the strict sense'.[92] Nevertheless, his Honour observed, the Committee was empowered to contract and hold property, and sue or be sued, 'as a corporate body'.[93] These matters, together with the protection against liability afforded to Committee members, meant that 'the effect of the Act is to create for certain purposes an artificial corporate entity which is separate and distinct from its individual members'.[94] On this basis, his Honour concluded the Committee should be recognised in New South Wales as a 'foreign quasi-corporation', applying the principle of comity.[95]

45. Chief Justice Latham did not consider it necessary to decide whether or not the Committee was a corporation.[96] In his Honour's view, the relevant question was whether it was 'a *legal entity* in South Australia as distinct from the personalities of the natural persons who constitute it' (emphasis added).[97] If the answer to this question was yes, Latham CJ reasoned, the principle of comity meant that it must be recognised elsewhere as a legal entity.[98] His Honour ultimately concluded the Committee had 'all the attributes of a separate *persona*. It can own property, it can acquire rights and become subject to duties owed to other persons', and was therefore entitled to be 'treated as an existing legal personality in New South Wales'.[99] Importantly, his Honour did not rule out the possibility that the Committee was properly characterised as a corporation—he simply did not need to decide the point.

46. The majority judgments in *Chaff and Hay* — particularly that of Starke J — are instructive. Justice Starke's judgment demonstrates an understanding of the elasticity of the concept of a 'corporation', and a recognition that in certain circumstances (in that case, for the purposes of applying the principles of private international law), it is necessary to distil the concept to its essential nature. Importantly, each member of the majority saw the existence of a distinct legal personality as the essential characteristic that determined whether an entity would be afforded recognition in accordance with the principle of comity.[100]

47. Consistently with this approach, the Commonwealth contends that for the purposes of s 51(xx), the defining feature of a 'corporation' is the existence of a distinct and continuing artificial legal personality. Legal personality is a distinct concept from legal power or capacity. The presence of the latter (for example, the right to own property and the capacity to sue and be sued) is relevant in

---

91 (1947) 74 CLR 375 at 396.

92 (1947) 74 CLR 375 at 395.

93 (1947) 74 CLR 375 at 395.

94 (1947) 74 CLR 375 at 395-6.

95 (1947) 74 CLR 375 at 396-7.

96 (1947) 74 CLR 375 at 385.

97 (1947) 74 CLR 375 at 385.

98 (1947) 74 CLR 375 at 385.

99 (1947) 74 CLR 375 at 386.

100 (1947) 74 CLR 375 at 385 (Latham CJ), 389 (Starke J), 396-7 (Williams J).

determining the existence of the former. But the existence of the former is not predicated upon any singular or universal conception of the latter.[101] Further enhancing this conclusion, s 51(xx), and its purposes within the new Commonwealth at Federation, require that no narrower view be taken of what is a corporation than that operating under the private international law rules between the units of the new Commonwealth, as exposed in *Chaff and Hay*.

(1)(e) Constitutional corporations do not need corporators

48. A corporation without corporators is capable of characterisation as a constitutional corporation.[102] For constitutional purposes, what is relevant is that the entity has a distinct legal personality—it does not matter whether an entity has members, or is constituted in such a way that does not involve shareholders.

49. As noted earlier in these submissions, a unique feature of the Commonwealth Bank at the time of its creation was that it was established as a body corporate but without corporators.[103] The nature of the Commonwealth Bank was considered by this Court in *Bank of New South Wales v Commonwealth* (***Bank Nationalisation Case***).[104] By this time, the Commonwealth Bank had been restructured by the *Commonwealth Bank Act 1945* (Cth). However, the distinguishing feature of the Commonwealth Bank—the absence of corporators—remained unchanged. Of six members of the Court, four dealt with the question of whether corporators are necessary for an entity to be considered a corporation.[105] Justices Rich and Williams considered the existence of corporators to be essential to the concept of a corporation.[106] However, Latham CJ and Dixon J did not. Chief Justice Latham, observing that the creation of such a corporation would be impossible at common law, went on to say 'but I do not see why it should be beyond statutory power to make a new kind of corporation'.[107] Justice Dixon said:[108]

> Although the Commonwealth Bank is declared to be a body corporate there are no corporators. I see no reason to doubt the constitutional power of the Federal 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. 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

---

101 *Williams v Hursey* , Fullagar J at 52-53 (Dixon CJ agreeing at 45, and Kitto J agreeing at 86).

102 Cf *Work Choices* (2006) 229 CLR 1 at 75 [59] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

103 In the second reading speech for the Commonwealth Bank Bill 1911 (Cth), the then Prime Minister expressly noted "[t]his will be a bank belonging to the people, and directly managed by the people's own agents": Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1911, 2644 (Mr Fisher, Prime Minister and Treasurer).

104 (1948) 76 CLR 1.

105 Neither Starke J nor McTiernan J squarely dealt with this issue.

106 (1948) 76 CLR 1 at 266.

107 (1948) 76 CLR 1 at 190.

108 (1948) 76 CLR 1 at 361.

> 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.

50. Over the next few decades, characterisation of the Commonwealth Bank as a corporation became non-contentious. In *Inglis v Commonwealth Trade Bank of Australia*,[109] Kitto J (Barwick CJ and Windeyer J agreeing) referred to the Commonwealth Bank entities[110] as corporations,[111] notwithstanding the absence of corporators. Similarly, in *Maguire v Simpson*,[112] Barwick CJ described the Commonwealth Bank as 'a corporation, without corporators' without passing any remark about this fact.[113] Mason J described it as a 'statutory corporation',[114] and the balance of the Court saw no need to discuss the lack of corporators at all. In *Work Choices* the joint judgment observed that 'the establishment of the Commonwealth Bank was referrable to the express power of incorporation of banks conferred by s 51(xiii).'[115]

51. In *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld),* Toohey, McHugh and Gummow JJ held:

> It is true that the legislature may modify what would be considered orthodox notions of the nature of a corporation. In the same way, it may modify the generally accepted characteristics of a private trust by, for example, creating a trust for statutory purposes, with no ascertained beneficiary to enjoy beneficial ownership.[116]

52. That this Court has, over time, reached the position of having no difficulty characterising an entity without corporators as a corporation is not something that is unique to the Commonwealth Bank. In *ABC v Redmore Pty Ltd*,[117] Brennan and Dawson JJ observed (without the need for any commentary on the point) that the Australian Broadcasting Corporation is 'a corporation without corporators whose affairs are managed by a Managing Director'.[118]

53. Significantly, in two decisions involving the State Bank of NSW, this Court unanimously described the State Bank of NSW as a 'corporation' or a 'statutory corporation',[119] and in so doing was not troubled by the absence of corporators.

---

109 (1969) 119 CLR 334.

110 It should be noted that there were further restructures, in particular, the Commonwealth Bank was split into five corporations by the *Commonwealth Banks Act 1959* (Cth).

111 (1969) 119 CLR 334 at 338-9, 341.

112 (1977) 139 CLR 362.

113 (1977) 139 CLR 362 at 367.

114 (1977) 139 CLR 362 at 398.

115 (2006) 229 CLR 1 at 155 [326] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

116 (1995) 184 CLR 620 at 664, citing, among others, *Fouche v Superannuation Fund Board* (1952) 88 CLR 609 at 640.

117 (1989) 166 CLR 454.

118 (1989) 166 CLR 454 at 460.

119 *State Bank (NSW) v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 649-50, 652 (the Court); *DCT v State Bank (NSW)* (1992) 174 CLR 219 at 230-3 (the Court).

While the cases did not directly concern s 51(xx), there would be no reason to take a narrower approach to s 51(xx) than the approach they demonstrate.[120]

54. Consistently with this, in *SGH Ltd v FCT*,[121] in the course of a discussion about corporate control, Gummow J said: '[w]here the corporation in question lacks corporators but is constituted with a board of directors, questions of control may be determined by looking to the conduct of the directors'.[122] Plainly, his Honour did not see the absence of corporators as problematic for the characterisation of an entity as a corporation.

55. There are other instances, at Commonwealth level, of corporations without corporators.[123]

56. It should also be noted that, although in the context of a corporation with members, perpetual succession can be understood as meaning that the corporation's existence does not depend on the continued survival of each and every one of its members, a corporation without corporators also has 'perpetual succession' in the sense that its existence as a person is not temporary and it 'continues in existence until it is dissolved by some means'.[124]

57. Any corporation, whether formed by corporators or not, must come under the direction, management, control and ownership of one or more other persons (whether natural, corporate or body politic). The means by which direction, management, control and ownership are secured are incidents of the corporation, but do not go to its character as a corporation.[125]

58. Accordingly, in the Commonwealth's submission, the concept of a corporation without corporators is now uncontroversial. The position should be no different in relation to constitutional corporations.

59. Consistent with this constitutional position, the *Corporations Act 2001* (Cth) recognises a distinction between those corporations which are 'companies' registered under the Act, which must have at least one member, and a broader conception of 'corporations' which includes bodies corporate wherever incorporated.[126]

---

120 Section 7 of the *State Bank Act 1981* (NSW) provided: 'There is hereby constituted a corporation with the corporate name "State Bank of New South Wales"'.

121 (2002) 210 CLR 51.

122 (2002) 210 CLR 51 at 85 [71].

123 See, for example, *National Museum of Australia Act 1980* (Cth), s 4; *National Gallery Act 1975* (Cth), s 4; *National Library Act 1960* (Cth), s 5; *Screen Australia Act 2008* (Cth), s 5.

124 See, in a different context, *Chaff and Hay* (1947) 74 CLR 375 at 384 (Latham CJ).

125 Thus, it was not essential to the Hydro-Electric Commission of Tasmania being a corporation to find its three commissioners to be 'corporators': see *Tasmanian Dam Case* (1983) 158 CLR 1.

126 See *Corporations Act 2001* (Cth), s 9 (definition of 'company' and 'body corporate'), s 114 (a company must have at least one member) and s 57A (definition of 'corporation'). The Act is supported by references of power from each of the States as well as the Commonwealth's powers under s 51 of the Constitution: see *Corporations Act 2001* (Cth), s 3.

(1)(f) Corporate character is not to be determined by descriptors or labels

60. To say that a body is not a constitutional corporation merely because a legislative provision deems it not to be a corporation, or because it is stated not to be a corporation in its constituent documents, would be contrary to the purpose of s 51(xx). It would enable legislatures (whether State or federal) or individuals, by a simple drafting device, to immunize certain entities from the reach of federal laws regulating constitutional corporations.

61. Just as the Commonwealth Parliament cannot '"recite itself" into power',[127] so too, a State Parliament cannot recite itself out of the reach of Commonwealth legislation validly enacted pursuant to the corporations power by providing in legislation that a particular entity is not a constitutional corporation.

62. There is a useful analogy to be made here with the aliens power, s 51(xix). This Court has observed on many occasions that the Commonwealth Parliament cannot expand the aliens power 'simply by giving its own definition of 'alien'".[128] Consistently with that approach, the Court should not permit the scope of the power under s 51(xx) to be restricted by a parliament (State or federal) adopting in legislation a definition of what is or is not a constitutional corporation or expressly providing that a specific entity is not a constitutional corporation.[129]

63. In 1870, a similar approach was taken by the Supreme Court of the United States in *Liverpool Insurance Co v Massachusetts*. The Liverpool and London Life and Fire Insurance Company was not incorporated but was an association of natural persons under the laws of Great Britain. The question arose whether it could be characterised as a 'foreign corporation' for the purposes of a US state statute. In arguing that it was not a corporation, the Company pointed to (inter alia) the fact that legislation authorising suits in the name of and against the Company expressly declared 'that they should not be held to constitute the body a corporation'.[130] Writing the Court's opinion, Miller J said that such a provision 'cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character'.[131] The same reasoning applies

---

127 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 205-06 (McTiernan J). See also at 263 (Fullagar J).

128 *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [4]-[5] (Gleeson CJ). See also at 343 [36] (McHugh J), 383 [153] (Gummow, Hayne and Heydon JJ), 431 [309] (Callinan J). See, also, *Pochi v Macphee* (1982) 151 CLR 101 at 109 (Gibbs CJ) (Mason and Wilson JJ agreeing) (cited with approval in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 410 [43] (Gaudron J), 435-6 [132] (McHugh J), 469-70 [238] (Gummow and Hayne JJ), and in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 36 [9] (Gleeson CJ, Gummow and Hayne JJ), 61 [94] (Kirby J)).

129 Just as describing a levy to be a 'royalty' does not avoid the conclusion it is a tax (see, eg, *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480) or using the words 'licence fee' does not avoid the conclusion the fee is an excise (see, eg, *Capital Duplicators Pty Ltd v ACT (No 2)* (1993) 178 CLR 561).

130 77 US, 10 Wall 566 (1870) at 576.

131 77 US, 10 Wall 566 (1870) at 576.

to the determination of whether an entity is a constitutional corporation. The 'true character' is what matters, not a description or label attached to it.[132]

64. The point is underscored by looking to the example of local councils. As a matter of principle, whether a local council is described as 'a corporation' constituted by '[t]he mayor, aldermen, and citizens' of a particular place,[133] or is labelled 'a body corporate' consisting of the elected aldermen,[134] or is said to be a 'body politic of the State' but 'not a body corporate',[135] the question of whether the council is a constitutional corporation must be answered by looking to whether—as a matter of substance, not form—it has the characteristics of a corporation for the purposes of s 51(xx).

(1)(g) Conclusion

65. Thus, in the Commonwealth's submission, a constitutional corporation is broad enough to cover 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. These are the fundamental characteristics of a constitutional corporation, and encompass 'foreign' corporations as well as 'trading or financial' corporations 'formed within the limits of the Commonwealth'.

(2) Establishing whether a corporation is a 'trading corporation'

66. Queensland Rail denies it is a 'trading corporation'.[136] In determining this issue, the test to be applied is the 'activities' test. After a long line of cases dealing with the question of how to determine whether a corporation is a 'trading corporation', this Court has settled on the activities test as the appropriate test to apply.[137] Applying this test, a corporation is a trading corporation for the purposes of s 51(xx) if 'its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation'.[138] The Court should not depart from the now settled approach to this issue. No party seeks to re-open the activities test.

---

132 In similar vein in 1848, in *Ex parte Newport Marsh Trustees*, it was held that although there were no express words of perpetual succession in the relevant statute, the 'very constitution of the body itself' and 'the powers given to it by the Act' meant it 'must be taken to be a corporation' (1848) 16 Sim 346 at 351 (Shadwell VC).

133 See, eg, *Sydney Corporation Act 1902* (NSW), ss 5, 6.

134 See, eg, *Local Government Act 1919* (NSW), ss 22(2) and 23(1), the statute in play in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (***St George County Council***).

135 See, eg, *Local Government Act 1993* (NSW), s 220(1),(2).

136 First Defendant's Amended Defence at [71(a)], SCB Vol 1, p 40.

137 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (***Adamson's Case***) at 208 (Barwick CJ), 233 (Mason J), 237 (Jacobs J agreeing), 239 (Murphy J); *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 20 (Toohey J).

138 *Adamson's Case* at 233 (Mason J). See, also, *Commonwealth v Tasmania* (1983) 158 CLR 1 at155-7 (Mason J), 179 (Murphy J), 240 (Brennan J), 292-3 (Deane J). A different rule applies in the case of newly-formed or nascent corporations: *Fencott v Muller* (1983) 152 CLR 570.

67. 'Trading' activities are not limited to activities involving the buying or selling of goods.[139] 'Trade' is to be understood more broadly in this context, and includes (for example) 'the pursuit of a calling or handicraft',[140] and the provision of services.[141]

68. The making of a profit is not an essential characteristic of a 'trading corporation'. In *St George County Council*, the Council was required by statute to supply electricity 'as cheaply as possible'.[142] Barwick CJ (in dissent) considered that, notwithstanding the fact that the Council 'may not be motivated by an uninhibited commercial desire to make the utmost profit attainable', its activities were properly characterised as trading activities.[143]

69. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*, in considering the meaning of the words 'trade' and 'commerce' for the purposes of s 47 of the *Trade Practices Act 1974* (Cth), Deane J said:[144]

> [T]he terms are clearly of the widest import ... They are not restricted to dealings or communications which ... have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making.

70. Subsequently, in *Adamson's Case*, Mason J said: 'I do not limit the concept of trading to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue'.[145]

71. Accordingly, if a corporation earns income through trading activities, whether or not it makes a profit does not determine whether the corporation is a trading corporation.

72. On this basis, in *E v Australian Red Cross Society*, Wilcox J rejected an argument that the Prince Alfred Hospital was not engaged in trading activities in providing services to its private patients, because such services were not profitable.[146] His Honour said 'it is not necessary that trading activities be profitable, or even intended to be profitable, to constitute the trader a "trading corporation"'.[147]

---

139 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 381 (Dixon J).

140 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 381 (Dixon J).

141 See, e.g., *St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ); *Fontana Films* (1982) 150 CLR 169 at 203 (Mason J); *Hughes v WA Cricket Association* (1986) 19 FCR 10 at 20 (Toohey J).

142 (1974) 130 CLR 533 at 539 (Barwick CJ).

143 (1974) 130 CLR 533 at 539.

144 (1978) 36 FLR 134 at 167 (internal citations omitted).

145 (1979) 143 CLR 190 at 235 (Mason J).

146 (1991) 27 FCR 310 at 345.

147 (1991) 27 FCR 310 at 345.

PART V ESTIMATED HOURS

73. It is estimated that 1 hour will be required for the presentation of the oral argument of the Commonwealth.

Dated: 2 September 2014

Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 61414145
Facsimile: 02 61414149
Email: Justin.gleeson@ag.gov.au

Kathleen Foley
Telephone: (03) 9225 6136
Facsimile: (03) 9225 7728
Email: kfoley@vicbar.com.au

Counsel for the Attorney-General of the Commonwealth