IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B63 of 2013

BETWEEN:

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

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and

QUEENSLAND RAIL & ANOR
Defendants

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

PARTS II and III: BASIS AND NATURE OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. It is not necessary to add to the statement of applicable provisions in Annexure A to the plaintiffs' submissions and Pt V of the first defendant's submissions.

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PART V: ARGUMENT

4. The Attorney-General for Victoria puts submissions on the first two questions in the special case (**SCB 74**, [98](1)-(2)).

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A. Summary

5. (Question 1) The statement in s 6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld) (the **QRTA Act**) that Queensland Rail "is not a body corporate" is not determinative, but is an important factor, in the characterisation of the entity established by the QRTA Act for the purposes of s 51(xx) of the Constitution. There is no constitutional principle that requires "corporation" in s 51(xx) to be interpreted broadly to ensure that bodies such as Queensland Rail are subject to Commonwealth regulation. To the contrary, s 51(xx) applies to bodies after they are "formed" under State and Territory law. Although Queensland Rail possesses some of the characteristics and powers of a body corporate, it cannot be inferred from those features alone that it is a s 51(xx) corporation. Section 6(2) has the effect that Queensland Rail is not a body corporate; it is part of the body politic of the State of Queensland. *See paragraphs 7-14 below.*

6. (Question 2) In determining whether Queensland Rail is a "trading corporation", it is necessary to determine its true character. This test looks not only to Queensland Rail's current activities, but also to the statutory purposes for which Queensland Rail was established. *See paragraphs 15-27 below.*

B. Is Queensland Rail a "corporation"?

7. The first question is whether Queensland Rail is a "corporation" within s 51(xx) of the Constitution.

8. It appears to be common ground that a body cannot be a "corporation" within s 51(xx) unless it has a separate legal existence.[1] The term "corporation" may be taken as synonymous with the expression "body corporate". Here, s 6(2) of the QRTA Act provides that Queensland Rail "is not a body corporate".

9. The question whether a body is a "corporation" within s 51(xx) is determined as a matter of substance, and a provision such as s 6(2) is not determinative.[2] However, it

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1 Plaintiffs' submissions, [41]; Commonwealth submissions, [35], [47]. That is not to say that a body that does have a separate legal existence must be a "corporation" within s 51(xx): see first defendant's submissions, [11](a)-(d), [13], [29]-[47], [61].

2 Cf plaintiffs' submissions, [12]; Commonwealth submissions, [61].

does not follow that s 6(2) should be given no weight.[3] An express statutory statement that a body is or is not a body corporate is an important factor in characterising the body for the purposes of s 51(xx), in the same way that a statement that a body is or is not a "court" is an important factor in determining whether a State body is properly characterised as a court for constitutional purposes.[4]

10. The position here is quite different from the position that obtains when an Australian court needs to characterise an entity established under a different legal system,[5] or when there is no express legislative statement as to the nature of an entity.[6] A State has legislative power to establish a body as a corporation or not.[7] If Parliament intended to establish a corporation, it may be expected in a modern statute that express terms of incorporation would be used.[8]

11. There is no principle of constitutional interpretation that requires "corporation" in s 51(xx) of the Constitution to be interpreted broadly to ensure that State bodies such as Queensland Rail are susceptible to the exercise of Commonwealth legislative

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3 A court construing a statutory provision must strive to give meaning to every word of the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

4 *Tana v Baxter* (1986) 160 CLR 572 at 582 (Brennan J); see also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 529 [85] (French CJ), 563 [221] (Kirby J).

5 Cf *Chaff and Hay Acquisition Committee v J A Hempill and Sons Pty Ltd* (1947) 74 CLR 375 (***Chaff and Hay Acquisition Committee***) at 385 (Latham CJ), 387 (Starke J), 396-397 (Williams J); *Liverpool and London Life and Fire Insurance Co v Massachusetts* 77 US 566 (1871); plaintiffs' submissions, [28], [31], [33]-[38]; Commonwealth submissions, [47], [63].

6 Cf *Chaff and Hay Acquisition Committee* (1947) 74 CLR 375 at 384 (Latham CJ), 395-396 (Williams J) (inferring that the Committee was a legal entity distinct from its members); see also 388 (Starke J), 390 (McTiernan J, dissenting in the result); *Williams v Hursey* (1959) 103 CLR 30 at 52 (Fullagar J, with Dixon CJ and Kitto J agreeing) (inferring the nature of an industrial organisation registered under Commonwealth law).

7 See, eg, *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 429; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620 (***McJannet***) at 664 (Toohey, McHugh and Gummow JJ); *Chaff and Hay Acquisition Committee* (1947) 74 CLR 375 at 391 (McTiernan J, dissenting in the result). It seems to be common ground that in principle the States can create new legal bodies that are not "corporations": see plaintiffs' submissions, [32]; Commonwealth submissions, [51].

Any analogy with the aliens power suggests that the power to determine the characteristics of an entity created by State law is a broad one: cf Commonwealth submissions, [62]. Section 51(xix) confers a wide power to determine who will be admitted to formal membership of the Australian community, which now means citizenship: *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 38 [11] (Gleeson CJ and Heydon J).

8 *Municipality of St Leonards v Williams* [1966] Tas SR 166 (***St Leonards***) at 172 (Burbury CJ), citing *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 533, 543 (Atkin LJ) and *Conservators of the River Tone v Ash* (1829) 10 B & C 349.

power.[9] Nor can the fact that there were financial scandals in the 1890s be used as a reason to give "corporation" an expansive meaning to cover any body engaged in trading or financial activities.[10] The power in s 51(xx) relevantly applies to corporations after they are "formed",[11] usually under State or Territory law. A corporation is an artificial legal entity that needs to be created (or "formed") by or under law.[12] As noted, there is broad scope for State law to create bodies that are, and bodies that are not, in substance corporations.[13]

12. Queensland Rail has many of the powers and characteristics that a corporation has, such as perpetual succession (s.6(1)), the right to sue and be sued (s 7(4)), and the right to hold property (s 7(1)(b)). However, it cannot be inferred from these features alone that Queensland Rail therefore both has a separate legal existence, and is a "corporation".[14] In principle, a State law can confer these powers and characteristics on a thing that, properly analysed, is simply a group of people, or an entity with separate legal existence but which is not a "corporation" for the purposes of s 51(xx).

(a) Several English cases have held that an entity that has some of the features of a corporation, such as the ability to sue and be sued in the entity's name, is a "quasi-corporation".[15] In Australia, there is some uncertainty about the legal

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9 Cf plaintiffs' submissions, [11], [32] (referring to State laws removing State entities from the reach of s 51(xx)); Commonwealth submissions, [60] (referring to State laws "immunising" certain entities from the reach of federal laws regulating constitutional corporations).

10 Cf plaintiffs' submissions, [25]. The drafting history does not reveal any clear meaning of s 51(xx): see *New South Wales v The Commonwealth* (2006) 229 CLR 1 (***Work Choices***) at 96-97 [119] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), which would include the meaning of the term "corporation".

11 *New South Wales v The Commonwealth (the Incorporation Case)* (1990) 169 CLR 482.

12 Contrast other Commonwealth heads of power which consist solely of legal concepts, such as bills of exchange (s 51(xvi)), patents of invention (s 51(xviii)) or marriage (s 51(xxi)), in respect of which the Commonwealth's legislative power is general and extends to creating and defining (within limits) the thing in question.

13 Moreover, the States have a broad freedom to determine the nature of the entities through which the State conducts government: see, by analogy, *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218 (Mason J).

14 Cf Commonwealth submissions, [65].

15 See for example *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140 at 147-148 (Lord Denning MR), 150 (Pearson LJ); see also 152 (Salmon LJ) (a Universities Central Council on Admissions was not a body corporate, but was treated as a separate entity for the purposes of the *Landlord and Tenant Act 1954* (UK)); *Grain's Case* (1875) 1 Ch D 307 at 320 (James LJ) (the intention of an insurance society contract was "that they should not be a partnership of the particular individuals existing at that time, but that they should be a body of persons with continuous and perpetual succession (until dissolved according to the terms of the constitution of their own body) as between themselves, and as between them and all persons having dealings and transactions with them"), cited with apparent approval in *S A Joseph and Rickard Ltd v Lindley* (1905) 3 CLR 280 at

status of a trade union registered under State laws such as the *Trade Unions Act 1958* (Vic) (as distinct from the Commonwealth laws considered in *Williams v Hursey*[16]). One commentator states that a union registered under these State acts has a type of legal personality falling somewhere between that of an unincorporated association and a corporation.[17]

(b) Conversely, a body may be a juristic entity distinct from its members but not have the powers to hold property, or to sue or be sued in its own name.[18] Thus the existence or otherwise of these powers does not provide a sure guide to whether an entity has a separate legal existence.

10 (c) In the case of company law, the precise nature of the body created by incorporation underwent a considerable conceptual change during the course of the 19th century. In the 18th and early 19th centuries, an incorporated company was conceptualised as a distinct legal entity comprising its members collectively (a "them").[19] By the end of the century, an incorporated company was considered to be a distinct legal entity separate from its members (an "it"),[20] which was connected to a related change in the conception of a share.[21] The same change occurred in relation to the shares of those joint stock companies that were *un*incorporated.[22] There is no reason

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289 (Griffith CJ, with Barton J agreeing). See generally K W Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 *Modern Law Review* 62.

16 (1959) 103 CLR 30; cf plaintiffs' submissions, [27]. Both *Williams v Hursey* and the other case cited by the plaintiffs (*McJannet* (1995) 184 CLR 620) held that Commonwealth laws providing for the registration of industrial organisations did not confer corporate status on State branches of those organisations: *McJannet* (1995) 184 CLR 620 at 639-641 (Brennan CJ, Deane and Dawson JJ), 663-664 (Toohey, McHugh and Gummow JJ).

17 See Marilyn J Pittard, "A Personality Crisis: The Trade Union Acts, State Registered Unions and their Legal Status" (1979) 6 *Monash University Law Review* 49 at 51. The position is "less clear" under these State Acts than under the Commonwealth Act considered in *Williams v Hursey*: ibid at 50.

18 *St Leonards* [1966] Tas SR 166 at 173 (Burbury CJ). Therefore the Municipal Commission set up under the *Local Government Act 1962* (Tas) was not a "corporation" for the purposes of a rule that a corporation could fix a quorum and make a decision of that quorum the decision of the Commission.

19 Paddy Ireland, "Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" (1996) 17 *Journal of Legal History* 41 at 45-47.

20 Ibid at 47-48.

21 Ibid at 67-69. The history of the change in the conception of a share, and its connection to investment in railway companies and the development of shares as tradeable commodities, is traced at 48-67.

22 Ibid at 61, 69. At the beginning of the 19th century, a "joint stock company" was a body with particular economic characteristics, and could be either incorporated or unincorporated: ibid at 42, 43-44.

to suppose that the ability of the States to legislate with respect to the creation of corporations and other legal entities was defined by legal developments prior to 1900.[23] This would be contrary to the distinctive feature of s 51(xx); namely, that it confers power with respect to entities that have either been created, or not, under other laws (usually State or Territory laws) before the exercise of that power.

13. Queensland Rail is part of the body politic of the State of Queensland.[24] The statement in s 6(3) of the QRTA Act that Queensland Rail "does not represent the State" at most means that Queensland Rail does not have the privileges and immunities of the State.[25] That is a different question from whether Queensland Rail is part of the body politic.[26] The following features of Queensland Rail indicate that it is part of the body politic:[27]

(a) the responsible Ministers may give Queensland Rail a written direction in relation to it or its subsidiaries (s 12);

(b) the board members are appointed by the responsible Ministers (s 16(1));

(c) the board must report to the responsible Ministers and keep them reasonably informed (Pt 4, Div 2);

(d) the responsible Ministers may give Queensland Rail a written direction about payment or transfer of an asset or liability (s 54);

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23 *Work Choices* (2006) 229 CLR 1 at 97 [121] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ): corporations law was still developing in the last decade of the 19th century, and the consequences of *Salomon v Salomon and Co* [1897] AC 22 "were still being debated, and dealt with, well into the twentieth century". Cf plaintiffs' submissions, [23].

24 Status as part of the body politic is not, of course, necessarily inconsistent with status as a corporation: see *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 385 (Williams, Webb and Taylor JJ), identifying "an intention on the part of the Parliament of New South Wales to create a corporation in the person of the commissioner not so that he would thereby become a separate independent entity but in order to set up an agency of the Crown, constituting a branch department of the Ministry of Transport". In that case, unlike the present, the Commissioner was expressly constituted a body corporate.

25 On the meaning of the phrase "represent the Crown", see Darrell Barnett, "Statutory Corporations and 'The Crown'" (2005) 28 *University of New South Wales Law Journal* 186 at 205-218. However, a body may not have the privileges and immunities of the State even if it is described as "representing" the State: see *McNamara v Consumer Trading and Tenancy Tribunal* (2005) 221 CLR 646.

26 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 230 (the Court).

27 See, eg, *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 339-341 (Kitto J).

(e) the responsible Ministers may give Queensland Rail a written direction to pay a dividend to the State (s 55);

(f) the responsible Ministers agree on Queensland Rail's operational plan and strategic plan (Pt 4, Div 4);

(g) Queensland Rail's accounts are audited by the Auditor-General;[28] and

(h) although Queensland Rail must have a board, it is not constituted by the members of the board (s 14).

14. Since the features of Queensland Rail set out in the QRTA Act, as canvassed above, are not determinative as to its corporate status or otherwise, and Queensland Rail is part of the body politic of Queensland, s 6(2) of the QRTA Act is able to operate according to its terms. Section 6(2) therefore has the effect that Queensland Rail is not a body corporate and therefore is not a corporation within the meaning of s 51(xx).

C. Is Queensland Rail a "trading corporation"?

15. If Queensland Rail is a "corporation" within s 51(xx) of the Constitution, the second question is whether it is a "trading corporation".

Test of trading corporations — "true character"

16. The underlying issue in determining whether a corporation is a "trading corporation" is to determine the true character of the body. This submission is not foreclosed by existing authority[29] or by the terms of the Defence.[30]

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28 Queensland Rail is a "statutory body" under the *Financial Accountability Act 2009* (Qld) (**Financial Accountability Act**) (QRTA Act, s 36(1)(a)). The Queensland Auditor-General audits all "public sector entities" (*Auditor-General Act 2009* (Qld) (**Auditor-General Act**), s 30(1)(b)). A "public sector entity" is defined in the Dictionary to the Auditor-General Act to include a "statutory body", which in turn is defined as having the same meaning as in Financial Accountability Act, s 9.

29 These submissions are not inconsistent with the summary of the existing state of authority in *Aboriginal Legal Service (WA) (Inc) v Lawrence (No 2)* (2008) 37 WAR 450 at 469-470 [68] (Steytler P), quoted with approval in *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483 (***Bankstown***) at 509-510 [48] (Moore, Mansfield and Perram JJ).

30 Contra Commonwealth submissions, [66]. The first defendant denies that it is a "trading corporation" (**SCB 40**, [71]). In any event, the validity and scope of a law cannot be made to depend on the course of private litigation: *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 (Brennan J).

17. This Court's decisions in *R v Federal Court of Australia; Ex parte Western Australian National Football League*[31] and *State Superannuation Board (Vic) v Trade Practices Commission*[32] are often considered to stand for the following propositions:[33]

(a) A corporation is a trading corporation if trading is such a "substantial" or "sufficiently significant" proportion of its activities so as to merit that description.[34]

(b) In considering the activities of a corporation, the court must look beyond the corporation's "predominant and characteristic activity".[35]

10 18. However, in the later case of *Fencott v Muller*,[36] Gibbs CJ stated that it was "impossible to hold that the meaning of s 51(xx) is finally settled", and the whole Court held that trading activities are *not* the sole criterion of the character of a corporation.[37] The decision in *Commonwealth v Tasmania (the Tasmanian Dam Case)*[38] does not support an exclusive focus on activities. In *Work Choices*,[39] the majority justices expressly declined to state any view on the question of the characteristics of "constitutional corporations". Their Honours did, however, observe[40] that *Adamson* had "distinguished" (rather than overruled) *R v Trade*

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31 (1979) 143 CLR 190 (***Adamson***).

32 (1982) 150 CLR 282 (***State Superannuation Board***).

33 See, eg, *Quickenden v O'Connor* (2001) 109 FCR 243 (***Quickenden***) at 258-260 [41]-[47] (Black CJ and French J).

34 *Adamson* (1979) 143 CLR 190 at 208 (Barwick CJ), 233 (Mason J, with Jacobs J agreeing), 239 (Murphy J); cf the dissenting opinions of Gibbs J (at 213), and Stephen J (with Aickin J agreeing) (at 220-221). See Commonwealth submissions, [66].

35 *State Superannuation Board* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ).

36 (1983) 152 CLR 570 at 588.

37 (1983) 152 CLR 570 at 588-589 (Gibbs CJ), 601-602 (Mason, Murphy, Brennan and Deane JJ), 611 (Wilson J), 623-624 (Dawson J).

38 (1983) 158 CLR 1. Two of the majority justices referred solely to activities: at 156 (point 6) (Mason J), 240 (Brennan J); however, the other two members of the majority referred to purpose as well: at 179 (Murphy J), 293 (Deane J). In the minority, Gibbs CJ stated that it was necessary to determine a corporation's true character (at 116), and Wilson J and Dawson J did not need to decide (although Dawson J expressed agreement with the conclusions of Gibbs CJ): at 201 (Wilson J), 318 (Dawson J). *Tasmanian Dam* therefore did not take the position any further than *State Superannuation Board*: see George Winterton, "Comment on section 51(xx)" (1984) 14 *Federal Law Review* 258 at 259.

39 (2006) 229 CLR 1 at 74 [55], 75 [58] and 108-109 [158] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

40 (2006) 229 CLR 1 at 108 [158].

Practices Tribunal; Ex parte St George County Council.[41] Moreover, the Court noted that it was "interesting to observe" that, in *Huddart, Parker & Co Pty Ltd v Moorehead,*[42] Isaacs J had regarded certain types of corporations (including corporations "constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes") as not being trading corporations.[43] More recently, in *Williams v The Commonwealth (No 2)*,[44] the Court referred to the "questions left open in the *Work Choices Case* about the meaning of 'trading or financial corporations formed within the limits of the Commonwealth'".

19. A corporation's purpose is always relevant to the characterisation process (albeit not the "sole or principal criterion").[45] A corporation's purpose has particular significance when a corporation has not yet begun trading.[46] Purpose is also particularly relevant in the case of statutory corporations (because their functions are defined by their constituting acts),[47] and holding companies (which may or may not conduct any activities of their own). In this case, assuming Queensland Rail is a corporation, it is both a statutory corporation and a holding company: see further paragraphs 26(b)-27 below.

20. Where it has been applied, the "activities test"[48] has displayed a protean quality, and is somewhat circular.[49] Further, the absence of any clear standard for assessing the

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41 (1974) 130 CLR 533 (***St George County Council***). Contrast the treatment of *St George County Council* in *Adamson* (1979) 143 CLR 190 at 233 (Mason J) and *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102 (***Etheridge Shire Council***) at 112 [48] (Spender J).

42 (1909) 8 CLR 330 (***Huddart Parker***) at 393.

43 (2006) 229 CLR 1 at 86 [86] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

44 (2014) 309 ALR 41 at 53 [51] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

45 *State Superannuation Board* (1982) 150 CLR 282 at 303 (Mason, Murphy and Deane JJ), referring to *Adamson* (1979) 143 CLR 190 at 208-211 (Barwick CJ), 233-237 (Mason J, with Jacobs J agreeing) and 239-240 (Murphy J). See also *State Superannuation Board* at 304-305 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570 at 601-602 (Mason, Murphy, Brennan and Deane JJ), 611 (Wilson J), 622-624 (Dawson J); *Etheridge Shire Council* (2008) 171 FCR 102 at 130 [148] (Spender J).

46 *Fencott v Muller* (1983) 152 CLR 570 at 589 (Gibbs CJ), 602 (Mason, Murphy, Brennan and Deane JJ); *State Superannuation Board* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ). However, an objects clause in a company's memorandum of association may not be a reliable method for determining those purposes: *Fencott v Muller* at 589-590 (Gibbs CJ); *St George County Council* (1974) 130 CLR 533 at 542 (Barwick CJ).

47 See *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117.

48 See paragraph [17](a) above.

49 See *Etheridge Shire Council* (2008) 171 FCR 102 at 118 [81] (Spender J).

"significance" of a corporation's trading activities has produced mixed results and generated uncertainty. [50] Corporations have been characterised as "trading corporations" by reference to the revenue derived from trading activities, even where trade accounts for only a small fraction of their revenue (let alone their activities more generally): for example, a public hospital (16%),[51] a university (17-18%),[52] a non-profit organisation (4.5%)[53] and a statutory fire authority (2.7%).[54]

21. For these reasons, the test for determining whether a corporation is a "trading corporation" should be refined as follows. The underlying question is: what is the corporation's true character?

(a) Generally speaking, the most reliable evidence of a corporation's true character will be its present activities, viewed in the context of its governing statute or other constituting instrument. However, a corporation with present activities that include trading will not satisfy the constitutional description of a "trading corporation" unless the trading, so viewed, is its characteristic activity. Where a corporation's trading activities are incidental to a non-trading activity, trading will not be its characteristic activity.[55]

(b) The question whether a corporation engages in "significant" trading activities (as relevant) should direct attention to the corporation's trading activities as a *proportion* of the corporation's activities generally, rather than the *value* of

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50 See the various approaches taken by lower courts summarised in Christopher Tran, "'Trading or Financial Corporations' under section 51(xx) of the Constitution: A Multifactorial Approach" (2011) 37 *Monash Law Review* 12 at 22-30; see also Nicholas Gouliaditis, "The meaning of 'trading or financial corporations': Future directions" (2008) 19 *Public Law Review* 110 at 113-119.

51 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 344-345 (Wilcox J).

52 *Quickenden* (2001) 109 FCR 243 at 261 [49], [51] (Black CJ and French J). The trading activities set out in [49] included investment activities (which derived almost 17% of the University's income) and other activities (which were not quantified). At first instance, Lee J held that the trading activities (including accommodation services and parking spaces, as well as investments) accounted for approximately 18% of the University's revenue: *Quickenden v O'Connor* (1999) 91 FCR 597 at 608 [52]. Chief Justice Black and French J did not treat the provision of higher education services as "trade": *Quickenden* (2001) 109 FCR 243 at 261 [50]-[51]; contra 272 [106] (Carr J).

53 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343-344 (Wilcox J).

54 *United Firefighters Union of Australia v Country Fire Authority* (2014) 218 FCR 210, see especially at [83], [100] (Murphy J).

55 *Adamson* (1979) 143 CLR 190 at 234 (Mason J, with Jacobs J agreeing). A "trading corporation" is not simply a corporation that trades: see *St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ), 546 (McTiernan J), 553-554 (Menzies J), 561-562 (Gibbs J), 572 (Stephen J); *Adamson* (1979) 143 CLR 190 at 213 (Gibbs J), 234 (Mason J, with Jacobs J agreeing); *State Superannuation Board* (1982) 150 CLR 282 at 291 (Gibbs CJ and Wilson J); cf *Adamson* at 239 (Murphy J).

the corporation's trading activities in an absolute sense.[56] The proportion of trading activities assists in identifying the true character of the corporation.

22. The proposed test is consonant with the focus of the existing case law on a corporation's activities. However, the proposed test involves a more flexible approach to assessing the significance of trading activities. This is appropriate, because the only possible reason for the use of the adjectives "foreign", "trading" and "financial" to describe corporations within the power conferred by s 51(xx) is to exclude other types of corporation from the scope of the power.[57] Thus, the ultimate inquiry must be directed to ascertaining whether the "true character" of a corporation
10 is that of a "trading" corporation, to be distinguished from corporations whose true character is otherwise.[58] As Gibbs CJ and Wilson J explained in *State Superannuation Board* in relation to the cognate expression "financial corporation":[59]

> [T]he financial activities of a corporation may be substantial in a quantitative sense and yet be no more than incidental and therefore insignificant in relation to the other activities of the corporation. In such a case the financial activities may be both substantial and yet ancillary and therefore insufficient to fix their character to the corporation ... It is not a question solely of substantiality in either a quantitative or a relative sense but whether the activity is the predominant or characteristic activity.

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56 See *Adamson* (1979) 143 CLR 190 at 233 (Mason J, with Jacobs J agreeing) (asking whether "trading activities form a sufficiently significant *proportion* of its overall activities"), and 234 (a corporation is not a trading corporation if its trading activity is so slight and so incidental to some other principal activity that it does not meet the constitutional description); *State Superannuation Board* (1982) 150 CLR 282 at 296 (Gibbs CJ and Wilson J); see also *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 (*Actors Equity*) at 221 (Brennan J); *Tasmanian Dam* (1983) 158 CLR 1 at 117 (Gibbs CJ, dissenting in the result), 156 (Mason J), 239-240 (Brennan J), 293 (Deane J). Contra *E v Australian Red Cross Society* (1991) 27 FCR 310 at 345 (Wilcox J).

57 *St George County Council* (1974) 130 CLR 533 at 562 (Gibbs J). See also *Huddart Parker* (1909) 8 CLR 330 at 393 (Isaacs J); *St George County Council* (1974) 130 CLR 533 at 551-552 (Menzies J); *Adamson* (1979) 143 CLR 190 at 208 (Barwick CJ), 212-213 (Gibbs J), 219 (Stephen J, with Aickin J agreeing); *Actors Equity* (1982) 150 CLR 169 at 182 (Gibbs CJ, with Wilson J agreeing); *State Superannuation Board* (1982) 150 CLR 282 at 290 (Gibbs CJ and Wilson J); *Fencott v Muller* (1983) 152 CLR 570 at 588 (Gibbs CJ), 611 (Wilson J), 623 (Dawson J); *Tasmanian Dam* (1983) 158 CLR 1 at 116-117 (Gibbs CJ).

58 In *Work Choices*, the majority justices recognised the importance of giving "due weight" to the words "foreign", "trading" and "financial" in considering the application of s 51(xx): (2006) 229 CLR 1 at 111 [165], referring to *Actors Equity* (1982) 150 CLR 169 at 182 (Gibbs CJ). See also *Etheridge Shire Council* (2008) 171 FCR 102 at 107 [16] (Spender J).

59 (1982) 150 CLR 282 at 296. See also *Adamson* (1979) 143 CLR 190 at 220-221 (Stephen J).

23. The proposed test also finds support in the judgment of Mason J in *Adamson*,[60] where his Honour observed that the trading activity of a corporation may be "so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation".

24. The process of characterisation is not to be "narrowly pursued": "[i]t calls for a consideration of all the circumstances touching the corporation in question before one can determine whether it satisfies the constitutional description".[61] And in assessing a corporation's character, it is necessary to consider all of its activities, and not focus exclusively on its predominant activity.[62] There is "no bright line delineating what is or is not a trading corporation".[63] Whether it is apt to characterise a corporation as a trading corporation is "very much a question of fact and degree".[64]

10

True character of Queensland Rail

25. The following matters are relevant in determining the true character of Queensland Rail (assuming for these purposes that it is found to be a "corporation").

26. The activities of Queensland Rail do not provide clear guidance on whether it is a trading corporation.

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60 (1979) 143 CLR 190 at 234.

61 *State Superannuation Board* (1982) 150 CLR 282 at 295 (Gibbs CJ and Wilson J). See also *St George County Council* (1974) 130 CLR 533 at 562 (Gibbs J); Christopher Tran, "'Trading or Financial Corporations' under section 51(xx) of the Constitution: A Multifactorial Approach" (2011) 37 *Monash Law Review* 12 at 34-35.

62 *State Superannuation Board* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ), referring to *Adamson* (1979) 143 CLR 190 at 208 (Barwick CJ), 234 (Mason J, with Jacobs J agreeing) and 239 (Murphy J). Although the majority in *State Superannuation Board* stated that "trading did not have to be the predominant 'and' characteristic activity", the majority "did not say that trading did not have to be 'a' characteristic activity": see Nicholas Gouliaditis, "The meaning of 'trading or financial corporations': Future directions" (2008) 19 *Public Law Review* 110 at 127. On the "predominant or characteristic" test, see *St George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ); *Adamson* (1979) 143 CLR 190 at 213 (Gibbs J); *State Superannuation Board* (1982) 150 CLR 282 at 294 (Gibbs CJ and Wilson J); *Etheridge Shire Council* (2008) 171 FCR 102 at 118-119 [78]-[86] (Spender J).

63 *Bankstown* (2010) 182 FCR 483 at 511 [52] (the Court).

64 *Adamson* (1979) 143 CLR 190 at 234 (Mason J, with Jacobs J agreeing). See also *St George County Council* (1974) 130 CLR 533 at 562 (Gibbs J); *State Superannuation Board* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570 at 588-589 (Gibbs CJ). See also *Quickenden* (2001) 109 FCR 243 at 261 [52] (Black CJ and French J); *Bankstown* (2010) 182 FCR 483 at 511 [52] (the Court).

(a) Queensland Rail's principal revenue-raising activity is the provision of employees to Queensland Rail Limited (**QR Ltd**).[65] Queensland Rail receives money for providing these employees;[66] however, this activity lacks many features of "trade".[67] For example, QR Ltd does not have any choice in the source of its employees (QRTA Act, ss 71 and 77).

(b) It cannot be assumed that Queensland Rail is a trading corporation simply because it is the holding company of QR Ltd, which is a "trading corporation".[68] It is a question of fact in each case whether a holding company is itself a trading corporation; for example, a holding company may use its voting power to influence the decisions of its subsidiaries and, on the totality of the circumstances, be a trading corporation as well.[69]

27. The purposes of Queensland Rail as revealed by the functions provided for in the QRTA Act are relevant to the true character of Queensland Rail.

(a) Queensland Rail's functions are set out in s 9 of the QRTA Act, and include managing railways (s 9(1)(a)); controlling rolling stock on railways (s 9(1)(b)); and providing rail transport services, including passenger services, and related services (s 9(1)(c)-(d)).

(b) Queensland Rail "may carry out its functions directly, or indirectly through its subsidiaries" (s 9(2)).

(c) Queensland Rail "must carry out its functions as a commercial enterprise" (s 10(1)), although it may also be directed to perform community service obligations, being activities that are not in Queensland Rail's commercial interests to perform (s 57).

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65 Special Case, [70] (**SCB 67**).

66 Special Case, [67] (**SCB 66**).

67 First defendant's submissions, [68].

68 Special Case, [36], [40](C) (**SCB 58**). Cf plaintiffs' submissions, [69].

69 *R v O'Halloran* (2000) 182 ALR 431 at 438 [28], 439-440 [31] (Heydon JA, with Spigelman CJ and Mason P agreeing). Whether an activity of a subsidiary company can be taken to be an activity of the parent company is a question of fact: *Trade Practices Commission v Gillette Co (No 1)* (1993) 45 FCR 366 at 381-382 (Burchett J); *Australian Competition and Consumer Commissioner v Boral Ltd* (1999) 166 ALR 410 at 446 [198] (Heerey J).

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

28. Approximately 20 minutes will be required for the presentation of the oral submissions of the Attorney-General for Victoria in this matter.

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