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
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

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

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth). The Attorney General for Western Australia does not intervene in support of any party.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the plaintiffs' submissions.

Date of Document: 24 September 2014

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PART V: SUBMISSIONS

5. Western Australia intervenes to address question one of the Special Case[1].

6. Although the answer to this question is, strictly, one of construction of the *Fair Work Act 2009* (Cth), this definition of corporation is commonly seen in other Commonwealth legislation[2], and gives rise to consideration of the meaning of the term corporations as it appears in s.51(xx) of the *Constitution*. Neither of the senses in which the word appears in s.51(xx) has given rise to detailed consideration in decisions of this Court[3]. In matters in which interesting questions may have arisen, the status of an entity as a corporation has been assumed or conceded.

10 7. In *St George County Council*[4], the entity was a county council established under the *Local Government Act 1919* (NSW). Section 563(1) of the Act provided that such councils were "corporate bod[ies] with perpetual succession and a common seal" and that "the body corporate shall continue to exist notwithstanding any vacancy or vacancies in its membership". The decision turned essentially on the (now discredited) distinction between a trading and municipal corporation[5], but several members of the Court concluded (without elaborate reasoning) that the relevant county council was a corporation[6]. From the report of argument, it appears that it was not submitted or contended otherwise[7]. Although Barwick CJ alluded to the possibility that "government or local government instrumentalities or agencies" could be
20 corporations, the context of this observation was (only) to dispose of an argument that such description *ipso facto* determined constitutional characterisation[8].

8. Similarly in *State Superannuation Board*[9], in neither of the judgments was the question of whether the State Superannuation Board was a corporation, as distinct from a financial corporation[10], examined. Likewise in *Ku-Ring-Gai*[11], the Court did not address whether co-operative terminating building societies registered under the *Co-operation Act 1923* (NSW) were corporations. In *Tasmanian Dam*[12], the validity of sections of the *World Heritage Properties Conservation Act 1983* (Cth) was considered in their application to the Hydro-Electric Commission established by the *Hydro-Electric Commission Act 1944* (Tas). The Commission was created as "a body

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[1] Special Case at [95] (Special Case Book volume 1 at 74).
[2] See also *Trade Practices Act 1974* (Cth) s.4 (definition of 'corporation'), now found in the *Competition and Consumer Act 2010* (Cth) s.4 (definition of 'corporation').
[3] As recognised in *New South Wales v Commonwealth* [2006] HCA 52; (2006) 229 CLR 1 at 75 [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 373 [892] (Callinan J) ('*Work Choices*').
[4] *R v Trade Practices Commission; Ex parte St George County Council* [1974] HCA 7; (1974) 130 CLR 533 ('*St George County Council*').
[5] See *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 548 (McTiernan J), 550–552 (Menzies J), 564–565 (Gibbs J).
[6] See *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 539 (Barwick CJ), 548 (McTiernan J), 552 (Menzies J), 561 (Gibbs J).
[7] *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 534.
[8] *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 541.
[9] *State Superannuation Board v Trade Practices Commission* [1982] HCA 72; (1982) 150 CLR 282 ('*State Superannuation Board*').
[10] See *State Superannuation Board* [1982] HCA 72; (1982) 150 CLR 282 at 289, 298 (Gibbs CJ and Wilson J), 298, 305–306 (Mason, Murphy and Deane JJ).
[11] *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.
[12] *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 ('*Tasmanian Dam*').

corporate having perpetual succession... capable of suing and of being sued" and holding and disposing of real and personal property[13]. Again, the issue was whether the Commission was a trading corporation. While disputing this characterisation, Gibbs CJ accepted that the Commission was a corporation[14]. Deane J, who held that the Commission was a trading corporation, stated without detailed reasoning that it was a corporation[15]. Mason J[16], Murphy J[17], and Brennan J[18] dealt only with the trading corporation contention.

9. *Bradken*[19] and *Bass v Permanent Trustee*[20] assist in confirming that a State is not a corporation. In both matters the issue was whether the State, not being a corporation, could be a person for the purposes of certain of the extended operation provisions of the *Trade Practices Act 1974* (Cth).

10. Although the *Incorporation Case*[21] assists by deciding that s.51(xx) does not confer legislative power on the Commonwealth to incorporate corporations, the decision did not seek to define what a corporation was. Though there are many references in the joint judgment to "companies"[22], this is best understood as arising from the context; being whether s.51(xx) conferred power to legislate for the incorporation of companies.

11. In *Adamson's Case*[23] it was conceded that three incorporated associations, two incorporated under the *Associations Incorporation Act 1895* (WA) and the other the *Associations Incorporation Act 1956* (SA), were bodies corporate[24]. As with *St George County Council*, the central issue was whether the associations were trading corporations within the meaning of the *Trade Practices Act 1974* (Cth)[25]. Though conceded, Stephen J (with whom Aickin J concurred[26]) expressed an unexplained lack of doubt that such associations were corporations[27]. To similar effect was Barwick CJ; "[t]here can be no doubt that both the prosecutors ... are corporations. The first two are registered under the *Associations Incorporation Act,* 1895-1969 (W.A.) and

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[13] *Hydro-Electric Commission Act 1944* (Tas) s.4.
[14] *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 116.
[15] *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 292–293.
[16] *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 155–157.
[17] *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 179.
[18] *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 239–240.
[19] *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* [1979] HCA 15; (1979) 145 CLR 107.
[20] *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334.
[21] *New South Wales v Commonwealth* [1990] HCA 2; (1990) 169 CLR 482 ('*Incorporation Case*').
[22] See *Incorporation Case* [1990] HCA 2; (1990) 169 CLR 482 at 496, 497, 501, 502, 503.
[23] *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* [1979] HCA 6; (1979) 143 CLR 190 ('*Adamson's Case*').
[24] See *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 232 (Mason J):

> The prosecutors concede that the effect of their incorporation under the Western Australian statute, and that of the S.A. League under the South Australian statute, is that they are all bodies corporate, but it is denied that they are trading corporations within the meaning of s. 51 (xx.) of the Constitution or s. 4 of the Act. It is common ground that if they are not trading corporations, they cannot be "corporations" within the meaning of the definition contained in s. 4 of the Act.

[25] Note that *St George County Council* dealt with the equivalent definition in the *Restrictive Trade Practices Act 1971* (Cth), the predecessor to the *Trade Practices Act 1974* (Cth).
[26] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 240.
[27] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 217.

consequently incorporated"[28]. Because of its brevity, it cannot be concluded that his Honour's reasoning is to be understood as being limited to or confined by the unexplored notion of "incorporation" or "being incorporated". Mason J (with whom Jacobs J agreed[29]) could be understood as being to the same effect as Barwick CJ in this respect, though his Honour also referred to features of the relevant associations legislation other than the provision dealing specifically with "incorporation"[30].

12. The only member of the Court in *Adamson's Case* to squarely address the meaning of "corporation" was Murphy J[31]. The plaintiffs in this matter refer to and rely upon his Honour's reasoning. Consideration of his Honour's observations is conveniently prefaced by the following.

13. *First*, in this matter the plaintiffs accept that State Parliaments (and State executive government) can create new entities, or genus of entity, that are not corporations[32] and therefore not matters with respect to which the Commonwealth Parliament (pursuant to s.51(xx)) has power to legislate. Therefore, this question does not arise.

14. *Second*, the history of business associations in the United Kingdom, particularly in the nineteenth century, illustrates that there is no necessary correlation between the corporation and widely utilised business structures, or between the 'corporation' and 'companies'. As (fully and perhaps best) explained by Dr Cooke[33], even after the enactment of the *Joint Stock Companies Act 1844* (UK)[34], the joint stock corporation, incorporated by Royal Charter under letters patent, and the joint stock company, created by deed, co-existed. Incorporation was seen as a privilege and a vehicle principally to limit the liability of subscribers and provide for the ready assignment of interest, and, although letters patent differed, all invariably limited the liability of subscribers to their contribution to the joint stock fund. Separate were companies and the word company denoted "non" or "un" incorporation. The joint stock company, like all companies, was created by deed and unincorporated. Prior to the *Joint Stock Companies Act 1844* (UK), unincorporated joint stock companies could obtain some of the privileges of incorporation by letters patent, but "[a] company having a grant of Letters Patent was not a corporation; it was an unincorporated company having such of the privileges of corporations as the Letters Patent issued to it might have granted."[35] Further to these was another class of unincorporated joint stock company deriving certain privileges associated with incorporation not from letters patent but from special Acts of Parliament[36].

15. *Third*, more recent times has seen the creation of phenomena, particularly created or recognised by the laws of certain States of the United States, that might be thought to

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[28] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 197. His Honour at 198 also appears to have placed weight on the fact that the prosecutors had a common seal and power to purchase and hold property, arising from their incorporation.

[29] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 237.

[30] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 231.

[31] Note that Gibbs J only considered whether the entities were "trading corporations"; see *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 212–213.

[32] Plaintiffs' Annotated Written Submissions at [32].

[33] Colin Cooke, *Corporation, Trust and Company: an Essay in Legal History* (Manchester University Press, 1950).

[34] Which Cooke describes as "set[ting] up the structure of modern company law": Cooke, above n 33, at 138.

[35] Cooke, above n 33, at 142.

[36] These were commonly railway, canal, dock and other public utility companies; Cooke, above n 33, at 142.

give rise to interesting questions of whether they would be corporations within the meaning of s.51(xx). Such questions need not be explored here. Many such entities are discussed by Professor Ribstein in *The Rise of the Uncorporation*[37]. Without detailing the many matters addressed by Professor Ribstein, he makes reference to the limited liability partnership (LLP), by which the liability of all partners is not necessarily joint[38]; the limited liability corporation (LLC), an unincorporated entity that limits members liability[39]; the limited liability limited partnership (LLLP), by which the liability of all classes of partner is limited[40]; and the limited partnership association, which appears to create an entity distinct from the partners proper[41]. Additionally, D'Angelo, in his recent monograph, refers to the United States statutory real estate investment trust (REIT)[42]. The recent reference by Leeming JA to "[t]he incorrect but prevalent notion that a trust is a legal person"[43], although obviously correct, does not foreclose the statutory creation of legal personality in unincorporated structures that might presently be comprehended merely as trusts or unit trusts. Professor Sutherland's observation, in respect of the (legal) status of the 'Harvard Law School', that "[c]orporate personality has always mystified people"[44], emphasises that the variety of corporate personality compels that little is to be gained by general statement.

16. *Fourth*, there is no essential correlation between incorporation and limited liability. Legislation can limit the liability of partners, as legislation now does to limit the liability of some individuals[45], and legislation could impose liability upon shareholders of a corporation in excess of unpaid calls on shares.

17. *Fifth*, although, again, not a matter that necessarily arises for consideration in this matter, it is to be recalled that the borrowing from the United States *Constitution* by the founders of the Commonwealth *Constitution* may have carried with it the United States aversion to the term "company", as explained by D'Angelo[46]:

> ...what Anglo-Australian lawyers call the 'company' is called a 'corporation' in the United States; due to divergent historical paths following the American Revolution, 'American business corporations are descendants of the chartered corporation. English registered companies, on the other hand, are not simply chartered corporations created another way. They are descended from the unincorporated joint stock company'.

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[37] Larry Ribstein, *The Rise of the Uncorporation* (Oxford University Press, 2010).
[38] Ibid at 127–128.
[39] Ibid at 143–147.
[40] Ibid at 130.
[41] Ibid at 63–64. It is also well to observe references by Professor Ribstein to the statutory business trust at 84, 231.
[42] Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) at 24.
[43] *Kelly v Mina* [2014] NSWCA 9 at [103].
[44] Arthur E Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1967* (Harvard University Press, 1967) at 59.
[45] See professional standards legislation in force in all Australian jurisdictions — *Professional Standards Act 1994* (NSW); *Professional Standards Act 2003* (Vic); *Professional Standards Act 2004* (Qld); *Professional Standards Act 2004* (SA); *Professional Standards Act 1997* (WA); *Professional Standards Act 2005* (Tas); *Professional Standards Act 2004* (NT); *Civil Law (Wrongs) Act 2002* (ACT); and the relevant parts of the *Australian Securities and Investment Commission Act 2001* (Cth), *Corporations Act 2001* (Cth) and *Competition and Consumer Act 2010* (Cth).
[46] D'Angelo, above n 42, at 22 (footnote omitted).

18. *Sixth*, it is likely now too late to agitate the relevance of pre-federation history that gives rise to an understanding that "trading corporations" and "financial corporations" were references to companies of distinct kinds; that is, not all companies, and not all corporations. It is also likely too late to consider the relevance, to the meaning of s.51(xx), to the nineteenth century mind, of the genus of foreign, trading and financial corporations being companies most likely to engage in interstate trade and commerce. As Professor Waugh has explained, in respect of colonial Victoria, there was a discrete understanding of the notions of trading companies, mining companies, municipal corporations and financial institutions[47]. This history is reflected in the observation of Isaacs J in *Huddart Parker*[48]:

> ... it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading; a strong circumstance to show how and to what extent the autonomy of the States was intended to be safeguarded. The federal power was sufficiently limited by specific enumeration, and there is no need to place further limits on the words of the legislature.

19. As noted, this understanding motivated McTiernan J's dissent in *St George County Council*, and, though Isaacs J's reasoning has not otherwise been followed, it has largely been ignored rather than dismissed. In *Work Choices* Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ observed[49] that:

> Isaacs J [in *Huddart Parker*] identified two relevant limitations on the power conferred by s 51(xx). First, only some kinds of corporation fell within the power; secondly, the corporations that "come within the legislative reach of the Commonwealth must be corporations already existing". Although, as explained earlier, it is not necessary to consider what are "trading or financial corporations formed within the limits of the Commonwealth", it is interesting to observe that Isaacs J regarded "a purely manufacturing company" and "those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading" as falling outside the class of trading or financial corporations. The basis for excluding mining and manufacturing corporations from the class of trading or financial corporations was not explained.

20. The basis was likely that such distinctions were understood as obvious to those of Isaacs J's generation[50].

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[47] See John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15 *University of New South Wales Law Journal* 356. See also, generally, Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805.

[48] *Huddart Parker & Co Pty Ltd v Moorehead* [1909] HCA 36; (1908) 8 CLR 330 at 393.

[49] *Work Choices* [2006] HCA 52; (2006) 229 CLR 1 at 86 [86] (footnotes omitted).

[50] See generally Waugh, above n 47, at 381–386.

Murphy J in *Adamson* and the Commonwealth's definition

21. The plaintiffs[51] rely upon the following passage from the judgment of Murphy J in *Adamson's Case*[52]:

> In s. 51 (xx.) of the Constitution, the word, corporations, is not used in any narrow sense. For example, foreign corporations may include syndicates or joint ventures, common in European and other legal systems whose law of incorporation is based on principles different from those of Australian States and England. A corporation is an entity with status as an artificial person; this involves it having its own capacities rights and liabilities which are distinct from those of its members (if it has any members) (see *Chaff and Hay Acquisition Committee v. J.A. Hemphill & Sons Pty. Ltd.* [(1947) 74 CLR 375]).

22. To similar effect is the urging of the Commonwealth in this matter of a meaning of the word corporation in s.51(xx) that encompasses all artificial legal persons, other than the States and the Commonwealth[53].

23. A number of observations can be made about Murphy J's *dicta.*

24. *First*, his Honour did not identify the "syndicates or joint ventures" from jurisdictions with different "law[s] of incorporation", and so such entities cannot be considered to better illuminate his Honour's meaning. To the Common Law, an incorporated syndicate is an odd notion and that a joint venture could be considered a corporation (in any sense) unlikely.

25. *Second*, like Barwick CJ in *Adamson's Case*[54], Murphy J uses the term "incorporation" without clearly defining its meaning. To say that a corporation is a thing that is incorporated does not assist much.

26. *Third*, *Chaff and Hay*[55] is an unlikely case to authoritatively determine the meaning of the term corporation in s.51(xx). That Murphy J did not, in the passage cited above, refer to a particular judgment in *Chaff and Hay* or passages from it, obscures, because the reasoning of different justices varied. *Chaff and Hay* concerned the question of whether the Chaff and Hay Acquisition Committee, created and constituted under the *Chaff and Hay (Acquisition) Act 1944* (SA), could be sued in the Supreme Court of New South Wales for money had and received. The Committee contended that a writ, issued out of the Supreme Court of New South Wales and served, ought to be set aside on the ground that the Committee was not a legal entity capable of being sued.

27. The *Chaff and Hay (Acquisition) Act 1944* (SA) created the Committee (of four people) who were appointed by the Governor. Section 3(4) of the Act provided that "[t]he committee shall be deemed to be an instrumentality of the Crown", and elsewhere the Act empowered the Committee to acquire chaff or hay within South Australia and provided that chaff or hay so acquired "shall vest absolutely in the

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[51] Plaintiffs' Annotated Written Submissions at [29].
[52] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 238–239 (footnote omitted).
[53] Commonwealth's Written Submissions at [5.1].
[54] *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 197.
[55] *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* [1947] HCA 20; (1947) 74 CLR 375 ('*Chaff and Hay*').

committee and shall ... be and remain the property of the committee"[56]. The Act provided that proceedings could only issue against the Committee, not its members, and proceedings brought by the Committee were to be in the name of the Committee[57]. The Act also contained a provision, creating a process different from a petition of right, to enforce any order against the Committee[58].

28. The issue as to whether the action in New South Wales was to be dismissed on the ground contended by the Committee was answered by Latham CJ by the following reasoning[59]:

> The learned judges of the Supreme Court were of opinion that the committee was not a corporation. It was recognized that it was not essential that express words of incorporation should be used in order to create a body as a corporation (*Conservators of the River Tone v. Ash*). But it was pointed out that the ordinary words used for the purposes of bringing about incorporation did not appear in the *South Australian Act*: Cf. *Mackenzie-Kennedy v. Air Council.* But even if it should be held that the committee is not a corporation, the provisions of the *South Australian Act* show that it is a statutory person, a *persona ficta* created by law. It is a subject of rights and duties. A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation. ... [T]he committee has, in my opinion, all the attributes of a separate *persona.* It can own property, it can acquire rights and become subject to duties owed to other persons. These characteristics are conferred upon it by the law of its creation and by comity the committee should therefore be treated as an existing legal personality in New South Wales.

29. Starke J observed[60]:

> [The] Committee has many of the characteristics and attributes of a corporation. It has a collective name and property vested in it in that name. It may make purchases and sales in that name in and outside South Australia, subject to certain limitations upon the power of acquisition. It may sue and be sued, in its collective name, and regulations may be made by the Governor in Council for the conduct of its affairs...
>
> But it is said that the Committee is not a corporation in the strict technical sense...
>
> This may be admitted but it is not, I think, decisive.
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> The... Committee is a statutory body endowed with the essential characteristics and attributes of a body incorporated by English law. It is an "artificial person," to use the description of *Westlake, Private International Law,* 6th ed. (1922), s. 305,

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[56] *Chaff and Hay (Acquisition) Act 1944* (SA) s.5(2). As Latham CJ observed; "[t]he property is the property of the committee, not of the members of the committee"; *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 383.
[57] *Chaff and Hay (Acquisition) Act 1944* (SA) s.14(1).
[58] *Chaff and Hay (Acquisition) Act 1944* (SA) s.14(2).
[59] *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 384–386 (footnotes omitted).
[60] *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 389.

p. 373, and therefore entitled to recognition "in accordance with what is called comity".

30. McTiernan J, though dissenting and concluding that the Committee was "not a corporation or other legal personality: that it is but a name for an unincorporated body"[61], accepted that "Parliament can create a legal personality of any type"[62]. Williams J, in the course of a broad ranging judgment, characterised the Committee as a "juristic body of an artificial entity ... which has some, but not all, of the capacities of a corporation according to English law", "a statutory entity created by the law of South Australia which should be recognized in the courts of New South Wales as a foreign quasi-corporation, having the corporate powers conferred upon it by the Act" and as a "quasi-corporation which is an instrumentality, that is to say an agent, of the Crown in right of the State of South Australia"[63].

31. *Chaff and Hay* is authority for the proposition that State Parliaments can create artificial legal persons that are not incorporated and are not corporations. It is authority for little else[64].

32. The *fourth* matter arising from Murphy J's judgment in *Adamson's Case* is that his Honour's identification of artificial personality, as requiring rights and liabilities distinct from those of the artificial person's members, *per definition* does not include a statutorily created entity with joint liability with its members or one that has no liability.

33. *Fifth*, Murphy J also recognises that not all artificial legal persons are corporations. This is on all fours with *Chaff and Hay*, which in turn coincides with the statement of Mason J in *Church of Scientology v Woodward*[65] (in respect of ASIO) to the effect that "artificial personality" and incorporation are not co-extensive.

34. These considerations tend to the conclusion that the observation of Murphy J in *Adamson*, upon which the plaintiff much relies, is an unlikely total or complete statement of relevant principle.

35. As to the Commonwealth's submission, the Court, in this matter, does not need to decide this, because the question here is much narrower, evolving essentially to this – whether an entity that might be thought, pursuant to otherwise relevant criteria, to be a corporation is not so characterised because legislation declares that it is not a body corporate. In answering this narrower question, it is unnecessary to determine or settle upon a definition of corporation in s.51(xx). The ultimate question in the case is to be answered in relation to Queensland Rail, and not as to all s.51(xx) corporations[66].

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[61] *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 394.
[62] *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 391.
[63] *Chaff and Hay* [1947] HCA 20; (1947) 74 CLR 375 at 396–397.
[64] It might be thought that *Williams v Coulthard* [1948] SASR 183 is to largely the same effect. Section 67 of the *Libraries and Institutes Act 1939* (SA) provided that an institute created under the Act could not be incorporated. The trustees of the relevant institute, however, were regarded as a statutory person capable of owning, possessing and occupying property, and of suing and being sued in respect thereof, as if they were a strictly incorporated body. See especially at 191.
[65] *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25 at 56.
[66] Consistently with Barwick CJ's approach in *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 538. See also the approach of the joint judgment in *Williams v Commonwealth (No.2)* [2014] HCA 23; (2014) 88 ALJR 701 at 710 [36] and the authorities cited therein (Crennan J agreeing at 718 [99]).

36. Not only does the Commonwealth definition not arise for decision, this meaning should not be entertained for other reasons that are best simply briefly noted. First, such a meaning would be ahistorical. On no understanding of events leading to federation could it be contended that the words of s.51(xx), proposed to give limited power to the Commonwealth, extend to all imaginable and unimagined artificial legal persons. Second, it is not evident what, in the times following federation, would compel the adoption now of such an ahistorical meaning.

Queensland Rail

37. The principle (if not sole) issue that arises in this matter is whether an entity that might be thought, pursuant to otherwise relevant criteria, to be a corporation is not so characterised because legislation declares that it is not a body corporate[67]. In this statement of issue, the "otherwise relevant criteria" can be understood as referring to separate legal personality[68], perpetual succession[69], a common seal[70], the power to purchase and hold property[71], a right to sue and be sued[72], enter into contracts[73] and to make by-laws[74].

38. As to the significance of the s.6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld), a number of things can be said.

39. *First*, no declaration of invalidity of s.6(2) is sought in this proceeding. So, Queensland Rail is "not a body corporate".

40. *Second*, the plaintiffs' contention[75] that this statutory provision engages the principle derived from Fullagar J's metaphor in the *Communist Party Case*[76]—that a stream cannot rise higher than its source—is misplaced. Had the legislation provided that Queensland Rail is "not a corporation within the meaning of s.51(xx)" then the principle would, of course, be engaged. If the defendants here are to be understood as

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[67] See s.6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld).

[68] See *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 238–239 (Murphy J), although note the propositions made above in respect of this passage.

[69] See the characteristics of the South Australian association in *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 232 (Mason J); and the county council in *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 549 (Menzies J), 555 (Gibbs J).

[70] See the characteristics of the prosecutors in *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 198 (Barwick CJ), 231 (Mason J); and the county council in *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 549 (Menzies J), 555 (Gibbs J).

[71] See the characteristics of the Hydro-Electric Commission in *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 111 (Gibbs CJ); the prosecutors in *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 198 (Barwick CJ), 231 (Mason J); and the characteristics of the county council in *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 537 (Barwick CJ), 556 (Gibbs J).

[72] See the characteristics of the Hydro-Electric Commission in *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 111 (Gibbs CJ); the prosecutors in *Adamson's Case* [1979] HCA 6; (1979) 143 CLR 190 at 231 (Mason J); and the county council *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 555 (Gibbs J).

[73] See the characteristics of the Hydro-Electric Commission in *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 111–112 (Gibbs CJ); and the county council in *St George County Council* [1974] HCA 7; (1974) 130 CLR 533 at 537 (Barwick CJ), 547 (McTiernan J).

[74] See the characteristics of the Hydro-Electric Commission in *Tasmanian Dam* [1983] HCA 21; (1983) 158 CLR 1 at 115 (Gibbs CJ), 292 (Deane J).

[75] Plaintiffs' Annotated Written Submissions at [12].

[76] *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at 258 ('*Communist Party Case*').

contending that, because the Queensland Parliament did not "intend" Queensland Rail to be a corporation, therefore it is not[77]; then such a contention would likely excite Fullagar J's metaphor. Of course, reference to the discredited notion of "parliamentary intention" is unhelpful[78]. It must be supposed that the Queensland Parliament "did not intend" Queensland Rail to be a body corporate because s.6(2) says this. It is difficult to construe s.6(2) as meaning that the Queensland Parliament "intended" that Queensland Rail not be a corporation, unless the terms corporation and body corporate are co-extensive (or—to illustrate the silliness of this—unless the Queensland Parliament "intended" the terms corporation and body corporate to be co-extensive). If the terms "body corporate" in s.6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld) and "corporations" in s.51(xx) of the Commonwealth *Constitution* are (and were intended by the Queensland Parliament to be) co-extensive, then it is necessary to squarely address the principle derived from Fullagar J's metaphor.

41. *Third,* it is apposite to note that it is not uncommon in Australian legislation for the status of particular entities to be specifically addressed. For instance, s.57A(1) of the *Corporations Act 2001* (Cth) states that, "an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose" is a corporation. Plainly it is not, and plainly the Commonwealth lacks power to legislate under s.51(xx) in respect of such entities (although such power could be, and was, referred under s.51(xxxvii)). In a like manner s.57A(2) states that a corporation sole is not a corporation. Section 57A(3) confirms that an Aboriginal and Torres Strait Islander corporation is a corporation. The *Corporations Act 2001* (Cth) also defines a body corporate to include unincorporated bodies[79].

42. *Fourth,* it might be thought to follow from the undoubted proposition that State legislation can create artificial legal persons that are not incorporated and are not corporations, that whether Queensland Rail is a corporation is determined by considering what it is, does and can do rather than what it is not – that is, that it is not a body corporate. On this understanding, that Queensland Rail is not a body corporate might be thought to be neither here nor there.

43. *Fifth,* the alternative to this is that the answer to question one of the Special Case can only be answered by answering another question; must a s.51(xx) corporation be a body corporate? The answer to this question, in turn, requires an answer to an anterior question; what is a body corporate? It is only if the answer to this question leaves open an area of legal personality, that Queensland Rail could be a corporation.

44. Obviously enough, "body corporate" is not a term of art. Statutory definitions vary, and in some contexts, the term is synonymous with, or used interchangeably with,

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[77] This contention is not necessarily attributed to the defendants; see First Defendant's Written Submissions at [11(c)] and [63].

[78] As stated in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at 80 fn.119 (Kirby J, citing *Commonwealth v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1 at 117–118 [261]–[262]): "This is why the fiction of parliamentary "intention" should not be used in relation to statutes". See also *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264–265 [31]–[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).

[79] See the definitions in s.9 of "body corporate" and "registrable Australian body".

corporation[80]. In other statutory contexts, the starting position is likely that of Lockhart J in *Trade Practices Commission v Australian Iron & Steel Pty Ltd*[81]. In interpreting the term "body corporate" in the *Trade Practices Act 1974* (Cth) "in accordance with general principles of statutory construction", his Honour stated; "[p]lainly the expression "body corporate" has a wider meaning than the statutorily defined word "corporation" because the ordinary meaning of the expression "body corporate" includes a corporation and because the terms of the definition of "corporation" in s 4(1) compel that conclusion... "Body corporate" is thus a wider expression than "corporation""[82]. That this is not inevitably so can be seen from the *Acts Interpretation Act 1954* (Qld), where, by s.32D, in Queensland legislation, "a reference to a person generally includes a reference to a corporation as well as an individual" and an example given of a "corporation" is a "body corporate". This, in turn, is to be understood having regard to s.14D of the *Acts Interpretation Act 1954* (Qld), which 'clarifies' that in the example of a body corporate *qua* corporation; the example is not exhaustive, nor does it limit, but may extend, the meaning of "corporation".

45. In the absence of a certain definition of "body corporate" in s.6(2) of the *Queensland Rail Transit Authority Act 2013* (Qld), it is unlikely that the provision assists greatly with the characterisation of Queensland Rail for the purpose of the *Fair Work Act 2009* (Cth).

PART VI: LENGTH OF ORAL ARGUMENT

46. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 15 minutes.

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[80] See, eg, *R v Baker* (Unreported, New South Wales Court of Criminal Appeal, 12 December 1975).
[81] [1990] FCA 23; (1990) 22 FCR 305 at 315.
[82] *Trade Practices Commission v Australian Iron & Steel Pty Ltd* [1990] FCA 23; (1990) 22 FCR 305 at 315.