IN THE HIGH COURT OF AUSTRALIA **No. B 63 of 2013**
BRISBANE REGISTRY

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

First defendant's submissions

Filed on behalf of the first defendant
Form 27d
Dated: 17 September 2014

Per Wendy Ussher
Ref PL8/QRL011/1/UWE
Document No: 5225409

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FIRST DEFENDANT'S SUBMISSIONS – ANNOTATED

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues are reflected in the questions for the Court's opinion, which are set out in paragraph 98 of the Special Case.[1] They are:

   (a) whether the first defendant ("**QR**"), is a corporation within the meaning of s51(xx) of the Commonwealth Constitution ("**the Constitution**");

   (b) if so, whether QR is a trading corporation within the meaning of s 51(xx) of the Constitution; and

   (c) if so, whether the *Fair Work Act 2009* (Cth) ("**the FW Act**") applies to QR and its employees by the operation of s 109 of the Constitution, to the exclusion of the *Queensland Rail Transit Authority Act 2013* (Qld ("**the QRTA Act**") or the *Industrial Relations Act 1999* (Qld) ("**the IR Act**") or both.

PART III: SECTION 78 B NOTICES

3. The Plaintiffs have given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth). QR does not consider that any further notice is required.

PART IV: FACTS

4. Relevant facts are agreed between the Plaintiffs and QR are set out in paragraphs 2 to 97 of the Special Case.[2]

PART V: LEGISLATION

5. The relevant legislation is:

   (a) The Constitution, s 51(xx);

   (b) The QRTA Act;

   (c) FW Act, ss 12, 13, 14, 26, 54, 219-227, 307-315.

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1 SCB Vol 1 at 74.

2 The Second Defendant filed a Submitting Appearance on 26 November 2013 pursuant to rule 23.02 *High Court Rules 2004* (Cth).

(d) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("FW Transitional Act") Schedules 2, 3 and 8.

(e) IR Act, ss 4, 5, 6, 691A-691D.

PART VI: ARGUMENT

Summary

6. The Plaintiffs claim that QR is covered by the FW Act because it is a "trading corporation" within the meaning of s 51(xx) of the Constitution.

7. As the Plaintiffs effectively accept, correctly with respect, s 51(xx) may only reach QR if the conception of "corporation" is so ambulatory that for Australian constitutional purposes it is "an artificial legal entity with distinct legal personality".[3] The corollary of such submission is that the only artificial legal entity that may be created is a corporation.

8. The Commonwealth agitates a slightly more nuanced conception of "corporation", being "an artificial juristic entity with a distinct, continuing legal personality that is not a body politic reflected or recognised in the Constitution".[4] It is, however, just as ambulatory in substance.

9. The Commonwealth also seeks to address the discord between such a definition and settled notions of a corporation by adding that, seemingly only for the purposes of s51(xx), "[a] body without members (in the sense of corporators) may be a corporation."[5]

10. The Plaintiffs further assert that because QR engages in trading activities on a substantial scale and is intended to operate as a commercial enterprise, it is necessarily a "trading corporation" and is covered by the FW Act.[6]

11. In response, QR submits that:

(a) a State Parliament is competent to create an artificial juristic entity without it necessarily being a corporation;

(b) there are, and were at federation, artificial legal entities other than corporations;

(c) the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express

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[3] Plaintiffs' submissions at [41].
[4] Submissions for the Commonwealth Attorney-General intervening ("the Commonwealth's submissions") at [5.1].
[5] Commonwealth's submissions at [5.2].
[6] Plaintiff's submissions at [41], [50], [63].

words or by necessary implication. That was the position at federation and it remains the position today;[7]

(d) moreover, given the circumstances in which s 51(xx) came into existence, such an outcome is not just the result of the orthodox application of principle, but the product of democracy;

(e) in this case, the Queensland Parliament did not intend to form QR as a corporation. Indeed to the contrary, it expressly intended to create an artificial legal entity that is not a corporation; and

(f) accordingly, the Plaintiff's submissions should be rejected.

Historical considerations

12. Subject to the Constitution, s 51(xx) of the Constitution gives the Commonwealth Parliament power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

13. The meaning of "corporations" in s 51(xx) concerning trading and financial corporations, which is the relevant point of inquiry here, must be understood in light of the common law and legislative developments regarding "companies"[8] and "corporations" in the United Kingdom and the Australian colonies before federation. When that is done, there is no reason to conclude that any artificial legal person, with the possible exception of a body politic, must be a "corporation".

14. In relation to the allied but not necessarily identical meaning of "foreign corporations", its content must be understood by reference to the learning reflecting both comity and a necessarily pragmatic approach of determining such artificial legal entity's character by reference to not only what would constitute a corporation domestically, but additionally what would constitute an analogous, if not necessarily identical, artificial legal entity in that foreign jurisdiction.[9] Further, the Constitution makes a textual distinction in identifying such corporations, and that must be recognised. Consequently, the learning in relation to foreign corporations should not be uncritically applied to the present case. It certainly should not be a springboard to broaden the conception of "corporation" for

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7 Cf Commonwealth's submissions [18].

8 In the nineteenth century, companies typically referred to unincorporated groups associated for a particular purpose or purposes: *New South Wales v Commonwealth* (***'Work Choices Case'***) (2006) 229 CLR 1 at [97] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Re Griffith* (1879) 12 Ch D 655, where an unincorporated life assurance society, established by a deed of settlement, with a board of directors, financial capital, shareholders and powers and concessions under a special Act of Parliament was held to be a "public company" within the meaning of another Act, the *Apportionment Act 1870* (UK). See also *Macintyre v Connell* (1851) 20 L.J. Ch. 284, where it was held that the Union Bank of London was a public company within the meaning of s 14 of the *Judgments Act 1838* although it was an unincorporated body, but it had certain public characteristics which satisfied the expression "public company". Both cases were applied in *R v Forsyth-Grant* [1955] VLR 211.

9 In this regard Miller J's language from *Liverpool Insurance Company v Massachusetts*, quoted in the Plaintiffs' submissions [35], is both instructive and illustrative.

trading or financial corporations,[10] as to do so would conflate the identification of the subject of the plenary power with the application of the power to a properly identified subject.

Development of trading corporations in the United Kingdom

15. The first English corporations were "corporations aggregate" and "corporations sole". A corporation aggregate consisted of many persons united together into one society, such as the mayor and commonalty of a city; the head and fellows of a college; or dean and chapter of a church. Corporations sole, however, consisted of one person only and his or her successors. In this sense, the King was a corporation sole as was a bishop.[11]

16. By the seventeenth century, it was generally recognised that corporations were created in one of four ways: by implication of common law, as in corporations sole; by prescription, as in the case with the city of London; by Royal Charter; and by an Act of Parliament.[12] Only the last two methods warrant further discussion, since they were the only methods relevant to the creation of trading corporations after the seventeenth century.

17. The earliest trading corporations[13] were created by grant of a Royal Charter, which was an exercise of the royal prerogative.[14] Such corporations had the power to deal with property, to bind themselves to contracts and to do all such acts as ordinary persons could. They had that power despite any direction contained in the charter that limited the exercise of the corporate powers. Furthermore, the debts of the corporation established by charter were separate from the debts of the members.[15] It was not until 1825[16] that legislation was enacted authorising the Crown to grant charters of incorporation and to declare that the persons incorporated would be personally liable for the debts of the corporation in the same way as members of unincorporated associations.[17] The *Chartered Companies Act 1837* (UK) retained that power and allowed the Crown to grant charters limited for a duration of years or any other period.[18]

18. The English Parliament also created specific corporations by statute. Unincorporated companies, particularly joint stock companies that operated under a deed of

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10 Commonwealth's submission at [12] – [15] to this effect, respectfully, ought therefore be rejected.

11 Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1, ch 18. See also Stephen's *Commentaries on The Laws Of England* (21st ed, Vol. 2), pp. 558-9. A limited number of corporations sole are recognised at common law, such as the sovereign, and certain ecclesiastical offices.

12 *Sutton's Hospital* (1612) 10 co Rep 23, 32; 77 ER 960, 968. See also Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1, ch 18, pp 471-2.

13 Famous examples include the East India Company and the Hudson Bay Company, each formed by royal charter in the 17th century.

14 Hon T Bathurst, 'The historical development of corporations law' (2013) 37 *Australian Bar Review* 217, 219.

15 Baron N. Lindley, *A Treatise on the Law of Partnership: including Its Application to Companies* (3rd ed, 1873), p 7.

16 6 Geo. 4, c. 91.

17 Baron N. Lindley, *A Treatise on the Law of Partnership: including Its Application to Companies* (3rd ed, 1873), p 7.

18 Section 29; see also the discussion in Palmer's *Company Law* (21st ed, 1968), pp 825-6.

settlement,[19] would petition Parliament to obtain the benefits of incorporation and sometimes special powers such as the ability to acquire land compulsorily.[20] Unlike the situation at common law with the Royal Charters, the statute that created the corporation would limit the powers of a corporation[21] and would often address the liabilities of members. Where Parliament did not incorporate a company, it sometimes enacted legislation providing that the company could sue and be sued by its secretary or chairman.[22]

19. In the 1830s, the British Parliament enacted legislation providing that letters patent could confer on companies some or all of the privileges that could be granted under a Royal Charter, especially the privilege of maintaining and defending suits in the name of the principal officers of the company.[23] It was repealed by the *Chartered Companies Act 1837* (UK), which contained provisions to similar effect.[24] As Gower has observed, such laws 'enabled the Crown by letters patent to confer all or any of the advantages of incorporation without actually granting corporate personality'.[25]

20. The 1840s saw the foundations of modern companies law being laid. In 1844, the *Joint Stock Companies Registration and Regulation Act 1844* (UK) was enacted. It set out a procedure whereby companies could be incorporated by registration rather than, as was previously the case, by Royal Charter or special Act. Indeed, it required companies with members above a certain number to register. The Act marked a decisive shift away from the philosophy that incorporation was to be a special privilege granted by the Crown or Parliament.

21. In 1855, the *Limited Liability Act 1855* (UK) first enabled companies to be formed on the principle that the liability of the members would be limited.[26] The *Joint Stock Companies Act 1856* (UK) followed. Among other things, the 1856 Act provided for the winding up of companies. Legislation relating to joint stock companies from 1844 onwards was consolidated in the *Companies Act 1862* (UK).[27] Later legislative history shows a series of improvements without departure from the fundamentals of company law established by the 1862 Act.[28]

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19 They comprised of persons who wished to operate jointly in commercial undertakings: see H.A.J. Ford, *Principles of Company Law* (5th ed, 1990) at [108]. Their aim was to make the association "as nearly a corporation as possible, with continuous existence, with transmissible and transferable stock, but without any individual right in any associate to bind the other associates, or to deal with the assets of the association": *In re Agriculturist Cattle Insurance Company* (1870) LR 5 Ch App 725, 734 (James LJ). For example, the original Bank of New South Wales (1817); the Australian Agricultural Company (1824) and Australian Gas Light Company (1836) were joint stock companies.

20 H.A.J. Ford, *Principles of Company Law* (5th ed, 1990) at [108].

21 *Eastern Counties RY v Hawkes* (1855) 5 HLC 331, 348.

22 That remained the position until 1826: see Baron N. Lindley, *A Treatise on the Law of Partnership: including Its Application to Companies* (3rd ed, 1873), p 8.

23 See *Trading Companies Act 1834* (UK) s 1.

24 See, for example, ss 2, 3.

25 L.C.B Gower, *The Principles of Modern Company Law* (2nd ed., 1957), p 61. See also Baron N. Lindley, *A Treatise on the Law of Partnership: including Its Application to Companies* (3rd ed, 1873), p 7.

26 H.A.J. Ford, *Principles of Company Law* (5th ed, 1990) at [108]-[109].

27 The 1862 Act introduced companies limited by guarantee.

28 H.A.J. Ford, *Principles of Company Law* (5th ed, 1990) at [110]. England's legislation, particularly the 1862 Act was the model for incorporating companies in many British Colonies including India (*Indian Companies*

22. In 1897, a significant development in the judicial recognition of corporations as separate legal entities came in *Salomon v A. Salomon & Co Ltd.*[29] In that case, the House of Lords, in considering the status of a company registered under the 1862 Act, held that a corporation is a separate legal entity from its directors.

Developments in colonial Australia

23. The early decades of the 1800s saw widespread use of unincorporated joint stock companies in New South Wales.[30] The difficulty with those companies suing and being sued in their own name, however, led to various legislative reforms. The first "companies" legislation in Australia dealing with joint stock companies was enacted in NSW in 1841[31] to validate certain contracts "entered into by banking and other co-partnerships". In 1842, [32] the New South Wales legislature enacted legislation allowing banks and other companies to sue and be sued in the name of an officer of the company.[33] In 1848, moreover, it enacted legislation allowing joint stock companies to sue their members and to be sued by them.[34]

24. Subsequently, as outlined in *Work Choices*,[35] Australian colonies passed legislation modelled on England's 1862 Act.[36] Unincorporated joint stock companies were prohibited after the introduction of these Acts in the colonies.[37] Like the English Act, that legislation distinguished companies and other associations from incorporated companies. Companies became incorporated by registration.[38]

Act 1866, Act No. X of 1866); Malaysia (*Companies Enactment 1897*); New Zealand (*The Joint Stock Companies Act 1860*); in Canada, the Parliament of the United Province of Canada passed a general incorporation Act for certain joint stock companies (13-14 Vict., c. 28) and in 1864, a general incorporation statute was passed (27-28 Vict., c.23) for manufacturing and mining companies.

29 [1897] AC 22.

30 Stephen Salsbury and Kay Sweeney, *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* (1988), p 19 (reference to "company mania"); P Lipton, "A History of Company Law in Colonial Australia" (2007) 31 *Melbourne University Law Review* 805 at 808-9.

31 *An Act to Make Good Certain contracts which have been and may be Entered into by Certain Banking or other Co-partnerships 4 Vict No 14.*

32 See Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805, 808.

33 *An Act for Further facilitating Proceedings by and against All Banking and Other Companies in the Colony Entitled to Sue and Be Sued in the name of Their Chairman Secretary or Other Officer Act 1842* (NSW).

34 *Companies (Process) Act 1848* (NSW). This resembled legislation enacted in the United Kingdom in 1826: see Baron N. Lindley, *A Treatise on the Law of Partnership: including its Application to Companies* (3rd ed, 1873), p 8.

35 (2006) 229 CLR 1 at [103] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36 *Companies Act* (NSW) 1874 (37 Vict No 19); *Companies Act* (Qld) 1863 (27 Vict No 4); *Companies Act* (SA) 1864 (27 & 28 Vict No 13); *Companies Act* (Tas) 1869 (33 Vict No 22); *Companies Act* (Vic) 1864 (27 Vict No 190). Western Australia did not adopt a consolidated Companies Act until 1893 (56 Vict No 8). However, it did have a *Joint Stock Companies Ordinance* (22 Vict No 6) which was based on the *Joint Stock Companies Act 1856* (UK).

37 25 & 26 Vic, c 89; Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31 *Melbourne University Law Review* 805, 810.

38 NSW Act (37 Vict c 19), s 17; Qld Act (27 Vict c 4), s 17; SA Act (27 & 28 Vict c 13), 17; Tas Act (33 Vict c 22), 18; Vic Act (s7 Vict c 190) s 16; WA Act (56 Vict c 8) ss 20-21. Companies become incorporated by registration and certification etc.

25. By the end of the 19th century, legislation had been passed in various colonies permitting some non-profit associations to be incorporated as limited liability corporations, such as universities, museums or zoological societies.[39]

26. Furthermore, the Convention Debates make it evident that the law regarding the incorporation of companies differed from colony to colony and that this was a factor in the drafting of provisions that would eventually become s 51(xx). In the Sydney debate in 1891, Mr Munro proposed that the corporations power should include "the registration or incorporation of companies." However, as noted by the majority in *Work Choices,*[40] Sir Samuel Griffith disagreed and stated:[41]

> There are a great number of different corporations. For instance, there are municipal, trading, and charitable corporations, and these are incorporated in different ways according to the law obtaining in the different states ... It is sometimes difficult to say what is a trading corporation. What is important, however, is that there should be a uniform law for the recognition of corporations. Some states may require an elaborate form, the payment of heavy fees, and certain guarantees ... while another state might not ... I think the states may be trusted to stipulate how they will incorporate companies, although we ought to have some general law in regard to their recognition.

27. Although the drafting of the corporations power subsequently changed, the role given to the States in creating corporations did not.

States can create new legal entities that are not corporations and confer corporate attributes on unincorporated bodies

28. In the eighteenth century, Blackstone identified the attributes of a corporation aggregate as a name; perpetual succession; a common seal; the ability to hold property in its corporate name; the ability to sue and be sued in that name; and the ability to make by-laws.[42] Grant, in the middle of the nineteenth century, referred to similar attributes in his treatise on the law of corporations.[43]

29. From the history outlined above, however, it is clear that in the nineteenth century British and colonial legislatures enacted legislation that conferred many of the attributes of a corporation on bodies without actually incorporating them. The *Trading Companies Act 1834* (UK) and the *Chartered Companies Act 1837* (UK) exemplify this. So does New South Wales legislation allowing banks and other companies to sue and be sued in

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39 *New South Wales v Commonwealth (Work Choices case)* (2006) 229 CLR 1 at [105]-[106] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

40 *New South Wales v Commonwealth (Work Choices case)* (2006) 229 CLR 1, 90-7 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

41 *Official Record of the Debates of the Australian Federal Convention* (Vol 1) (Sydney) 3 April 1891, p 685-6. In contrast, the framers of the Constitution considered that it was necessary to have a uniform system of incorporating banks as now evident in s 51(xiii).

42 Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1, ch 18, pp 471-2.

43 J Grant, *A Practical Treatise on the Law of Corporations in General as well Aggregate as Sole* (1850), pp 4-5.

the name of an officer of the company,[44] and allowing joint stock companies to sue their members and to be sued by them.[45] The conferral of such rights under New South Wales law did not mean that joint stock companies thereby became incorporated.[46] Any other conclusion is difficult to reconcile with the enactment of later legislation based on the *Companies Act 1862* (UK), which prohibited commercial ventures by unincorporated companies and associations with more than certain numbers of people.[47]

30. Besides these Acts, there were instances throughout the nineteenth century where the British Parliament put beyond doubt that various entities were not in fact corporations. The first Act considered in *Liverpool Insurance Company v Massachusetts*[48] demonstrates the point. That Act provided relevantly that the company could sue and be sued in the name of the chairman or deputy chairman of the board of directors, and the stockholders could sue the company as plaintiffs, or be used by it as defendants; but the Act was not to be construed to incorporate the company. In these respects, the Act operated like the *Trading Companies Act 1834* (UK) and the New South Wales legislation referred to in the previous paragraph. Although Miller J regarded the Liverpool Insurance Company as a corporation within the meaning of American law, Bradley J[49] correctly pointed out in his concurrence that the company was not so much a corporation as an example of a joint stock company, something that could not sue or be sued without legislative aid.[50]

31. The pre-federation history also demonstrates that control of whether an entity was or was not a corporation remained with the legislature. It stipulated the circumstances in which a body was incorporated and controlled the powers of the entities that it incorporated. Thus, the traditional attributes of corporations at common law, such as those automatically granted to chartered corporations before 1826, could be and were displaced by statute. In other cases, as with joint stock companies, the legislature gave many of the attributes of a corporation to an entity that remained unincorporated.

32. The Constitution did not alter that position; indeed, it reinforced it. By using the words "formed within the limits of the Commonwealth" to qualify "trading or financial corporations" in s 51(xx), the framers of the Constitution ensured that the States alone would have power over the creation of trading and financial corporations within

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44 *An Act for Further facilitating Proceedings by and against All Banking and Other Companies in the Colony Entitled to Sue and Be Sued in the name of Their Chairman Secretary or Other Officer Act 1842* (NSW).

45 *Companies (Process) Act 1848* (NSW).

46 At least one joint stock company, the Australian Gas Light Company, remained unincorporated until 2002 despite being granted extensive powers since it was established in 1836: see H.A.J. Ford, *Principles of Company Law* (5th ed, 1990) at [111], fn 22; *AGL Corporate Conversion Act 2002* (NSW), s 7.

47 For a summary of the colonial Acts based upon the 1862 Act, see *Work Choices* (2006) 229 CLR 1 at [103]-[104] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

48 77 US 566 at 569 (1870).

49 77 US 566 at 576 (1870).

50 For a later example that did not apply to companies, see s 37 of the *Contagious Diseases (Animals) Act 1878* (UK): 'A local authority, not being a body corporate, may sue and be used, and take and hold land and otherwise act and be dealt with, for all purposes of this Act, by the name or title of the local authority under this Act for their district, as if they were incorporated.'

Australia.[51] As Isaacs J observed in *Huddart Parker & Co Proprietary Ltd v Moorehead*:[52]

> The creation of corporations and their consequent investiture with powers and capacities was left entirely to the States. With these matters, as in the case of foreign corporations, the Commonwealth Parliament has nothing to do. It finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.

33. In the *Incorporation Case*, the majority quoted this passage with evident approval.[53]

34. The fact that the States have power over the creation of trading corporations implies that they can choose to create a given body as a corporation or something else. In other words, federation did not restrict the powers of the colonies to confer the attributes of corporations on unincorporated bodies or to create legal entities that were unknown to the common law.

35. In addition, the States have retained the power to create corporations that lack many of the attributes of corporations at common law. For example, it has sometimes been said that the ability to make by-laws is a necessary attribute of a corporation.[54] Likewise, the existence of corporators has sometimes been said to be essential to the concept of a "corporation aggregate".[55] The States, however, have expressly incorporated entities that did not provide for the making of by-laws and did not have corporators.[56] The capacity of the States to create such corporations is the obverse of its capacity to create entities that are not corporations and that are unknown to the common law.

36. These propositions are apparent from the authorities which establish that legislatures, including State legislatures, can create a legal entity that is not a corporation but which has many of its attributes. In *Taff Vale Railway Company v Amalgamated Society of Railway Servants* ('*Taff Vale*'), for example, Farwell J found that a registered trade union, although not a corporation, an individual or a partnership, could nonetheless be subject to an injunction. His Lordship stated:[57]

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary

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51 *New South Wales v The Commonwealth (Incorporation Case)* (1990) 169 CLR 482.
52 (1909) 8 CLR 330 at 394.
53 (1990) 169 CLR 482 at 500 (Mason CJ, Brennan, Dawson, Toohey, Gaudron, McHugh JJ).
54 *Chaff and Hay* (1947) 74 CLR 375 at 388 (Starke J) (quoting Grant's treatise from 1850); Sir William Blackstone, *Commentaries on the Laws of England* (1765-1979) Book 1, ch 18, p 475.
55 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 266 (Rich and Williams JJ).
56 See, for example, the Hydro-Electric Commission of Tasmania (considered in the *Commonwealth v Tasmania* (1983) 158 CLR 1) and Victoria's State Superannuation Board (considered in *Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282).
57 [1901] AC 426, 429.

> correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the courts according to the intention of the Legislature.

37. On appeal, the House of Lords agreed with Farwell J's judgment.[58]

38. In *General & Municipal Workers v Gillian*, two members of the Court of Appeal described registered trade unions as distinct legal entities that were not corporations. Lord Justice Scott stated:[59]

> There is a *tertium quid*. A trade union has many activities; it has some existence: and it is something. The omission of Parliament to christen it with some new generic name is immaterial; for Parliament has absolute sovereignty and can make new legal creatures if it likes. It is able, for instance, to create a *persona juridica* not previously known to law if it so chooses; or to clothe an existing association of natural persons with what I may call co-operative personality, so as to give it the status of a *persona juridica*. In my view, that is just what it did in 1871.

39. In the same vein, Lord Justice Uthwatt described a trade union as a 'near corporation'.[60]

40. In *Bonsor v Musicians' Union*, the House of Lords held that a registered union could be sued for breach of contract by a person whom it had wrongfully expelled. Three members of the House did so on the basis that the union remained an unincorporated body that had been granted many of the attributes of a corporation, including the capacity to sue and be sued in its registered name and to hold property.[61] The remaining two members of the House of Lords reasoned, however, that the union was an unincorporated body that was nonetheless capable of entering into contracts and being sued as a legal entity distinct from its members.[62]

41. *Chaff and Hay Acquisitions Committee v JA Hemphill and Sons Pty Ltd* ('*Chaff and Hay*')[63] also supports the proposition that State legislatures are competent to establish legal entities that are not corporations but share many of their attributes. The case concerned a Committee established by South Australian legislation. It consisted of four persons who were authorised, *inter alia*, to acquire certain property, hold the property in its collective name, dispose of the property and to sue and be sued in its collective name. The Act which established the Committee contained no express words of incorporation and the committee had no common seal, but it could own property, acquire rights and incur liabilities that were not liabilities of its members. The whole

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58 [1901] AC 426, 436 (Earl of Halsbury LC), 436 (Lord Macnaghten), 440 (Lord Shand), 441-442 (Lord Brampton); See also at 444 (Lord Lindley).
59 [1945] All ER 593, 603.
60 [1945] All ER 593, 604.
61 [1956] AC 104, 142-144 (Lord MacDermott), 149-152 (Lord Keith), 155, 158 (Lord Somervell).
62 [1956] AC 104, 127 (Lord Morton), 129-31 (Lord Porter).
63 (1947) 74 CLR 375.

Court held that the Committee was not a corporation as known in English law, although the majority held that it had a legal personality separate to the Committee members.[64]

42. In *Church of Scientology v Woodward*, Mason J described the proposition for which *Chaff and Hay* stands in these terms:[65]

> [T]he authorities suggest that it is possible to incorporate a statutory body by implication or to endow it *with an artificial legal personality falling short of incorporation*. This may be achieved by providing that it is to own property, employ its own staff, enter into transactions, sue and be sued in its collective or corporate name. In *Chaff and Hay Acquisition Committee v. J. A. Hemphill and Sons Pty. Ltd.* (1947) 74 CLR 375 this Court held that the Committee, which did not have perpetual succession or a common seal, was not incorporated, but was nevertheless a legal entity distinct from the natural persons who composed it.

43. In *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd*, moreover, Deane J applied that proposition to a tribunal constituted by Commonwealth and New South Wales legislation. Although the tribunal continued to exist after the tenure of any incumbent, it did not have corporate personality. As Deane J explained:[66]

> Neither Act, in terms or by implication, confers corporate personality upon the Tribunal. In my view however, both Acts recognize that the Tribunal, whether it be described as a tribunal or an office, has an existence that transcends the tenure of office of any incumbent. It is competent for the legislature to constitute or to authorize the constitution of an entity of a type unknown to the common law (see *Taff Vale Railway v. Amalgamated Society of Railway Servants* (1901) AC 426, at p 429; *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.* (1947) 74 CLR 375, at pp 384-386, 389, 391, 393). This the Acts have, in their concurrent operation, done in the case of the Tribunal. It is unnecessary to attempt to define with precision the nature of the statutory entity which has been established. It suffices to say that the Tribunal has a continuing existence and that it is the Tribunal itself which is the recipient of the powers which both Acts confer. Those powers will lie dormant if, at any time, there is no individual appointed either to constitute the Tribunal or to act as the person constituting the Tribunal during the absence, through illness or otherwise, of the person so appointed.

44. The authorities on incorporation by statute reinforce the views expressed in *Taff Vale* and *Chaff and Hay*. It is well established that whether a corporation is created by statute depends on legislative intention. If the legislature does not use express words of incorporation, such as those found in the *Companies Act 1862* (UK) or later equivalents, the courts will only consider that such a body has been created by necessary

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[64] *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 386 (Latham CJ), 390 (Starke J), 399 (Williams J); contrast 394 (McTiernan J); See also *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620, 664 (Toohey, McHugh and Gummow JJ).

[65] (1982) 154 CLR 25, 56 (emphasis added).

[66] (1983) 158 CLR 535, 587.

implication.[67] That will not, however, occur if the body can discharge its powers and functions without being incorporated. As Lindley LJ observed in *Salford Corp v Lancashire County Council*:[68]

> If you find that a body not incorporated can discharge all its duties and exercise all its rights without treating it as an incorporated body, you have no right to treat it as incorporated.

45. Consistent with these observations, in *Mackenzie-Kennedy v Air Council*, Atkin LJ expressed the view that the Air Council, a body that by Order in Council had a corporate name, perpetual succession and a right to sue and be sued in the corporate name, was not a corporation. His Lordship explained:[69]

> If it had been intended to incorporate the Air Council one would have expected the well-known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.
>
> In these circumstances I am unable as at present advised to find in the words of the Legislature 'the manifest intention to incorporate' which Littledale J. in [*Tone River Conservators v Ash*] rightly thought essential.

46. Furthermore, in *Williams v Coulthard*,[70] Reed J considered the status of an institute which had been created pursuant to the *Libraries and Institutes Act 1939* (SA). That legislation specifically stated that no institute shall be capable of becoming incorporated. Applying *Chaff and Hay*, Reed J held that the institute was not incorporated but nevertheless should be regarded as a statutory person, because its trustees had many of the attributes of legal personality, such as perpetual succession as trustees, ownership of property as trustees, the ability to sue and be sued as trustees, and freedom from personal liability such that a judgment against them as trustees could only be enforced against the institutes' property.[71]

47. Accordingly, history and authority, together with the text of s 51(xx), suggest that State legislatures can determine whether and in what circumstances corporations are created. They are free to confer the attributes of corporations on unincorporated bodies and to create legal entities that, despite having a separate legal personality, are not corporations. None of these propositions is reconcilable with the Plaintiffs' argument.

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67 *Tone River Conservators v Ash* (1829) 10 B & C 349, 384 (Littledale J), 391 (Parke J); 109 ER 479, 492-3 (Littledale J), 495 (Parke J).

68 (1890) 25 QBD 384, 389; see also at 390.

69 *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517, 534 (Atkin LJ). See also *Bonsor v Musicians' Union* [1956] AC 104 at 144 (Lord MacDermott).

70 [1948] SASR 183, 191.

71 Also see *Re International Tin Council* [1989] 1 Ch 309.

Particular response to Plaintiffs' submissions

48. The Plaintiff's arguments for the contrary view depend on several claims that should not be accepted.

49. First, contrary to the Plaintiff's claim,[72] nothing in the Convention Debates suggests that the use of the word "corporation" as opposed to "companies" entailed a "broad notion" of the former. At the Convention Debates in Adelaide in 1897, in relation to the framing of the corporations power, the following exchange took place between Mr Deakin and Mr McMillan:[73]

> Mr Deakin: We want to include all limited companies because the class of companies I am speaking of [financial companies] deal with lands and with deposits, and they require to be carefully regulated.
> Mr McMillan: You want to include everything outside private companies.
> Mr Deakin: Especially land and finance companies which caused so much litigation in the past.

50. Mr Barton then expressly distinguished between "corporations" and "companies" in this way:[74]

> Mr. Barton: The reason of making the difference was this: It having been seen that the word 'corporations,' as it existed, covered municipal corporations, the term was changed to 'trade corporations'.
> Mr Symon: Why not simply use the term 'company'? If you use that word it will be well enough understood.
> Mr Barton: Why not adhere to 'corporation'? That governs everything under the Companies Act.
> ...
> Mr Barton: Would it not be better to make it thus: Any trading or financial corporation. So as to separate that branch from foreign corporations.

51. To the extent that the Debates shed light on the meaning of the term "trading corporation", they suggest that the framers were referring to a corporation as defined from time to time under the State Companies laws, not the broader and more amorphous notion of anything with a separate legal personality.

52. Secondly, it is mistaken to claim that if QR's submissions were accepted there would be an unwarranted "disconformity" between the power with respect to "foreign corporations" and the trading and financial corporations formed within the limits of the Commonwealth.[75] The recognition of "foreign corporations" in Australia raises issues

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[72] Plaintiff's submissions at [22].

[73] *Official Record of the Debates of the Australian Federal Convention* (Vol 3) (Adelaide) 17 April 1897, p 793.

[74] *Official Record of the Debates of the Australian Federal Convention* (Vol 3) (Adelaide) 17 April 1897, pp 793-4.

[75] Plaintiffs' submission at [28]-[38]; See also the Commonwealth's submissions at [14]-[15].

of comity between nations[76] that do not apply in the case of local trading and financial corporations operating within the same legal system. The learning also reflects a necessarily pragmatic approach to the recognition of foreign corporations. If it were otherwise, foreign corporations would fall outside the purview of domestic regulation unless there was an exact correlation between the law of incorporation in each state, leading to capricious results. Rather, what may be discerned is a recognition as a corporation of an artificial legal person which conforms with the requirements of incorporation in the domestic jurisdiction or analogous, although not necessarily identical, provisions in the foreign jurisdiction. In any event, this Court is yet to decide what the term "foreign corporations" in s 51(xx) means. In particular, it is unclear whether the broad view of its meaning posited by Murphy J in *R v Federal Court of Australia; Ex parte WA National Football League*[77] (that "foreign corporations may include syndicates or joint ventures") is correct.

53. Thirdly, contrary to the submissions of the Plaintiff[78] and the Commonwealth,[79] the cited authorities dealing with the purported use of legislative "labels" in the context of other heads of Commonwealth legislative power do not provide a useful analogy. That is because s 51(xx) of the Constitution leaves the role of creating corporations to the States; and in order for a separate legal entity created by State legislation to be a corporation, the legislation must manifest such an intention, either by express words or necessary implication. In contrast, "aliens" are not artificial legal entities created by legislation (Commonwealth or State) but natural persons with an existence in the real world independent of statute.

54. The authorities dealing with excise duties are also irrelevant, given that (i) s 90 of the Constitution confers *exclusive* legislative power on the Commonwealth with respect to such duties; (ii) in making the Commonwealth's power under s 90 exclusive, "it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action";[80] and (iii) s 90 was intended to have the effect of withdrawing from the States the power they formerly had as colonies to exact duties of excise.[81]

55. It is wrong, therefore, to characterise an express statement of legislative intent that a separate legal entity created by State legislation is or is not to have the status of a corporation as an impermissible descriptor or "label" which can be ignored by adopting an "in substance" approach to determining whether the entity is a "corporation" for the purposes of s 51(xx).

56. Fourthly, contrary to the submissions of the Plaintiff and the Commonwealth, the decision in *Liverpool Insurance Company v Massachusetts* is based on an incorrect analysis of the character of the company. As outlined in paragraph 30 above, the correct

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[76] *Chaff and Hay* (1947) 74 CLR 375, 385 (Latham CJ), 387 (Starke J), 390 (McTiernan J); *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, 161-2.
[77] (1979) 143 CLR 190, 238-9, quoted in the Plaintiff's submissions at [29].
[78] Plaintiffs' submissions at [12]-[13], [32].
[79] Commonwealth's submissions at [62].
[80] *Parton v Milk Board (Vic)* (1949) 80 CLR 229, 260; *Ha v New South Wales* (1997) 189 CLR 465, 495.
[81] *Ha v New South Wales* (1997) 189 CLR 465, 494.

analysis is that contained in Bradley J's concurrence. It is the only one that accords with the historical treatment of joint stock companies, including legislative amendments giving them the power to sue and be sued. Far from demonstrating the importance of determining whether there is a corporation "in substance", notwithstanding what the legislation governing it says, the decision demonstrates the dangers of such an approach.[82]

57. Fifthly, the Plaintiffs' reference to *Haggin v Comptoir d'Escompte de Paris*[83] does not assist them. The court there found that an entity which was a corporation (a point not disputed) registered and operating in Paris, with an office and base in England, could be served pursuant to process rules under English law at its office in England. Further, the Plaintiffs quote from that case[84]is taken out of that context and its significance is overstated. The court was merely considering whether service on the English office of the French corporation would satisfy the rules of service under English law.

58. The same can be said of *Von Hellfeld v E. Rechnitzer.*[85] That case was specifically about the application of procedural rules in relation to service as they applied to the defendant. The case does not assist this in determining the ambit of s 51(xx).

59. Sixthly, the reference to the "incorporation" of banks in s 51(xiii) of the Constitution does not shed light on the meaning of "trading or financial corporations" in s 51(xx). The Plaintiffs point out that banks have long had a distinct and high degree of regulation beyond that applying to other corporations.[86] That fact, however, says nothing about whether States can create entities that have a separate legal personality but that are not corporations.

60. Seventhly, *Williams v Hursey* is distinguishable. The issue in that case was whether a registered union was a body corporate or another legal person capable of being sued. The answer depended on the effect of s 136 of the *Conciliation and Arbitration Act 1904* (Cth). Justice Fullagar (with whom Dixon CJ and Kitto J agreed) found that the union was a corporation because s 136 provided that every registered organisation was to have perpetual succession, a common seal and the right to own, possess and deal with property.[87] That finding is explicable on the basis of the evident legislative intention.[88] In any event, his Honour did not consider the proposition for which *Chaff v Hay* stands. It is therefore difficult to draw conclusions about Fullagar J's reasons and what they might mean for the concept of a corporation in s 51(xx).

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[82] Plaintiffs' submissions at [31]-[32]; see also Commonwealth's submissions at [63]. Furthermore, consistent with the notion that a separate legal entity created under State law can only be a trading or financial "corporation" if the State legislation manifests an intention that it be incorporated, were the issue to arise for determination today, this Court should hold that the *Liverpool & London Life & Fire Insurance Company* is not a foreign corporation for the purposes of s 51(xx) of the Constitution.

[83] (1889) 23 QBD 519.

[84] Plaintiffs' submissions at [35].

[85] Plaintiffs' submissions at [36].

[86] Plaintiffs' submissions at [26].

[87] (1959) 103 CLR 30, 52.

[88] There was, for example, no provision declaring that the registered union was not a body corporate.

61. Finally, the claim that the "essential characteristics"[89] of a corporation in s 51(xx) distil to a separate legal personality would give the power an operation unlikely to have been intended. If the claim were true, there would be a serious question whether s 51(xx) applied to bodies politic. Although the Commonwealth and the States may be said to differ from corporations because the Constitution treats them as constituent aspects of federation,[90] the same cannot be said of the Australian Capital Territory and the Northern Territory.[91] Nor can it be said of many foreign bodies politic. They are artificial persons with particular powers and perpetual succession, but they are not mentioned in the Constitution. It is very doubtful whether they were ever contemplated by the framers as falling within s 51(xx).[92] Yet if the Plaintiff is correct, there is no obvious textual basis on which those entities can be excluded from the reach of the power.[93] That suggests that the construction of the term "corporation" advocated by the Plaintiff, and supported by the Attorney-General of the Commonwealth, is too wide.

62. For the reasons above, a corporation within s 51(xx) is a body created as such under State legislation.

First Defendant is not a corporation

63. As outlined above,[94] the legal status of a statutory body must be determined by reference to the manifest intention of Parliament. The QRTA Act evinces a manifest intention that QR is intended to be a statutory body that is not a body corporate.

64. First, nothing in the QRTA Act expressly provides that QR is to be incorporated. The QRTA Act therefore contrasts with provisions of the earlier companies Acts and with s 119 of the *Corporations Act 2001* (Cth), which provides:

> A company comes into existence as a body corporate at the beginning of the day on which it is registered.

65. Secondly, there is no necessary implication that the QRTA Act forms a body corporate. Subsection 6(2) is important in this regard. It declares that QR is not a body corporate, and it does so immediately after s 6(1), which establishes QR. By reason of s 6(2), it is difficult to see how the QRTA Act, as a matter of necessary implication, intended to form a corporation. It can exercise its express powers and functions, including the powers to contract and to sue and be sued in its name, without needing to be one. The

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89 Plaintiff's submissions at [41]; See also Commonwealth's submissions at [35]-[36].

90 Commonwealth's submissions at [16] (referring to *Williams v Commonwealth (No.1)* (2012) 248 CLR 156, 237 [154] (Gummow and Bell JJ)). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

91 These are bodies politic under the Crown established by s 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and s 5 of the *Northern Territory (Self-Government) Act 1978* (Cth) respectively.

92 The same can be said of entities like the Coal Industry Tribunal considered in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535.

93 Even if this difficulty could be overcome, it is not apparent why the class of entities with a separate legal personality should be restricted to two: corporations and bodies politic.

94 Paras 22 to 24.

situation is like that in *Williams v Coulthard*,[95] where the presence of a section providing that an institute was not to be incorporated helped to establish that it was not a corporation, notwithstanding that the trustees of the institute had perpetual succession, ownership of property as trustees, and the ability to sue and be sued as trustees.[96]

66. Thirdly, and relatedly, QR lacks attributes that have typically belonged to corporations. It does not have corporators, although at common law their existence has sometimes been described as essential.[97] Nor does it have a common seal or the ability to make by-laws, both of which have been described as attributes of a corporation.[98] The absence of such attributes, coupled with the absence of any express statement of incorporation[99] and the presence of s 6(2) of the QRTA Act, underscores the intention not to incorporate QR.

67. Accordingly, QR is not a corporation to which s 51(xx) applies.

First Defendant is not a "trading corporation"

68. Even if QR were a corporation, it would not be a trading corporation under s 51(xx). Except where a corporation is dormant or has barely begun to trade, the activities test must be applied, and it focuses not on the purpose for which a corporation has been created but on what it does.[100] The activity that QR undertakes, which is its principal source of revenue,[101] involves the provision of employees to QR Ltd under the Managed Services Agreement. Those employees are provided to enable QR Ltd to carry out its functions of managing, operating and maintaining rail services and infrastructure.[102] The amount charged by QR is limited, in effect, to cost recovery.[103] No element of profit is involved,[104] and the parties are not at arms' length. On the contrary, the Board of QR is the same as the Board of QR Ltd.[105]

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95 [1948] SASR 183, 191.

96 The Plaintiffs' reliance on s 6(3) of the QRTA Act is misplaced. That provision does no more than put it beyond doubt that QR does not have the immunities and privileges that might otherwise attach to it through its association with the State: compare *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [39]-[40] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [64] (Heydon J).

97 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 266 (Rich and Williams JJ). See also *Work Choices* (2006) 229 CLR 1 at [97] (describing a "corporation" as a "juristic person distinct from its corporators").

98 *Chaff and Hay* (1947) 74 CLR 375, 388 (Starke J). See also Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1, ch 18, pp 471-472; J Grant, *A Practical Treatise on the Law of Corporations in General as well Aggregate as Sole* (1850), pp 4-5.

99 By contrast, the Hydro-Electric Commission of Tasmania was expressly incorporated.

100 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 ('***Adamson's Case***'), 208 (Barwick CJ), 233 (Mason J), 237 (Jacobs J), 239 (Murphy J); *Fencott v Muller* (1983) 152 CLR 570, 602 (Mason, Murphy, Brennan and Deane JJ).

101 Special Case [70], SCB Vol 1 at 67.

102 Special Case [63] and [64], SCB Vol 1 at 65; .

103 See Plaintiffs' submissions at [66](d) (pointing out that QR does not incur any net expense) and Special Case [67]-[69], SCB Vol 1 at 66-7 (describing the relevant parts of the Managed Services Agreement).

104 Contrast the Plaintiffs' submissions at [68]. Those submissions, however, overlook the fact that the financial year covers QR and QR Ltd: SCB, Vol 2 at 634-5.

105 Special Case [42], SCB Vol 1 at 59.

69. While profit is not a prerequisite to trade, it is a relevant factor in determining whether a corporation is trading, as the Plaintiffs admit.[106] Given the peculiar arrangements between QR and QR Ltd, it is submitted that QR is not a trading corporation within s 51(xx).

Section 109 inconsistency

70. Because QR is not a trading corporation within s 51(xx), it is not a "national system employer". The FW Act therefore does not apply to it.

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71. If QR is found to be a national system employer, however, it accepts that consequences follow.[107]

PART V: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

72. QR estimates that 3 hours should be sufficient to present its oral argument.

20 Dated: 17 September 2014.

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[106] *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 539 (Barwick CJ), 563 (Gibbs J).

[107] Special Case [80], SCB Vol 1 at 69.

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