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

PLAINTIFFS' SUBMISSIONS - ANNOTATED

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PART I: INTERNET CERTIFICATION

1. The plaintiffs certify certifies that these submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. The questions that arise in the proceedings are those set out in the questions stated in [98] of the Special Case. The answers to those questions suggested by the Plaintiffs are set out at Part VIII of these submissions, below. At the heart of the case are two issues:

    i. Is Queensland Rail (**QR**) a "corporation" within the meaning of s.51(xx) of the Constitution, despite s.6(2) of the *Queensland Rail Transit Authority Act 2013* (QLD) (the **Act**)? The plaintiffs submit that it is; it possesses all the essential characteristics of being such a corporation.

    ii. Is QR a *trading* corporation within the meaning of s.51(xx) of the Constitution? The plaintiffs submit that it is; the statutory characteristics of QR indicate that it has been established to carry on a commercial enterprise, its trading activities are significant and substantial, and those trading activities are an integral part of its operations.

3. On this basis, the plaintiffs submit that the *Fair Work Act 2009* (Cth) (**FW Act**) applies to QR and its employees by the operation of s.109 of the Constitution, to the exclusion of both the Act and the *Industrial Relations Act 1999* (Qld) (**IR Act**).

PART III: S 78B NOTICES

4. The plaintiffs have served notices under s.78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENTS BELOW

5. This matter is brought in this Court's original jurisdiction pursuant to s.76(i) and (ii) of the Constitution.

PART V: FACTS

6. The relevant facts are set out at [2]-[97] of the Special Case. In brief, the context in which the current dispute arises is as follows. Prior to enactment and implementation of the Act, Queensland Rail Ltd (**QR Ltd**) was a government corporation regulated by the *Government Owned Corporations Act 1993* (Qld).[1] It operated Queensland passenger rail services, along with the Queensland rail track network.[2] Industrial instruments binding QR Ltd were made under the FW Act and its predecessor legislation – presumptively on the basis that it was accepted to be a constitutional corporation. Various of the plaintiffs were parties to two industrial instruments with QR Ltd – the QR Limited Traincrew Collective Workplace Agreement (**Traincrew Agreement**), made in 2009 under the *Workplace*

[1] Special Case [14], Special Case Book (**SCB**) Vol 1 at p.52.
[2] Special Case [25]-[36], SCB Vol 1 at pp.55-58.

Relations Act 1996 (Cth), and the Queensland Rail Rollingstock Agreement made in 2011 under the FW Act (**Rollingstock Agreement**).[3]

7. With the enactment of the Act, and the separate creation of QR, all employees of QR Ltd (the shares in which are wholly owned by QR – Act, s.67) were transferred to QR (Act, s.71). The actual operation of the passenger rail services and the rail track network remained with QR Ltd.[4] The work of QR Ltd continued to be supplied by the same employees, but they are now employed by QR, which charges QR Ltd for provision of these labour services.[5] The provision of employees to QR Ltd has been and is QR's principal revenue-generating activity.[6] The federal industrial instruments are deemed by the Act to be State certified agreements, and the Act provides for the State Industrial Relations Commission to regulate the industrial affairs of QR (see ss.69-77).

8. The ultimate dispute between the parties is whether the FW Act applies to QR. QR has conducted itself on the basis that it does not.[7] The plaintiffs' position is that QR is bound by the FW Act. If QR is a trading corporation within the meaning of s.51(xx) of the Constitution, such that QR is subject to the operation of the FW Act,[8] the provisions of the Act effecting these changes are invalid pursuant to s.109 of the Constitution.

PART VI: ARGUMENT

QR IS A CORPORATION

9. Section 6(1) of the Act established the Queensland Rail Transit Authority. By s.63 of the Act, the Authority's name was changed to Queensland Rail 30 days after 3 May 2013 (see also s.64). Section 6(2) of the Act states that QR is not a body corporate.

10. However, *inter alia*, QR:

    (a) Has all the powers of an individual including, for example, entering into contracts, holding property and employing staff (s.7(1));

    (b) May sue and be sued in its own name (s.7(4));

    (c) Has, presumptively, its own distinct legal personality and identity (s.64(1));

    (d) Has, presumptively, its own seal (s.8(2));

    (e) Does not represent the State (s.6(3));

    (f) Has a range of functions allocated to it (s.9), which may be exercised outside Queensland (s.11);

    (g) May have "subsidiaries" (ss.9(2), 59(1) and 61);

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[3] See Special Case [15]-[16], SCB Vol 1 at p.53; the agreements are at SCB Vol.1 pp.77 and 183.
[4] Note eg see Act, s.100; Special Case [40], SCB Vol.1 at p.58.
[5] Special Case [54]-[70], SCB Vol 1 at p.62-67.
[6] Special Case [70], SCB Vol 1 at p.67.
[7] Special Case [82]-[97], SCB Vol 1 at pp.70-74.
[8] Section 26 of the FW Act provides that that Act applies to the exclusion of all State or Territory industrial laws so far as they would otherwise apply to a "national system employer" or employee. Section 14(1)(a) provides that a "national system employer" includes a "constitutional corporation, so far as it employs, or usually employs, an individual" (see also s.13 re employees). Section 12 provides that "**constitutional corporation** means a corporation to which paragraph 51(xx) of the Constitution applies".

(h) Owns all the shares in QR Ltd, which is no longer treated as a government owned corporation (ss.67-68);

(i) Is recognised as being capable of being "the ultimate holding company" of other State government entities (s.66);

(j) Must carry out its functions (other than any "community service obligation") as a "commercial enterprise" (s.10);

(k) Must have a board, which is responsible for the way in which QR performs its functions, but QR "is not constituted by the members of the board" (ss.14-16);

(l) Must have senior executives, including, a CEO (s.29; also, s.35);

(m) Things done in the name of or for QR by the CEO are taken to have been done by QR (s.34);

(n) May pay dividends and is subject to and must comply with ministerial directions, including directions about the payment of dividends (ss.12 and 55-56, 59 and 79), although the amount of any dividends must not exceed what would be allowable to be paid by a company under Part 2H.5 of the *Corporations Act 2001* (Cth);

(o) May be (along with its subsidiaries) subject to a duty to pay amounts equivalent to federal tax into the consolidated fund of the State (s.62);

(p) Has two "responsible Ministers" allocated various powers under the Act, being the Treasurer and the Minister administering the Act (see Dictionary re "responsible Ministers", and eg s.16(1) re appointment of the board), where a direction given by the responsible Ministers under the Act is provided to be an excluded matter in relation to Chapter 2D of the *Corporations Act* (s.87).

11. Section 6(2) of the Act states simply "The authority is not a body corporate". This provision does not appear to create or regulate rights, duties, obligations or norms. Its legal operation seems to be directed to seeking to remove QR – the main business of which is providing employees for the use of QR Ltd – from the scope of s.51(xx) and, thus, from the operation of the FW Act (amongst other federal Acts).

12. Whether or not QR is a "corporation" within the meaning of s.51(xx) of the Constitution raises a constitutional question. The Queensland Parliament cannot determine that question by its own ipse dixit: cf *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, at 222 per Williams J and at 258 per Fullagar J; *Singh v The Commonwealth* (2004) 222 CLR 322, at [151]-[153] per Gummow, Hayne and Heydon JJ; and note Walsh J in *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 37.

13. The answer to that question depends on whether or not this Court determines that QR possesses such characteristics as to bring it within the meaning of that constitutional concept. That raises, first, the question of what the essential characteristics (or "connotation") of that concept are. Then it raises the question of the true character of QR, a question which falls to be resolved by reference to what the Act does (relevantly, the nature of the entity created by the Act), considered as a whole: see eg *Bank of NSW v The Commonwealth (Bank Nationalization Case)* (1948) 76 CLR 1, at 185-187 per Latham CJ; *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263, at 299 per Dixon J;

Singh, at [37]-[38], per McHugh J, and [153] per Gummow, Hayne and Heydon JJ; *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at [16].

14. Ascertaining the meaning of the word "corporation" must begin with the constitutional text and context. Section 51(xx) grants the Commonwealth Parliament power to legislate with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". The types of corporations it may regulate cannot be divorced from the task of identifying what "corporations" are. That has particular significant in relation to foreign corporations. Further, s.51(xiii) authorises the Parliament to legislate for "the incorporation of banks".

15. It must also be recalled that it "is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances": *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J; see also *Singh* at [53], per McHugh J and [159] per Gummow, Hayne and Heydon JJ; *Commonwealth v ACT* (2013) 304 ALR 204 at [15]-[38]. The constitutional text is to be construed "with all the generality which the words used admit": *R v Public Vehicles Licensing Appeal Tribunal* (1964) 113 CLR 207 at 225; *Grain Pool* at [16].

16. In identifying the essential characteristics of a s.51(xx) corporation, it is useful to begin with reference to historical matters.

History

17. At common law, persons were categorised as either natural or corporate: *Coke upon Littleton*, 18th ed. (1823), 250a. Historically, corporations have existed by prescription, by an Act of Parliament, by charter or by implication: Grant, *Practical Treatise on the law of corporations in general as well aggregate as sole* (1854) (**Grant**), p.18. According to Grant, a body is a corporation by implication "when, being constituted by any legal means, it is found that the purpose intended cannot be carried into effect without attributing the corporate character to such body": at p.19, footnote (b), citing *Conservators of the River Tone v Ash* (1829) 10 B & C 349; 109 ER 479.

18. Historically, corporations have been said to be comprised of two main types: corporations sole and corporations aggregate: *Halsbury's Laws of England*, 4th ed. (1979) vol 9, at [1201]-[1202]; see also *WorkCover NSW v Police Service of NSW* (2000) 50 NSWLR 333, at [15]-[25] per Hungerford J, and the authorities cited therein.

19. A corporation sole is a body politic having perpetual succession and constituted in a series of single persons succeeding each other in an official position of function, such as the sovereign or a bishop: *Halsbury's Laws of England*, 4th ed. (1979) vol 9, at [1206]-[1207]; Carr *The General Principles of the Law of Corporations* (1905) (**Carr**), p 14.

20. A corporation aggregate comprises a collection of individuals united into one body having perpetual succession and, as an individual body, vested by "the policy of the law with the capacity of acting in several aspects as an individual, particularly of taking property, of contracting obligations and of suing and being sued....": *Halsbury's Laws of England*, 4th ed. (1979) vol 9, at [1204]. Unlike a corporations sole which has two capacities (corporate and natural), a corporation aggregate has only one capacity, namely, its corporate capacity.

21. Relevant 19th Century developments relating to regulation of companies and corporations are summarised in *NSW v Commonwealth* (2006) 229 CLR 1 ***(Work Choices)*** at [96]-

[124]. As the majority noted there at [97], "[t]he word 'company' was used in the nineteenth century to refer to a group of individuals associated together for a particular purpose or purposes. The word 'corporation' was used to describe a juristic person distinct from its corporators". Prior to Federation there had been specific colonial legislation incorporating certain not-for-profit ventures, as opposed to being incorporated under general companies legislation: ibid at [104]; note also the statements of Barwick CJ (at 538) and Gibbs J (at 561) in *Queen v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (***St George County Council***).

22. The 1897 constitutional debates in Adelaide reveal that the use of the term "corporations" in s.51(xx) as opposed to "companies" was deliberate. Sir Edmond Barton saw the latter as a subset of the former: *Official Report of the National Australasian Convention Debates*, Adelaide (17 April 1897), pp 793-794. That suggests a broad notion was intended, whilst acknowledging the difficulty and limited utility of trying to divine the framers' intentions in this regard: note *Work Choices* at [119]-[120]. However, it is important to note that "corporations law was still developing in the last decade of the nineteenth century": ibid at [121]. An analogy may be drawn with the status of marriage in that regard: note *Commonwealth v ACT* at [16]-[23].

23. Notably, the decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22 confirmed and illustrated that companies under the general companies legislation had distinct legal personality from their members and incorporators, with limited liability thereof. That decision played a significant role in the growth in the use and significance of the corporate form for businesses: *Work Choices* at [122]. That fact illustrates that it is that separate legal existence which is critical to the practical significance of being incorporated.

24. The commentary in Quick and Garran suggests that s.51(xx) extends beyond a company formed under a statute of incorporation, and supports the view that a corporation within s.51(xx) simply means an entity which possesses the fundamental characteristics of a corporation in the sense of having a separate and distinct legal existence, however formed (*The Annotated Constitution of the Australian Commonwealth* (1901), at pp.578 and 604):

> [182] An Act of Incorporation is an Act creating an artificial or fictitious person, the peculiarity of which is that it has a legal existence separate and distinct from the individual units of which it is composed. Its members may change, but the corporate entity remains; it has perpetual succession and it never dies, unless its dissolution or winding-up is brought about by operation of law. ...
>
> [195] ... A corporation, according to the law of England, cannot be created except by royal charter, letters-patent, or Act of Parliament. Once duly constituted it is an artificial person, having the incidents of unity and perpetuity, capable of suing and being sued, holding property, performing acts, and having a domicile. Its domicile is its principal place of business, where the administrative work of the corporation is carried on. (Dicey, Conflict of Laws, 154.)

The types of corporations capable of regulation

25. Section 51(xx) authorises the regulation of trading or financial corporations, encompassing corporations engaging to a not insignificant extent in trading or financial activities (see further discussion below). That power of regulation is broad: see *Work Choices* at [178]. The provision was suggested in something like its current form after the financial scandals of the Victorian land boom: ibid at [114]. That is suggestive of a broad power to regulate artificial legal entities engaged in trading or financial activities.

26. Further, it is relevant that s.51(xiii) authorises the Commonwealth to make laws with respect to the "incorporation" of banks. Such banks, when incorporated, are corporations. Banks have long had a distinct and high degree of regulation, beyond that applying to other corporations. The power would extend to, for example, being subject to particular levels of governmental direction with respect to capital requirements, board membership, and other constitutive aspects of the entities. That indicates that no simple assumption can be made that corporations necessarily have a high degree of independence from regulatory direction and control.

27. A similar point may be made with respect to trade unions. When registered under statute, unions have been recognised as potentially acquiring distinct legal status as incorporated bodies: *Williams v Hursey* (1959) 103 CLR 30 at 52; *Re McJannet; Ex Parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620 at 635-6, 641 and 659-664. That may be so even though the word "corporation" is not used in the statute: *Re McJannet* at 664. Registered trade unions in Australia have long been subject to myriad, detailed requirements as to what they may do, how their officers are to be elected, and so forth. Such detailed constitutive requirements are quite distinct from those applied to companies under general companies legislation.

28. As for foreign corporations, the reference to these in s.51(xx) necessarily encompasses legal entities created outside the Australian legal system. Consistent with constitutional principle, no narrow view should be taken of what types of foreign entities may be encompassed by the power. This term must include entities formed under foreign law which have the characteristics of corporations, but not the label "body corporate" or "corporation": see, generally, the discussion in *Chaff and Hay Acquisitions Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 385 per Latham CJ, 387-389 per Starke J and 395-397 per Williams J. Indeed, even within Australian law the characteristics of being a corporation have altered significantly over the course of the last century – eg the abolition of the ultra vires doctrine, the introduction of single member companies, and the abolition of certain capital requirements: note *Work Choices* at [122].

29. Murphy J stated in *R v Judges of Federal Court of Australia & Adamson; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190 (***Adamson***) at 238-239, that:

> 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 Europe and other legal systems whose law or 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 and liabilities which are distinct from those of its members (if it has any members) ...

30. In that context, to focus on labels, rather than the substance, would potentially give rise to a disconformity between the ambit of legislative power with respect to locally formed "corporations" and the ambit of legislative power with respect to foreign "corporations". That is to be avoided: see *Work Choices* at [168]-[172]. The "character of a foreign corporation is fixed by its status, not by its activities": ibid at [170]. That status is being an artificial legal entity with distinct legal personality.

31. The decision in *Liverpool and London Life and Fire Insurance Co. v. Massachusetts*, 77 US 566 (1870), illustrates such matters in an American context (that case is quoted by Starke J in *Chaff and Hay Acquisitions* at 388-9). In that case the Supreme Court was concerned with an English joint stock company which, by its Deed of Settlement and various Acts of the Imperial Parliament, was equipped with the characteristics of a

corporation; see esp. at 573-574. However, various Acts of the Parliament expressly declared that the Deed and other Acts which provided for the regulation of the Liverpool & London Life & Fire Insurance Company should not be so construed as to constitute a corporation. Miller J, for the Court, said that this was not determinative (at 576):

> But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character whenever that may come in issue.

32. A parallel point may be made here. State Parliaments are no doubt equipped to create new creatures not previously known to the law: note *Re McJannet* at 664; *National Union of General and Municipal Workers v Gillan* [1945] 2 All ER 593, at 603 per Scott LJ. However, if a entity created by statute is in substance a corporation, the State cannot remove State entities from the reach of s.51(xx) merely by using a different label.

33. There are English authorities dealing with the question whether a foreign entity may be a party to proceedings in the English courts which provide a useful illustration of the range of foreign entities that, as a matter of substance, would potentially be corporations and, in turn within the reach of s.51(xx), but which might not otherwise be if the ambit of that legislative heard of power was defined by mere labels. In *Sarrio SA v Kuwait Investment Authority* [1997] CLC 280,[9] a question arose as to whether proceedings were validly served on the defendant (**KIA**) in England. In resolving that question, the Court was required to decide whether the KIA was a "body corporate" for the purposes of the rules of court: at 292. The KIA was a public authority established by decree under the Constitution of Kuwait and, as such, had legal identity and could sue and be sued. Its employees were civil servants of the Kuwaiti government. At 293, Evans LJ further described the KIA, as follows:

> ... it holds no assets and manages no business for its own account; the assets and business are the state's. It is funded by an allocation of a budget by the state which forms part of the state budget; and its budget and accounts are subject to the control of the National Assembly. Its 'board of directors' includes the Minister of Finance, the Minister of Oil, the Under-Secretary at the Ministry of Finance and the Governor of the Central Bank.

34. Evans LJ held that the KIA (and "KIO", being the name of the KIA's London-based branch) was a "body corporate" for the purposes of the rules of court. His Lordship stated at 294 that the "defendants have a separate legal personality ... it would be artificial and unreal to hold that they do not come within the meaning of 'body corporate' in O. 65, r. 3(1). That is precisely what the legal entity is: a person in legal fiction comprising the activities of a group of individuals who carry on its affairs...". In reaching this conclusion, his Lordship referred to longstanding English authorities which recognised the "difference in nomenclatures, between a 'corporation' or company under English law and other groups or bodies given legal personality under a foreign law". These included *Haggin v Comptoir d'Escompte de Paris* (1889) 23 QBD 519 and *Von Hellfeld v E Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748.

35. In *Haggin*, a question arose as to whether an entity incorporated under French law was a "body corporate". At 521-522, per Cotton LJ stated:

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[9] The Court of Appeal's judgment was ultimately overturned by the House of Lords on different grounds; these aspects of the Court's judgment were not disturbed on appeal: *Sarrio SA v Kuwait Investment Authority* [1997] 4 All ER 929.

> It was said, and no doubt it is true, that "corporation aggregate" is a term of English law, but if we find a foreign corporation which comes within the description, I think the mere use of a technical expression as a term of art will not prevent such a corporation from coming within the rule.

36. In *Von Hellfeld,* an issue arose as to whether a French entity, known as a "societe en nom collectif", was a corporation that could be amenable to suit in England. The evidence of French law established that the societe en nom collectif was a legal person for the purpose of service but was not a totally separate legal entity from the individual partners. At 754-755, Phillimore LJ stated that:

> ... [the expert evidence of French law is] not enough to shew..... that a societe en nom collectif is like a corporation in this respect, not merely that it has a separate persona, but that it has a separate ownership of property and separate liability from the ownership or liability by or of the persons composing the aggregation. ...but this is on the face of it apparently a partnership ...[10]

37. Aside from providing a useful illustration of the range of foreign entities that potentially fall within s.51(xx), these English authorities reinforce the point that the issue is one of substance, not labels.

38. Other types of foreign "corporations" that potentially would be within the reach of s.51(xx) include the following:

    (a) The German entity, known as a "Kommanditgesellschaft auf Aktien" (KGaA), which is a mixture of a joint stock corporation (AG) and a limited partnership (KG). A KGaA has at least one partner with unlimited liability for the company's debts, while the liability of the other stock-holding partners is limited to their share capital;[11]

    (b) The Swiss "KomAG", which is a company partially limited by shares. Like the German KGaA, this is a hybrid entity with the features of a joint stock corporation and those of a partnership. One of its primary distinguishing characteristic is that at least one of the individual members has unlimited liability for the company's debts. This member is automatically a member of the board of directors, and is responsible for managing the company and representing it.[12]

The essential characteristics of a s.51(xx) corporation

39. There has been very limited discussion in the cases decided by this Court as to the central characteristics of a "corporation" for the purposes of s.51(xx). The following statements, from broader contexts, are noteworthy:

    (a) In *Chaff and Hay Acquisitions* Starke J, 74 CLR at 388 (and not in a constitutional context), said that the "characteristics of an English company appear to be perpetual succession, a name, a common seal, authority to hold property in its corporate name, to

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[10] See, further, *Arab Monetary Fund v Hashim (No.3)* [1991] 2 AC 114, which concerned an entity established by a treaty between Arab States and Palestine that had been given corporate status by virtue of a domestic law decree under the law of United Arab Emirates; that case is referred to in *Re McJannet; Ex Parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620 at 664 fn 133.

[11] See Reimann & Zekoll (eds.), *Introduction to German Law*, (2nd ed.), 2005, pp 143-144; also, http://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/Establishing-a-company/Company-forms/Corporations/partnership-limited-by-shares-kgaa.html (accessed 14 August 2014).

[12] See Becchio et al., *Swiss Company Law*, 2nd ed., (1996), pp 25-26.

sue and be sued in that name, and to make by-laws...". He then quoted with a statement at 389, with apparent approval, that "the essence of incorporation according to English law is the bringing into existence of an entity with status as a person and capacities distinct from those of its members"; see also *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, at 56-57 per Mason J.

(b) In *Williams v Hursey* (1959) 103 CLR 30, relating to the legal status of a branch of a federally registered trade union, Fullagar J (with whom Dixon CJ and Kitto J agreed), stated the following at 52 (citation omitted) of the union:

> The *Conciliation and Arbritration Act* of the Commonwealth, under which it is registered as an 'organization', gives to it what I would not hesitate to call a corporate character - an independent existence as a legal person. It is given a personality, which is distinct from that of all or any of its members, and which continues to subsist unchanged notwithstanding the changes which are bound to occur from time to time in its membership. What is now s. 136 of the Act provides that every registered organization shall for the purposes of the Act have perpetual succession and a common seal, and may own possess and deal with any real or personal property. This provision alone is, in my opinion, quite enough to give to a registered organization the full character of a corporation.

His Honour also referred at 54 to perpetual succession being "the most fundamental of the differences between a corporation and an unincorporated society", that is, "it maintains its identity and its personality notwithstanding changes in its membership, which may occur from day to day".

See, further, *Re McJannet*, 184 CLR at 635-6, 641 and 659-664.

(c) In *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dam)*** at 156-7, Mason J rejected an argument that the Hydro-Electric Commission could be treated as trading corporation only in relation to its trading activities, in part by stating that "s.51(xx) designates as the subject of the power the corporate persona itself, ie the artificial person created by incorporation".

(d) In *NSW v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, at 498, the majority stated that the power conferred by s.51(xx) to "make laws with respect to artificial legal persons is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate".

(e) As noted above, the majority in *Work Choices* referred at [97] to the word "corporation" being used in the 19th Century "to describe a juristic person distinct from its corporators".

40. These statements, together with that of Murphy J in *Adamson* (quoted above at [29]), are consistent with taking a broad approach to what is a corporation. Consistently with these statements, consistently with the history referred to above, and consistently with the significance of the inclusion of foreign, trading and financial corporations in s.51(xx), not to mention consistently with the reference to incorporation in s.51(xiii), the following may be said.

41. At the heart of the notion is that a corporation is an artificial legal entity with distinct legal personality. More specifically, the plaintiffs submit that an entity established under law

with its own name, and with separate legal personality and perpetual succession, is a corporation within the meaning of s.51(xx).

42. Carr states that separate legal personality is the touchstone of a corporation: Carr, p.6. What is involved in this characteristic is, in particular, the ability to sue and be sued in the entity's own name and right, the ability to hold property, and the ability to enter contracts.

43. It may be that in some instances a statute creates a right to sue a body in a particular name where that body does not necessarily have independent status as a juristic person: see, for example, the various views expressed in *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *Bonsor v Musicians' Union* [1956] AC 104. Of course, these English cases cannot be decisive of the s.51(xx) question: note discussions in *Williams v Hursey* at 52-53, and *Re McJannet*, 184 CLR at 660-1. In any event, what they really illustrate is that having separate legal personality has to be assessed reviewing the constitutive provisions of the body as a whole.

44. The requirement for a separate legal personality is intertwined with the incident of perpetual succession. Blackstone considered perpetual succession as being inexorably tied to the corporate form: *Blackstone's Commentaries*, Vol 1, at [475]. It is, in a sense, the other side to the coin to being an artificial legal personality, for it involves being independent of human life. Historically, the ability to convey to one's successors as opposed to one's heirs resided at the very core of the legal construct of a corporation: Grant, p.16 and Carr, p.13; see also *Trustees of Dartmouth College v Woodward* 17 (4 Wheat) US 518 (1819), at 636, per Marshall CJ.

45. That the entity have its own name has been held to be an essential requirement of identifying a corporation at general law: *Sutton's Hospital Case* (1612) 10 Co Rep 1a at 29b; 77 ER 937 (***Sutton's Hospital***), at 968 per Coke CJ; *Conservators of the River Tone v Ash*, (1829) 10 B & C 349, at 384; 109 ER 479, at 493 per Littledale J; Grant, *Practical Treatise on the law of corporations in general as well aggregate as sole* (1854) (**Grant**), p 17. However, having a separate name is really a manifestation of having separate legal personality.

46. In *Chaff and Hay Acquisitions*, Starke J suggested at 388 that a common seal and the facility to make by-laws were also characteristics of a corporation under English law. However, these aspects were not included in the statement his Honour approvingly quoted at 389.3. In any event, the plaintiffs submit that these indicia are not essential characteristics of a corporation under s.51(xx). *Sutton's Hospital* has long established that having a seal is not an essential element of a corporation: see, further, Carr, pp 56-57. In *Johnsons Tyne Foundry Pty Ltd v President, Ratepayers and Councillors of the Shire of Maffra* (1948) 77 CLR 544, at 562, Dixon J said that "at common law although it was always possible for a corporation to contract by using its seal, it was not by any means invariably indispensable". The practical significance of having a seal has diminished considerably over time, as is illustrated by s.127 of the *Corporations Act 2001*, which permits a corporation (within the definition in that Act) to execute a documents without a common seal.

47. As for the making of by-laws, the practical effect of this requirement is somewhat unclear. Further, it has been said that where an entity has been incorporated pursuant to an Act of Parliament (as opposed to under a regime of incorporation established by Parliament), the statute becomes the corporation's charter and only Parliament has the power to alter it: *Halsbury's Laws of England*, 4th ed. (1973) vol 9, at [1247]. That undercuts the significance of this characteristic.

48. Equally, the plaintiffs submit that whilst the existence of members may be *a* characteristic of a corporation – or at least of a corporation aggregate – it is not an essential characteristic of a corporation within s.51(xx). As noted above, single member companies are now permitted under the *Corporations Act*. In *Chaff and Hay Acquisitions* Starke J (at 388 and 389) did not include having members as a necessary characteristic of a company: see also *Williams v Hursey*, at 52 per Fullagar J and *Adamson*, at 238-239 per Murphy J. The underlying matter of substance is that a corporation has a person or persons able to exert lawful control over the entity so that it does not lose the power of continuing succession. That has a greater significance in the case of private companies formed by individuals than for corporations established by legislation.

49. The last two points are reinforced by this Court's acceptance that bodies such as the Hydro-Electric Commission of Tasmania (*Tasmanian Dam*) and the State Superannuation Board (*Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 (***State Superannuation Board***)) can be trading or financial corporations within s.51(xx), despite the fact that such bodies did not have members and could not make by-laws in the sense employed in the older cases: see also *Quickenden v O'Connor* (2001) 109 FCR 243 (FFC) (***Quickenden***), concluding that the University of Western Australia was a trading corporation.[13]

QR possesses the essential characteristics of a corporation

50. QR is an artificial legal entity created by law with its own legal personality and having perpetual succession. It is a corporation within the meaning of s.51(xx).

51. Further, it has a range of other characteristics supporting this conclusion (though not necessary to it). QR can have a seal, and the Act identifies a means of the entity manifesting itself in action: ss.8 and 34. QR has a board, although the board members are stated not to comprise QR (s.14). The Board is empowered to direct and control QR (s.15). Further, even if all members of the Board were to perish, QR would not be in abeyance, since the responsible Ministers have power to reconstitute the Board (s.16(1)).

52. These corporate characteristics are reinforced by other indicative matters, especially those listed at [10] above. For example, QR can have subsidiaries and, as such, may be an ultimate holding company within the meaning set out in s.9 of the Corporations Act (s.9(2) and 66(3)). Members of QR's Board must disclose any conflict of interest: s.28. Further, the Board cannot be occupied by any person who is insolvent (s.16(3)(a)). Likewise, the CEO cannot be any person who is insolvent (s.36(2)(a)) or is disqualified as a corporate director (s.32(c) and (d)). These restrictions replicate the prohibitions in Pt 2D.6 of the *Corporations Act* (see esp. s.206B).

53. It might be suggested that various provisions of the Act confer on QR distinctive or specific "governmental" characteristics such that it cannot be regarded as a "corporation" and that QR is more in the nature of a public body that is an emanation of the State. These provisions might include, for example, the following:

    (a) The Board must keep the responsible Ministers reasonably informed of QR's operations, financial performance and position and its achievement of the objectives in

[13] Special leave to appeal from this decision was refused, on the basis that there would be no practical utility in the circumstances of the case: *Quickenden v Commissioner O'Connor of the AIRC & Ors P13/2001* [2002] HCATrans 270.

its strategic and operational plans and give them reports and information for those purposes: s.39;

(b) The Ministers may require QR or its Board to provide reports to the Department: s.40;

(c) The Board must prepare draft strategic and operational plans for review and approval by the responsible Ministers: ss.47-51. Such plans may only be modified with the written agreement of the responsible Ministers: s.52;

(d) QR is subject to ministerial directions, including directions about the payment of dividends: ss.54-55, 59;

(e) QR is obligated to perform any community service obligations included in its operational plan: ss.57-58;

(f) QR cannot dispose of its main undertaking without ministerial approval (s.60) and cannot acquire or dispose of subsidiaries without ministerial approval (s.61).

54. The provision for QR to be subject to Ministerial direction is not a barrier to the characterisation of QR as a corporation. After all, some modern State legislation provides that Departments or Ministers (necessarily under ministerial control) are themselves taken to be corporations for certain purposes: see, for example, Ch. 8, Pt. 2 of the *Water Management Act 2000* (NSW), Pt. 1A of the *Transport Administration Act 1988* (NSW) and Pt. 2, Div. 1 of the (now repealed) *Education (General Provisions) Act 1989* (Qld). Undoubtedly, such statutory corporations are intended to be separate legal bodies.

55. Further, the "governmental characteristics" set out above are often found in statutes which establish corporations for the purposes of running or administering a government enterprise. Their existence does not necessarily strip the relevant entity of its corporate status.

56. For example, the Hydro-Electric Commission considered in *Tasmanian Dam* was vested with the entirety of the State's hydroelectric works and undertakings. Likewise, certain parcels of land were vested in the Commission in order to allow it to construct generation facilities (see Brennan J at 206 and Deane J at 277). The Commission was charged with the power to construct new power developments as well as generate, transmit, supply and sell electricity throughout the State. It also had other public functions, including giving advice to consumers on the use of electrical and other forms of energy, and making recommendations on regulations regarding the sale and hire of electrical equipment. The Commission was involved in selling a substantial volume of electricity throughout the State, to over 190,000 customers and generating revenue in excess of $160m. It was self-supporting and retained profits in reserve to cover future deficiencies (see agreed facts at 11-14). Pursuant to s.15A, the relevant Minister was authorised to notify the Commission of the policy objectives of the government with respect to any matter relating to generation, distribution, etc. of electrical energy, and s.15B enabled the Minister to give a direction to the Commission with respect to the performance of its functions, subject to certain limitations and qualifications(see eg discussion at 156). Notwithstanding the proximate connection of the Commission to the State and the extent of the Minister's powers of oversight, Mason J found that the Commission was an independent statutory trading corporation (at 155-157). That was so even though it had "an important policy-making role" and its electricity-generation activities "are largely conducted in the public interest" (at 156). Murphy J (at 179-180), Brennan J (at 241), and Deane J (at 292-293) reached the same conclusion.

57. Similarly, in *State Superannuation Board*, the Victorian State Superannuation Board was charged with the administration of a superannuation fund for officers employed by the Victorian government, as well as governmental authorities and institutions. In administering the fund, the Board collected contributions from such officers and received payments from the Treasurer. The six members of the Board were all appointed by the Governor. It was a requirement that there be 3 members who included a Government statist and an actuary. The other 3 members were elected by contributors to the superannuation scheme. Members of the Board could be removed from office by resolution of both houses of Parliament (in certain circumstances): see at 300, per Mason, Murphy and Deane JJ. The vast majority of the staff employed by the Board were public servants employed under the *Public Service Act 1974* (Vic): at 301. The Board's powers to invest funds were fixed by statue. Although the Board was authorised to purchase land, it could only do so with the consent of the treasurer was also empowered to "determine that the aggregate amount which may be invested in loans on mortgage security shall not exceed such percentage or proportion of the Fund as he determines": at 302. Again, notwithstanding these governmental characteristics and proximate connection of the Board to the State, the majority held that the Board was a financial corporation within s.51(xx).[14]

58. The preceding point is reinforced by s.6(3) of the Act here, which provides that QR does not represent the State. This provision, combined with the provisions conferring powers on QR to hold property and sue/be sued, confirm that the body has separate legal personality, and is not part of the State, or the Crown. These statutory characteristics of QR, and QR's independence are to be contrasted, for example, with the statutory characteristics and position of ASIC, which has been found to be "the Commonwealth" within s.75(iii) of the Constitution: *Re ASIC; Ex parte Edensor Nominees Pty Ltd* (2001) 204 CLR 559, esp. at [39], [126] and [215]. In any event, critically, the question of whether or not ASIC was part of "the Commonwealth" within s.75(iii) was understood to be a distinct question from whether or not ASIC was a body corporate, for it clearly was such a body under its governing Act: see at [39], [127], [215].

QR IS A *TRADING* CORPORATION

The applicable principles

59. In its Amended Defence, QR no longer takes issue with the relevant authorities and established principles that apply in the determination of whether a corporation is a trading corporation.[15]

60. The quality "trading" is to be determined with regard to the current activities of the corporation, as well as the intended purpose of the corporation, the latter to be taken into account particularly when the entity is at a nascent state: *Fencott v Muller* (1983) 152 CLR 570 at 588-589 per Gibbs CJ, 602 per Mason, Murphy, Brennan and Deane JJ, 611 and 622 per Dawson J. At 602, Mason, Murphy, Brennan and Deane JJ emphasised that the entity's character assumes particular significance where, as is the case here, the entity has just begun:

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[14] By way of further examples, see *Quickenden*, where the Court did not consider that its statutory characteristics and its predominant scholastic purposes precluded a conclusion that the University of Western Australia was a trading corporation; also, *Bankstown Handicapped Children's Centre Assn Inc v Hillman* (2011) 182 FCR 483 (FFC) (***BHCC Association***), where the Court found that the Association was a trading corporation, despite the significance of its contractual relationship with the State and the fact that, in large part, the Association provided ongoing services to the State for the care and welfare of children (it appears that special leave to appeal from this decision was not sought).

[15] Amended Defence [71], SCB Vol 1, p.40.

> While its constitution will never be completely irrelevant, it is in a case such as the present where a corporation has not begun, or has barely begun, to carry on business that its constitution, including its objects, assumes particular significance as a guide ...

61. In order to constitute a trading corporation, trading does not need to be the predominant activity, however, it must be a substantial and not merely peripheral activity: *Adamson*, at 208 per Barwick CJ, 234 per Mason J and 239 per Murphy J; also *Tasmanian Dam*, at 155-156 per Mason J, 240 per Brennan J, 293 per Deane J; *State Superannuation Board*, at 303-304 per Mason, Murphy and Deane JJ. It must be "a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation": *Adamson* at 233 per Mason J; *State Superannuation Board*, at 304. This will be a question of fact and degree: *Adamson*, at 234 per Mason J; also, *State Superannuation Board* at 304. In this regard:

    (a) "Trading" is not to be construed narrowly. It extends to business activities carried on with a view to earning revenue and includes trade in services: *Adamson* at 235 per Mason J;

    (b) The fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* at 541 and 543-544 per Barwick CJ; *Tasmanian Dam* at 156, per Mason J;

    (c) The making of a profit is not an essential prerequisite to trade, but is a relevant factor: *St George County Council* at 539 per Barwick CJ, 563 per Gibbs J, 569 per Stephen J;

    (d) In addition to the current activities of the corporation, the intended purpose of the corporation is also relevant: *State Superannuation Board* at 304-305 per Mason, Murphy and Deane JJ.

QR is a trading corporation within the applicable principles

62. The objects and purposes of QR, as set out in the Act, reveal that it has the requisite characteristics of a trading corporation within s.51(xx). In summary:

    (a) QR has been established for the purposes of managing railway services, providing rail transport services (and related services – such as engineering services, business management services and consultancy services), providing customer services and constructing, operating and maintaining rail infrastructure: ss.3 and 9;

    (b) To these ends, QR may employ staff, enter into contracts, acquire and dispose of property, and fix charges and fees for its services: s.7;

    (c) QR must carry out its functions as a commercial enterprise pursuant to s.10 (other than any community services obligations – and these are required to be separately identified in QR's operational plan, and the Act implicitly contemplates QR being compensated by the State for fulfilling these – ss.57 and 58);

    (d) QR must generate strategic and operational plans (ss.47-53), annual reports (ss.42-45)[16] and quarterly reports (s.38); and

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[16] In the financial statements in the Annual and Financial Report for 2012-2013, it is stated that QR is "a for-profit entity". QR is referred to in the financial statements as "the 'company'": SCB, Vol 2, at p 641.

(e) QR must pay to the State a dividend when directed by the responsible Ministers: ss.55-56.

63. These characteristics, which assume particular significance in light of the fact that QR has only recently been established, reveal that QR is intended to operate as a commercial enterprise and engage in trading activities. That this is so is reinforced by the governance procedures and practices adopted by QR since its inception. By way of example:[17]

(a) The Charter of the Board and the Board Handbook require the members of the Board to comply with common law fiduciary duties and the Corporations Act and to avoid conflict of interest;

(b) The responsibilities of the Board set out in the Board Charter include maintaining good corporate governance standards and promoting QR as a good corporate citizen;

(c) The Board has a secretary who assists it and carries out functions which are akin to those carried out by a secretary;

(d) Under QR's operational plan, the Board is required to continually monitor and review its corporate arrangements to reflect good practices.

64. QR's trading activities have been, and continue to be, an integral part of its operations and have been significant and substantial by any measure. Notably, since its establishment QR's principal revenue-generating activity has been and is the provision of employees to its subsidiary, QR Ltd.[18] Indeed, during the financial year ending 30 June 2013 (**FY 13**), QR's only revenue was:[19]

(a) Revenue of approximately $120.5m from QR Ltd, for the provision of employees to QR Ltd after 3 May 2013, in accordance with the managed services agreements executed by the two entities;

(b) Inter-company dividend revenue of $138.6m, from QR Ltd.

65. It is understood that the accounts for FY 14 are not available, but QR issued three invoices to QR Ltd in the 2013-2014 financial year totalling some $192.7m.[20]

66. The current Managed Services Agreement (**MSA**) between QR and QR Ltd replaced a previous initial agreement between QR Ltd and the Queensland Rail Transit Authority (entered into before the Authority's name was changed to Queensland Rail).[21] The agreements are similar and both provide for the following:[22]

(a) QR is to make its personnel available to QR Ltd for specified purposes (namely, for QR Ltd to carry out is functions to manage, operate and maintain rail services) and provide project management services to QR Ltd (cl.s 2 and 3 of each agreement);

(b) QR Ltd is to provide QR with access to its premises, property, systems and consumables for the purposes of QR providing its services (cl.s 4 and 5 of each MSA);

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[17] Special Case [43]-[48], SCB, Vol 1 at pp.59-60, and the pages in the SCB cited under those paragraphs.
[18] Special Case [70], SCB, Vol 1 at p.67.
[19] Special Case [76]-[77], SCB, Vol 1 at pp.68-69.
[20] SCB, Vol 4 at pp.1231-2 and 1235.
[21] See SCB, Vol 4, at p.1187ff for the initial agreement and Vol 4, at p.1280ff for the current agreement.
[22] See Special Case [56]-[68], SCB, Vol 1 at pp.63-67.

(c) Both parties are to invoice each other for the services provided (cl.8 of the current MSA; cl.10-11 of the initial MSA);

(d) QR Ltd is required to pay to QR (i) all costs QR is otherwise required to pay its employees who are made available to QR, including the sum of all salary, on costs (such as superannuation) and entitlements that such employees may be entitled to be paid under any applicable industrial award or agreement and (ii) other "indirect" costs, including QR's director's fees, insurance payable by QR and the "Queensland Rail Limited Services Charge" (essentially, the costs QR is required to pay QR Ltd for provision of services by it to QR; see cl.8 and Sch 2 of the current MSA; cl.9 and Sch 2 of the initial MSA). The effect of this arrangement is that, in practice, QR does not incur any net expense to QR Ltd since QR's liabilities to QR Ltd are offset by the total amounts received from QR Ltd.

67. In substance, since its inception, QR has been and continues to be akin to a labour-hire company for its subsidiary, QR Ltd. Although QR is ultimately responsible for operating and managing rail services and infrastructure in Queensland, these functions are in fact carried out by QR Ltd, which has retained its assets and authorisations necessary for or involved in the delivery of rail services (and, in turn, QR Ltd has passed on the profits generated by the carrying out of those functions through an inter-company dividend to QR).[23] The majority of work performed by QR Ltd is effected through the provision of employees provided by QR.[24]

68. The position is reflected in QR's income statements for FY13, which record QR as having received approximately $259.1m in revenue (which comprises the amounts received from QR Ltd for, *inter alia*, the provision of employees, and the inter-company dividend – as noted above at [64]).[25] It incurred one significant expense, namely, "employee benefits" totalling approximately $120.5m.[26] This resulted in QR having earned a profit of approximately $138.6m during FY 13.[27] Although the generation of a profit is not determinative, it is a factor to be taken into account in the process of characterisation.

69. Further, it may also be noted that,[28] (i) QR Ltd, as a wholly owned subsidiary, is subject to the control and direction of QR, (ii) after 3 May 2013, all members of the Board of QR were also directors of QR Ltd, and vice versa, (iii) QR has overall responsibility for the provision of services and the carrying on of activities actually provided or carried on by QR Ltd, (iv) QR Ltd carries out the principal functions of QR, namely, operating, maintaining and managing rail services and rail infrastructure, (v) QR Ltd is a trading corporation (and has been so since at least 3 May 2013) and (vi) QR is entitled to receive (and in FY 13, actually received) dividends issued by QR Ltd. Thus aside from the provision of employees to QR Ltd, a significant aspect of QR's activities is to control and direct QR Ltd's enterprise, namely, the operation, maintenance and management of rail services and rail infrastructure.

70. The fact that QR has certain "governmental characteristics" (see, for example, [53] above), or that it is responsible for the provision of rail services that have often (but not invariably) been carried out by governments, is not an impediment to QR being a trading corporation.

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[23] Special Case at p.58 [40], p.60 [49] and p.68 [75], SCB, Vol 1.
[24] Special Case [55], SCB, Vol 1 at p.62.
[25] SCB, Vol 2 at pp.635 and 664.
[26] SCB, Vol 2 at p.635.
[27] SCB, Vol 2 at p.635; also at p.664. Note that the accounts describe QR as a "for-profit entity": SCB, Vol 2, p.641/30.
[28] Special Case at p.58 [37] and [40], p.59 [42], p.60 [49], and p.68 [75], SCB, Vol 1.

These characteristics are often found in statutory corporations established for the purposes of running or administering an enterprise, including, for example, the Hydro-Electric Commission, considered in *Tasmanian Dam*, the Victorian Superannuation Board, considered in *State Superannuation Board* and the University of Western Australia, considered in *Quickenden*.

71. Equally, the fact that QR is party to, and has obligations under the RTS Contract,[29] is of no material significance to its characterisation as a trading corporation within s.51(xx). Under the RTS Contract, QR Ltd Ltd also has obligations and the State pays QR Ltd (not QR) for the provision of services pursuant to that contract. In FY 13, revenue received under previous transport services contracts between the State and QR Ltd comprised approximately 79% of QR Ltd's total revenue.[30] The position was similar in the financial years ending 30 June 2011 and 2012.[31] Yet, notwithstanding the fact that a significant amount of QR Ltd's revenue has come from transport services contract, QR has accepted in this proceeding that at least since 3 May 2013 QR Ltd has continued to be a trading corporation. That concession is not surprising in light of the decided cases, including *Quickenden* (there, the percentage of non-government revenue earned by the University of Western Australia was approximately 17% of total revenue – see at [49]).

QR IS A NATIONAL SYSTEM EMPLOYER UNDER THE FAIR WORK ACT

72. As QR is a trading corporation within s.51(xx), it follows that QR has been and is a "national system employer" within the meaning of s.14(1) of the FW Act, taking account of the definition of "constitutional corporation" in s.12(1). The employees of QR thus have been and are "national system employees" within the meaning of s.13 of the FW Act.

73. As a consequence, ss.69, 72 and 73 of the Act and ss.691A-691D of the IR Act – so far as they purport to apply to QR, employees of QR and/or the Traincrew Agreement or the Rollingstock Agreement[32] – are inconsistent with the FW Act, including ss.13, 14, 26 and 54 of that Act, and are invalid pursuant to s.109 of the Constitution.

74. If it is found that QR is a national system employer, QR has accepted that it would follow that there would have been a connection between QR Ltd and QR in the sense outlined in s.311(1)(d) of the FW Act relating to transfer of businesses, in circumstances where the transferred employees immediately were employed by QR, and to perform the same or substantially the same work as they had previously performed.[33] Further, no application has been made under the FW Act to terminate the Traincrew Agreement or the Rollingstock Agreement, and no other enterprise agreement under the FW Act covers QR with respect to the types of employment dealt with in these two Agreements.[34]

75. The Traincrew Agreement nominally expired on 30 June 2013, and the Rollingstock Agreement nominally expired on 30 April 2014.[35] However, both remain in force beyond their nominal expiry dates – the Rollingstock Agreement pursuant to ss.54(2) and 224-227 of the FW Act, and the Traincrew Agreement pursuant to Sch 3 (cl.s 9, 15 and 16) and Sch 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

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[29] Special Case [50]-[53], SCB, Vol 1 at pp 61-62, and the pages in the SCB cited under those paragraphs.
[30] Special Case [72], SCB, Vol 1 at p.68.
[31] Special Case [29], SCB, Vol 1 at p.56; also Vol 1, at p 401 (2011) and Vol 2, at p 521 (2012).
[32] Copies of these Agreements are at SCB, Vol 1, p.77ff and p.181ff; the disputes arising from these two Agreements are summarised at Special Case [82]-[97], SCB Vol 1, pp.70-74.
[33] Special Case [80], SCB Vol 1 at p.69.
[34] Special Case [79] and [81], SCB, Vol 1 at p.69.
[35] At, respectively, SCB Vol 1, p.85 (cl.6) and p.186 (cl.3.1).

76. In this context, and pursuant to the business transfer provisions in ss.310-315 of the FW Act, the Traincrew Agreement and the Rollingstock Agreement apply to:

    (a) QR (but mutatis mutandis with it in the position of QR Ltd);

    (b) The employees of QR Ltd who became employees of QR on the Act coming into force;

    (c) Any new employees employed since 3 May 2013 to perform work that would, prior to that date, have been regulated by the Traincrew Agreement or the Rollingstock Agreement;

    (d) The relevant employee organisations named as parties to those Agreements.

77. Alternatively, if the Traincrew Agreement and the Rollingstock Agreement do not remain in force as agreements applying to those persons identified in the preceding paragraph, then there are no enterprise agreements governing the relevant employment relationships, and the parties are free to negotiate a new enterprise agreement pursuant to the terms of the FW Act, given that the parties are subject to that Act.

78. For these reasons, the plaintiffs are entitled to the relief sought in the statement of claim[36] (noting there is one alternative specified in the relief sought, depending on whether or not the agreements are held still to be in force).

PART VII: APPLICABLE PROVISIONS

79. See the annexure.

PART VIII: ORDERS SOUGHT

80. The questions for the Court's opinion should be answered as follows:

    1. Yes.

    2. Yes.

    3. The Fair Work Act 2009 (Cth) applies to Queensland Rail and its employees by the operation of s.109 of the Constitution, to the exclusion of both the Queensland Rail Transit Authority Act 2013 (Qld) and the Industrial Relations Act 1999 (Qld).

    4. The relief sought at sub-paragraphs 107(A), (B), (C), (D) *[or in the alternative to (C) and (D), (E)]*, (F), (G) and (H) in the statement of claim.

    5. The first defendant.

[36] At SCB Vol 1, p.23.

PART IX: ORAL ARGUMENT

81. The plaintiffs estimate that 2.5 hours will be required for the presentation of their oral argument in chief, with some 30 minutes in reply.

25 August 2014

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ANNEXURE A

LEGISLATIVE INSTRUMENTS REFERRED TO IN THE PLAINTIFFS' SUBMISSIONS

Table of provisions – the following constitutional provisions and statutes are still in force, in the same form, as at the date of these submissions.

Legislative Instrument	**Annexed provisions**	**Page references**
The Constitution 1900 (Cth)	Sections 51(xx) and 109	1-6
Queensland Rail Transit Authority Act 2013 (QLD)	Entire Act	7-71
Industrial Relations Act 1999 (Qld)	Sections 691A-691D	72-79
Corporations Act 2001 (Cth)	Sections 9 and 127 and Part 2D.6	80-164
Fair Work Act 2009 (Cth)	Sections 12, 13, 14, 26, 54, 224-227, 310-315	165-209
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)	Schedules 3 and 16	210-270
Transport Administration Act 1988 (NSW)	Part 1A	271-274
Water Management Act 2000 (NSW)	Chapter 8, Part 2	275-278

Table of provisions – the following statute was repealed by section 435 of the *Education (General Provisions) Act 2006* (Qld)

Legislative Instrument	**Annexed provisions**	**Page refs**	**Repealed by the following annexed provision**	**Page refs**
Education (General Provisions) Act 1989 (QLD)	Part 2, Division 1	279-281	Section 435 of the *Education (General Provisions) Act 2006* (QLD)	282-283

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