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' REPLY - ANNOTATED

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PART I: INTERNET CERTIFICATION

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

PART II: REPLY

QR is a corporation

2. QR's argument that it is for the States to decide whether a body is a corporation "or something else" (DS [34]), ie, to stipulate the "circumstances in which a body [is] incorporated" (DS [31], [47]) does not address the critical issue. QR does not address what the essential qualities of a "corporation" are (and/or why QR does not have them), nor what "incorporation" entails. To "say a corporation is a thing that is incorporated does not assist much" (quoting WA [25]). QR's acceptance that an entity created by statute may, by implication, be a corporation (DS [11(c)] and [44]) serves to highlight the deficiency in its argument. How is such an implication to be found? What is it an implication *of*? To put the same point another way, QR bases its argument on s.6(2); otherwise, it does little to grapple with why, viewing the Act as whole and as a matter of substance, QR does not otherwise have the characteristics of a corporation, save for a passing reference at DS [66] to the absence of corporators, a common seal and an ability to make by-laws (as to which see PS [46]-[51]). It is notable that it does not articulate what legal effect s.6(2) has, beyond its argument that this means QR is not "incorporated" and is thus not within s.51(xx).

3. At core, QR's argument is that it is for the States to identify what is and what is not a corporation. Thus it is said that the States are free to confer "the attributes of corporations" – apparently extending to *all* the attributes of a corporation – on legal entities that are not corporations for the purposes of s.51(xx) (DS [47]). That contention suggests that the States may create an entity that in substance *is* a corporation within s.51(xx), but label it to be something other than a corporation. Such an approach would leave the operation of a federal power – one that is paramount pursuant to s.109 – subject to being sidestepped by the States. And this would not be limited to public entities. On QR's argument, it would be open to the States to pass a *Companies Act*, dealing with the same matters as the *Corporations Act 2001*, applying to registered entities which had all the characteristics of a corporation save that the law stated that "registered companies are not bodies corporate". If QR's argument was accepted, then in retrospect the application of s.51(xx) in cases such as *Adamson*, *State Superannuation Board* and *Tasmanian Dams* could readily have been avoided by the States inserting one provision containing six or seven words into the relevant legislation.

4. That is not to say that some all-encompassing definition of the essential meaning of "corporation" in s.51(xx) should be attempted, nor have the plaintiffs submitted that it should be (cf SA [6]-[11]). Rather, the plaintiffs submit that at the heart of that notion is an entity established under law with its own name, separate legal personality and perpetual succession; and that here, taking account of the Act as a whole, QR *is* a corporation. It may be acknowledged that the polities created by the Constitution cannot simply be equated with natural persons or trading corporations.[1] It also may be noted that States cannot be said to have been "formed within the limits of the Commonwealth", as their creation coincided with the creation of the Commonwealth. That said, it is not necessary in this case to determine the position of the States, Territories,[2] local governments, or non-self-governing territories.

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[1] Note *Williams v Commonwealth (No.1)* (2012) 248 CLR 156 at [38], [154], [204]-[206] and [577].
[2] Cf *Capital Duplicators Pty Ltd v ACT (No.1)* (1992) 177 CLR 248 at 276-277, 281-282, 285 and 288.

5. There is no doubt that States may provide for the incorporation of bodies. Nor is there dispute that they may create new creatures not previously known to the law. But there is a difference between incorporating entities on the one hand, and determining whether or not they fall within the s.51(xx) conception on the other: cf DS [27]. Whether their creations are "corporations" for the purposes of s.51(xx) is to be determined by their nature, as judged against the constitutional notion of "corporation" in s.51(xx), not against a label applied, nor by a provision apparently directed only to providing the Parliament's own answer to the constitutional question.[3] So much is implicit, incidentally, in the quotation from Sir Samuel Griffith in the 1891 debates, set out at DS [26]. "Incorporation" encompasses the circumstance where a law creates a legal entity that is endowed with the essential attributes of a corporation (including, most significantly, separate legal personality).[4] QR's acceptance that a corporation may be established by implication is tacit acknowledgement that this is so.

6. QR's apparent argument that the word "corporation" might mean one thing for foreign corporations and another for trading and financial corporations (DS [14] and [52]) is unsupported by any cogent reasoning. Why a "necessarily pragmatic approach" should be applied to entities created under foreign law, but not to entities created in diverse ways locally, is not explained. In each case, the word corporation refers to an entity of a certain status, where the precise characteristics of and criteria for that status may have been expected to vary over time, and as between the different States and nations: cf analogously *Commonwealth v ACT* (2013) 250 CLR 441 at [18]-[38].

7. The observations of Isaacs J in *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330 at 394 (quoted DS [32]) are on point – whether created overseas or locally, the Commonwealth "finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction". That conception was reflected in the writings of Pollock, who, having noted the recognition by the common law of corporations as artificial persons, observed that "[w]e have artificial persons, or, as we say in the Common Law, corporations. ... we constantly need in modern law the conception of an *artificial person*, a subject of duties and rights which is represented by one or more natural persons....but does not coincide with them. It has continuous legal existence not necessarily depending on natural life...".[5] Pollock's reference to the "need" for artificial persons to be part of the "modern law" reflects the importance such entities were assuming in society. As Ford stated in *Principles of Company Law* (5th ed., 1990), at [103], in "any mature legal system there is a need to create artificial legal entities which can enjoy rights and be subject to duties in much the same way as human beings who are treated as legal persons". Section 51(xx) is directed to authorising regulation of such entities, whatever the precise circumstances of their creation.

8. Historical considerations are of course relevant to ascertaining the nature of the constitutional conception (see DS [13]ff). But the history, including the 19th century legislation on which QR relies heavily (see esp DS [29]), does not readily provide an answer to the central issue here. The legislation referred to at DS [29] provided for the attribution of apparently "corporate characteristics" on entities which were not separate juristic persons. Thus the *Trading Companies Act 1834* (UK) provided for letters patent to confer on "companies" (ie bodies of associated persons) the capacity to sue or be sued in the name of the principal officer or officers. There was a similar provision under the *Chartered Companies Act 1837*

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[3] The discourse dealing with s.109 of the Constitution is instructive on this point: *Momcilovic v The Queen* (2011) 245 CLR 1 at [111]-[112] per French CJ, [315]-[316] per Hayne J. [654], per Crennan and Kiefel JJ.

[4] Note Ford, *Principles of Company Law* (5th ed., 1990) at [104]; see also H C Black, *A Dictionary of* Law (1891), definition of "corporation", at 278, and definitions of "incorporate" and "incorporation" at 612.

[5] *A First Book of Jurisprudence for Students of the Common Law* (1896) at 109; see also 112, referring to corporations, and 112-113, referring to "firms" being treated in Scottish and other law as legal persons.

(UK). A similar point can be made in relation to the position in New South Wales (cf NSW subs [6]-[12]). In *A History of Company Law in Australia* (2007) 31 MULR 805, at 810, Lipton explained that because members of a joint stock company were required to be named as parties to litigation involving the "company", changes in membership resulted in practical difficulties. The 1842 Act (6 Vic No. 2) sought to address these difficulties by enabling banks and other companies to bring proceedings, and be sued, in the name of select officers. The *Companies (Process) Act 1848* (NSW) (11 Vic No. 56) went a step further by conferring a power on members to sue the "company" (and vice versa). It was not the purpose of such legislation to establish entities with the essential corporate attributes, including distinct legal personality separate from members. The Australian Gas Light Company (cited at DS fn 46) is illustrative of the point. That entity was established by the *Australian Gas Light Company Act 1837* (NSW), as a joint stock company. The *AGL Corporate Conversion Act 2002* (NSW) then provided for the establishment of AGL as a distinct juristic entity and for the vesting of assets and liabilities in the newly created entity: s. 16. Previously, assets and liabilities were vested in the Secretary.

9. Equally, none of the cases cited at DS [36]-[40] squarely address the question as to what is a corporation and what is meant by "incorporated". In *Taff Vale Railway v Amalgamated Society of Railways* [1901] AC 426, the primary issue was the status of registered trade union, ie, whether it was an entity that could be sued. Farwell J concluded that it could be, "on principle, and the construction of the Acts...": at 431. The same question arose in *Bonsor v Musicians' Union* [1956] AC 104: see for example at 128 per Lord Porter. Again, the resolution of the issue turned on the construction of the statute.[6] Those cases are not inconsistent with the plaintiffs' argument. In *Taff Vale Railway*, Farwell J stated that by giving the trade union the capacity to own property and to act by agents, the legislature had, "...without incorporating [the trade union], given it two of the essential qualities of a corporation..." (at 430). Thus, in Farwell J's opinion, the legislature had established an entity with some, but not all the features of a distinct juristic person (and as such the trade union was not a corporation). That does not detract from the plaintiffs' argument. Similarly, in *Bonsor*, Lord MacDermott said the legislature had conferred on unions only some of the characteristics of a full juridical person, with the consequence that unions did not have the status of "a legal personality distinct from their membership": at 142; also at 131, per Lord Porter and 152, per Lord Keith of Avonholm.

10. In any event, these English authorities are of limited assistance (as appears to be accepted at SA [27]). In this country, it has been accepted that a federally registered union is endowed with the "full character of a corporation": *Williams v Hursey* (1959) 103 CLR 30 at 52 per Fullagar J (with whom Dixon CJ and Kitto J agreed). Indeed, that dates back to *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309. Griffith CJ indicated there, at 336, that a provision creating a registered organisation with perpetual succession and a common seal used "the accepted formula for creating a corporation". O'Connor J stated at 361 that "[i]t has been supposed that a corporation is some great, independent thing; and that the power to erect it is a great, substantive, independent power; whereas, in truth, a corporation is but a legal capacity, quality, or means to an end".

11. Furthermore, in *Williams v Hursey*, Fullagar J at 53 questioned the line of reasoning in *Taff Vale Railway* and in *Bonsor*. His Honour said "one would think that a registered trade union either had or had not a personality distinct from that of its members". His Honour had noted earlier, at 52, that the "notion of qualified legal capacity is intelligible, but the notion of

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[6] Similarly, the conclusion in *Borough of Salford v Lancashire County Council* (1890) 25 QBD 384 (see DS [44]) was that the three justices who made up the local authority were not a corporation. This also turned on the construction of the relevant legislation: see esp. at 389-390.

qualified legal personality is not": see also *Re McJannet; Ex Parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620, at 660-661.

12. *Chaff and Hay Acquisitions Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 reinforces the point. In that case, it was not strictly necessary for the Court to decide the question whether the Acquisitions Committee was a corporation. Latham CJ said that "even if it should be held that the Committee is not a corporation, the provisions of the South Australian Act show that [the Committee] is a statutory person, a *persona ficta* created by law": at 385. He did not decide whether it was a corporation. Starke J said that the Committee "is not a corporation in the strict technical sense", but held that the Committee "is a statutory body endowed with the essential characteristics and attributes of a body incorporated by English law. It is an 'artificial person'..." (at 389). Williams J labelled the Committee a "quasi corporation": at 397. In any event, the Committee lacked various characteristics of a corporation; eg it did not have perpetual succession or a seal.

13. Mason J's suggestion in *Church of Scientology v Woodward* (1982) 154 CLR 25, at 56, that it is possible to endow a statutory body with an artificial legal personality falling short of incorporation does not appear to rise above the conclusion in *Chaff and Hay Acquisitions* that the Committee lacked various characteristics of a corporation. That this is so is reinforced by his Honour's discussion, at 56-57, that ASIO lacked "provisions relating to incorporation, perpetual succession and common seal" and "provisions relating to the ownership of property....and capacity to sue and be sued". Mason J concluded that, in the absence of such attributes, there was "no firm basis for saying that ASIO is a corporation".[7] A similar point may be made with respect to Lord Atkin's judgment in *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517. There, the Air Council consisted of his Majesty's Principal Secretaries of State and others appointed by his Majesty (at 520 and 530). The Air Council did not exist separately from its members. Bankes LJ observed that it was a "Department of State": at 521. Lord Atkin appears to have taken a similar view: see at 534. Lord Atkin also pointed to the fact that property did not vest in the Air Council.

14. The question whether a tribunal is a corporation within s. 51(xx) does not arise here: cf DS [43] and fn 92. In any event, as is apparent from the quote from *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, at 587, the question whether a particular tribunal is a corporation will turn on the construction of the enabling legislation and, presumably, will involve consideration of the specific attributes of tribunals.

15. Victoria, alone, half-suggests at [13]-[14] that QR is not a corporation because it "is part of the body politic of the State of Queensland". It is odd that in a case in which the States give so much emphasis to s.6(2), Victoria is content to ignore s.6(3). In any case, its argument is defeated by its own, correct acknowledgement that a body can be both a corporation (with separate legal personality) whilst also being part of the "State" for some purposes.

QR is a trading corporation

16. QR, at DS [68]-[69], barely takes issue with the plaintiffs' submissions at PS [59]-[71] that QR is a trading corporation. It suffices to note that the provision of employees to QR Ltd under the Managed Services Agreement constitutes trade in services, carried on with a view to earning profit. QR accepts that this trading activity constitutes its "principal source of revenue".[8] On that basis (and having regard to the matters set out at PS [62]-[71]), it follows

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[7] *Chaff and Hay Acquisitions* was also cited in *Municipality of St Leonards v Williams* [1966] Tas SR 166. In that case, Burbury CJ considered that the Municipal Commission lacked various attributes of a corporation, including the power to hold land and to sue or be sued in its own name: at 173; cf NSW [24], and Victoria [10].

[8] Special Case [70], SCB vol 1 p.67.

that QR is a trading corporation within s.51(xx). The extent of profit derived does not affect that conclusion. Here, there is profitable intent: QR has must carry out its functions, other than any community services obligations, as a commercial enterprise (s. 10). As for the apparent suggestion that QR and QR Ltd are materially one and the same, that suggestion only reinforces the conclusion that QR is a trading corporation given QR's acceptance that QR Ltd remained a trading corporation within s.51(xx) since 3 May 2013[9]

17. Victoria, alone, seeks at [21] to challenge the established approach with respect to identifying trading and financial corporations. Its proposed test involves asking "what is the corporation's true character?", and looking to the "characteristic activity", giving particular attention to the proportion of its activities which involve trading. The proposal should be rejected. First, it involves seeking a purported single character of the corporation. That is not only likely to be difficult, but is inconsistent with established principles which acknowledge that laws, purposes and things commonly bear more than one character.[10] Secondly, the suggestion of looking to the characteristic activity is inconsistent with the clear rejection by majorities of this Court in *Adamson*, *State Superannuation Board* and *Tasmanian Dam* of the view that the necessary focus is the corporation's predominant and characteristic activity. Victoria has not sought leave to re-open those decisions. If sought, it should not be granted. The test in this area has been worked out in a succession of cases, and has withstood the test of time. That there is some uncertainty is inevitable with such constitutional tests (cf Victoria [20]), as Victoria acknowledges at [24]. Thirdly, in fact Victoria's test is likely to increase uncertainty, because it makes it more likely that entities will fluctuate in and out of federal power as the proportions of their activities change from time to time: cf *Incorporation Case* (1990) 169 CLR 482 at 503. Fourthly, insofar as Victoria relies on various references to different types of corporations, such as that of Isaacs J in *Huddart, Parker* at 393, it is difficult to see why, say, mining and manufacturing corporations could not also be trading corporations (as noted in *Work Choices* at [86]). One can only speculate what Isaacs J might have made of incorporated law firms listed on a national stock exchange and providing legal services across national and international borders. As the South Australian discussion at [36]-[44] illustrates, there are a range of different ways of classifying corporations. None of those have any particular foundation in the constitutional text. And as South Australia also illustrates at [33]-[35], the concern of the framers was with trading activities – and that concern can arise even if the corporation in question bears a range of characters.

18. Finally, QR does not take any issue with PS [72]-[77]. Accordingly, if QR is found to be a "national system employer" within s.14(1) of the FW Act, then the plaintiffs' submissions in those paragraphs should be accepted and that the relief sought in sub-paragraphs 107(A), (B), (C), (D), (F), (G) and (H) of the statement of claim should be granted.

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[9] Special Case [40(C)], SCB vol 1 p.58.
[10] *Grain Pool of Western Australia v Commonwealth of Australia* (2000) 202 CLR 479 at [16]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [35].