HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

SGH LIMITED (formerly known as Suncorp Building Society Limited) APPLICANT

AND

THE COMMISSIONER OF TAXATION RESPONDENT

SGH Ltd v Commissioner of Taxation
[2002] HCA 18
Date of Order: 6 December 2001
Date of Publication of Reasons: 1 May 2002
B19/2001

ORDER

1) The questions reserved for consideration by the Full Court are answered as follows:

Question (a): Whether SGH Limited is the "State" for the purposes of s 114 of the Constitution?

Answer: No.

Question (b): Whether the tax in question is a "tax on property" for the purposes of s 114 of the Constitution?

Answer: Unnecessary to answer.

2) Costs to be determined by the Justice dealing with the further conduct of the cause.

Representation:

D F Jackson QC with J D McKenna for the applicant (instructed by Clayton Utz)

D M J Bennett QC, Solicitor-General of the Commonwealth with J A Logan SC and M L Robertson for the respondent (instructed by Australian Government Solicitor)

Interveners:

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper and C A Watt intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

D Graham QC, Solicitor-General for the State of Victoria with M K Moshinsky intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with F Sunderland intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with P S Psaltis intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

CATCHWORDS

SGH Ltd v Commissioner of Taxation

Constitutional law (Cth) – Relationship between Commonwealth and State – Imposing any tax on State property – Building society controlled by State instrumentality – Whether building society is the State for the purposes of s 114 of the Constitution.

Associations and Clubs – Building Societies – The nature and structure of building societies.

Words and phrases – "property of any kind belonging to a State".

Constitution, s 114.

1 GLEESON CJ, GAUDRON, McHUGH AND HAYNE JJ. SGIO Building Society Limited was formed, as a building society, under the *Building Societies Act* 1886 (Q), and later changed its name to Suncorp Building Society Limited. Still later, by operation of law[1], it became SGH Limited and provision was made for it to become a company governed by the companies legislation. It is convenient to refer to it as "SGH" even though the transactions and events which give rise to this matter took place before the entity was given this name.

2 In March 1995, the respondent, the Commissioner of Taxation, issued an assessment of the income tax payable by SGH for the year ended 30 June 1994. SGH objected against the assessment contending that two payments (the first in an amount of $23,002,000, and the second in an amount of $2,011,095) should not be included in its assessable income. SGH contended that the prohibition in s 114 of the Constitution against the Commonwealth imposing any tax on property belonging to a State applied. It alleged that it was, at the relevant time, the State of Queensland or was carrying on business as an agent of the State, and that the receipt of these sums, being in each case a capital receipt, constituted property for the purposes of s 114. The Commissioner wholly disallowed the objection. Pursuant to Div 5 of Pt IVC of the *Taxation Administration Act* 1953 (Cth), SGH appealed to the Federal Court of Australia against the disallowance of the objection.

3 The part of the cause pending in the Federal Court which involved the questions:

(a) whether SGH Limited is the "State" for the purposes of s 114 of the Constitution; and

(b) whether the tax in question is a "tax on property" for the purposes of s 114 of the Constitution,

was removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). The two questions which we have identified were reserved for consideration of a Full Court on a Case Stated.

4 At the conclusion of argument, the Court ordered that the questions reserved be answered:

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1 *State Financial Institutions and Metway Merger Facilitation Act* 1996 (Q), ss 35 and 37.

(a) No

(b) Unnecessary to answer

and indicated that reasons would be published at a later date. What follows are our reasons for joining in the order that the questions be answered as they were.

Section 114

5 Section 114 provides that:

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

What was said to be the relevant property in this case were two sums of money which had been received by SGH in the course of the year of income in question. The first sum, $23,002,000, was paid to SGH pursuant to the *Building Societies Fund Act* 1993 (Q), from the Consolidated Fund established by s 34 of the *Constitution Act* 1867 (Q). The *Building Societies Fund Act* 1993 provided for payments to building societies totalling $49,995,000. It also provided that the amount of the gross assets standing to the credit of the Contingency Fund established under the *Building Societies Act* 1985 (Q) (less $500,000) were to be paid into the Consolidated Fund.

6 The Contingency Fund had been established to provide protection to persons who subscribed, contributed, lent or deposited money with building societies and SGH, and all other building societies in Queensland, were bound to and did make contributions to the Contingency Fund according to their share capital and the amount of deposits they held. When the *Building Societies Act* 1985 repealed the *Building Societies Act* 1886, a new Contingency Fund was established and the funds of the old fund were transferred to the new fund. It was the assets of this fund that were paid into the Consolidated Fund.

7 For reasons which do not now matter, the transfer of assets from the Contingency Fund to the Consolidated Fund did not take place as quickly as it was thought it would. Interest accrued on the assets of the Contingency Fund in the meantime and the assets transferred to the Consolidated Fund were more valuable than had been expected. The *Building Societies Fund Act* 1993 did not provide for that event (except by providing that *all* assets of the Contingency Fund, less $500,000 should be transferred to the Consolidated Fund). Amounts

totalling the accrued interest were distributed to the building societies (including SGH) as ex gratia payments under s 106 of the *Financial Administration and Audit Act* 1977 (Q). It is that payment, of $2,011,095, that is the second of the sums said to be relevant property.

8 Whether income tax levied upon the taxable income derived by a taxpayer during a year of income can amount to a tax on particular sums which are received during the relevant year is, at the least, open to serious doubt[2]. Income tax is not levied upon particular receipts of a taxpayer or upon the *assessable* income of a taxpayer. It is levied upon the amount which remains after deducting from a taxpayer's assessable income all allowable deductions[3]. This, however, is a question which it is not necessary to decide in determining the first of the questions reserved.

9 Section 114 speaks of one polity (in this case the Commonwealth) imposing "any tax on property of any kind belonging to" another polity (here, the State). At least three kinds of issue may arise. First, what is meant by "tax on property"? That requires consideration of what constitutes a tax and what constitutes a tax *on* property. Secondly, what is meant by "property … belonging to" a State? Thirdly, how is "State" to be understood? The question, whether SGH is the "State" for the purposes of s 114, focuses upon the third of the issues we have identified. Nevertheless, it is essential to bear in mind the context in which the question arises – a context which requires identification of a connection between a tax and property (a tax *on* property) and a connection between the property and a "State" (property *belonging to* a State).

10 The property which was said to be taxed in this case was money received by SGH. That is, the property in question was property received by, and held in the name of, SGH. Is SGH to be treated as the relevant polity (the State of Queensland), or an "emanation" of the State[4], or an "agency" or "instrumentality" of the State[5]? (It is not necessary, in this case, to consider whether, or when, it is apt to use these last three terms.)

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2 *South Australia v The Commonwealth* (1992) 174 CLR 235 at 251-252 per Mason CJ, Deane, Toohey and Gaudron JJ, 257 per Brennan and McHugh JJ, 260 per Dawson J.

3 *Income Tax Assessment Act* 1936 (Cth), s 6(1), definition of "taxable income".

4 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 342.

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

11 Both the expression used in s 114, "property … belonging to a State", and similar expressions, are to be found elsewhere in the Constitution. Section 85 which deals with "[w]hen any department of the public service of a State is transferred to the Commonwealth" refers to "all property of the State of any kind, used exclusively in connexion with the department" and to "any property of the State, of any kind used, but not exclusively used in connexion with the department". At least in that context, "property of the State" is used to refer to property over which the executive government of the State has power of disposition, being property which is used, at least in part, in connection with the department of the public service of that State.

12 Sections 98 and 104 refer, in the former case, to "railways", and in the latter to "a railway", "the property of" a State. Given that "before 1890 all the six Colonies had established State railways, the control of which formed a very large and important part of State administration"[6] and that, in at least some cases, the colonial railway commissioners had been incorporated[7], it is clear that, as recognised in *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employes Association* ("the *Railway Servants Case*"), the interposition of a corporation did not take the particular railways outside the constitutional reference to railways, "the property of" a State. Similarly, banking activities were conducted by corporations under legislation enacted by the colonial legislatures[8] and in s 51(xiii) this activity was referred to as "State banking"[9].

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6 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employes Association* ("the *Railway Servants Case*") (1906) 4 CLR 488 at 534 per Griffith CJ.

7 *Railway Servants Case* (1906) 4 CLR 488 at 535 per Griffith CJ. See also, for example, *Railways Act* 1854 (NSW) (18 Vict 40), s 3; *The Victorian Railways Commissioners Act* 1883 (Vic), s 4.

8 See, for example, the *Savings Banks Act* 1890 (Vic) discussed in *Commissioners of the State Savings Bank of Victoria v Permewan, Wright & Co Ltd* (1914) 19 CLR 457 and its legislative predecessor *The Savings Banks Statute* 1865 (Vic).

9 Section 51(xiii) states the relevant head of legislative power as "banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money". State banking referred to "banks established and conducted by a State or by an authority

(Footnote continues on next page)

13 Against the background of these other provisions of the Constitution, it is evident that references in s 114 to the Commonwealth and a State are not to be understood narrowly. Reinforcement for that view comes from other provisions of the Constitution and, in particular, s 75. It was in the context of s 75, and its provisions for the original jurisdiction of this Court, that Dixon J referred to the Constitution going "directly to the conceptions of ordinary life" and said that[10]:

> "From beginning to end [the Constitution] treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests."

14 Section 114 is a prohibition, albeit a prohibition which affects both the Commonwealth and the States. In *Attorney-General (Vict); Ex rel Black v The Commonwealth*[11], Mason J said of s 116, and its prohibition on the Commonwealth making any law for establishing any religion, that:

> "As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted."

Subsequently, however, in *Deputy Commissioner of Taxation v State Bank (NSW)* ("the *State Bank Case*")[12] in a judgment of the whole Court, the contention that the same approach should be adopted in construing s 114 was rejected. It was said that the argument just identified "may have some strength in the context of a prohibition which is clearly directed against an identifiable mischief", but that "to give a strict construction to s 114 would be more likely to frustrate than to achieve the attainment of its object, namely, the protection of the property of the Commonwealth and the States from the imposition of taxation by

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established under State law and representing a State": *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 52 per Latham CJ.

10 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363.

11 (1981) 146 CLR 559 at 615.

12 (1992) 174 CLR 219 at 229.

each other in the interests of their respective financial integrity". Argument of the present matter proceeded from an acceptance of what was said in the *State Bank Case* and it is, therefore, unnecessary to embark upon the troubled waters of more general questions about the preferable approach to constitutional interpretation.

15 In the *State Bank Case*[13], the Court also rejected a submission that the question raised by s 114 is to be determined by asking whether a body is entitled to the privileges and immunities of the Crown, in accordance with the approach adopted in *Townsville Hospitals Board v Townsville City Council*[14]. There, Gibbs CJ had referred[15] to a strong tendency to regard statutory corporations as distinct from the Crown unless Parliament has expressly provided to the contrary, pointing out that the principle of equality before the law dictates such an approach. When a question arises under s 114, the answer depends upon the meaning and operation of the Constitution.

16 In considering whether an entity, in whose name property said to belong to a State is held, falls within the description "the State" in s 114, it is, no doubt, relevant to consider the activities undertaken by that entity. Similarly, it will be relevant, and usually very important, to identify the legal relationship between the entity and the executive government of the State and to identify what rights or powers the executive government of the State has over the use and disposal of the property in question. Not only will those inquiries be necessary for the purpose of deciding whether the property *belongs* to "the State", they will also bear upon whether the entity in whose name the property stands is properly regarded as the State. Adopting what was said in the *State Bank Case*[16]:

> "[t]he question then is whether [in this case, SGH] is discharging governmental functions for the State or, to put it another way, is the State carrying on [the relevant business] through its statutory corporation".

It is convenient to begin the examination of the relationship between SGH and the State by considering the circumstances in which SGH was formed.

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13 (1992) 174 CLR 219 at 230.

14 (1982) 149 CLR 282.

15 (1982) 149 CLR 282 at 291.

16 (1992) 174 CLR 219 at 233.

The circumstances of the establishment of SGH

17 It was agreed that SGH was formed "as a matter of State governmental policy in order to provide stability in the building society industry in Queensland and to provide investor confidence, in that the establishment of [SGH] averted the collapse of seven building societies and the consequent loss of depositors' funds". To that end, amendments were made in 1976 to the *Building Societies Act* 1886 allowing the transfer of engagements or property of building societies at the direction of the Registrar of Building Societies[17]. In addition, a Contingency Fund was established to which (some) persons who suffered loss on default by a building society could resort.

18 In May 1976, what is now SGH was formed under the name SGIO Building Society Limited. It was formed under the *Building Societies Act* 1886 by not less than 100 adult persons, qualified by the rules of the proposed building society, meeting, approving the rules and signing an application for membership of the proposed society and then proceeding to elect the first directors of the society[18]. Application for registration of the society having been made[19] the Registrar of Building Societies, being satisfied that the society had complied with the requirements of the Act, registered the society[20]. Upon registration of the society and notification of registration in the *Gazette*, "the then present members of the Society, together with such other persons as may from time to time become members of the Society" became a body corporate[21].

19 The *Building Societies Act* 1886 provided that in that Act, unless the context otherwise indicated, the terms "Building Society" or "Society" should have the meaning:

> "A Society having for its object, or one of its objects, the raising of a fund by payments, subscriptions, or contributions made by its members, and the application of such fund in assisting its members to obtain freehold or leasehold property, or in the making of loans or advances to its members

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17 *Building Societies Act Amendment Act* 1976 (Q), s 40.

18 *Building Societies Act* 1886, s 3(2).

19 s 3A.

20 s 3B.

21 s 10.

or others, upon the security of freehold or leasehold property with the periodical repayment of principal and interest by instalments".[22]

SGH, when formed, was such a body. The objects of SGH, stated in its rules, were:

"(a) to raise funds by subscription or otherwise as authorised by the Act;

(b) to apply those funds, subject to the Act and these Rules, in making advances and in such other ways as are authorised by the Act and these Rules; and

(c) to render such services to its members and depositors as are incidental to attaining the objects specified in paragraph (a) or (b)."

20 Building societies were originally unincorporated and terminating mutual associations. Later they became permanent. Members subscribed by investing in shares, but the share capital was withdrawable and subject to fluctuation[23]. The nature of a building society, as an association of persons in whose mutual interests the affairs of the society are conducted, strongly tends against a conclusion that such a society is the State.

21 In 1976, after SGH was incorporated, seven Queensland building societies that were at least in danger of failing were directed by the Registrar of Building Societies to transfer their engagements to SGH. That direction to transfer, made under s 38C of the *Building Societies Act* 1886, required the approval of the relevant Minister, the Treasurer. Pursuant to the direction, the assets and liabilities of the seven building societies passed to SGH. It was an agreed fact that the application for SGH's registration as a building society "was made so that it could accept the transfers from these building societies". It was further agreed that, at the time SGH was created, the State Government Insurance Office, to which further reference will be made shortly, took a mortgage debenture over the assets of SGH to secure a standby facility (up to a maximum of $43 million) to maintain liquidity reserves at the agreed level.

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22 s 2.

23 *Halsbury's Laws of England*, 4th ed, vol 4(2), par 701; *Cuthbertson v Maxtone Graham* (1905) 43 SLR 17.

22 SGH submitted that the circumstances of its establishment were of an "essentially public character". If by that expression it is intended to indicate that SGH was established because those who promoted its establishment saw that as being in the public interest, it is a proposition that may readily be accepted. So much would follow from the agreed fact that SGH was formed as a matter of State governmental policy in order to provide stability in the building society industry in Queensland and to provide investor confidence. But whether SGH was "the State" requires demonstration of more than government policy favouring or facilitating the creation of the entity in pursuit of some aspect of the public interest. No doubt it requires consideration of the circumstances and purposes of the entity's creation, but it also requires consideration of *every* feature of the entity which bears upon its relationship with the polity. That is why cases about s 114[24] have focused upon the ownership and management of the entity and the purposes the entity was required to pursue. It is those features which will most often reveal the relationship the entity has with the State, and if it is revealed by examination of them that the entity is wholly owned and controlled by the State concerned, and must act solely in the interests of the State, the conclusion that it *is* the State or, as was said in *Inglis v Commonwealth Trading Bank of Australia*[25], an "emanation" of the State will readily follow. We turn, therefore, to consider the ownership and management of SGH.

Ownership and management

23 To understand the structure of the ownership and management of SGH, it is necessary to say something about the State Government Insurance Office (Queensland). That entity was established as a statutory corporation under *The State Government Insurance Office (Queensland) Act* 1960 (Q). The Act provided[26] that the corporation represented the Crown and that due performance by the corporation of all contracts entered into by it, or on its behalf, was deemed to be guaranteed by the Crown. By s 7 of the *Suncorp Insurance and Finance Act* 1985 (Q), the corporation was continued in existence under the name

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24 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219. See also *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639.

25 (1969) 119 CLR 334 at 342.

26 s 8.

"Suncorp Insurance and Finance" ("Suncorp"). This Act provides[27] that Suncorp represents the Crown and has all the immunities, rights and privileges of the Crown. The parties agreed that Suncorp "is the State for the purposes of s 114" of the Constitution.

24 Suncorp controlled the organs of management of SGH. It appointed three of the six directors and could nominate both the Chairman and the Deputy Chairman of the board. The rules governing voting at directors' meetings enabled Suncorp's nominees to carry any motion they proposed.

25 There were two classes of shares in SGH – A class and B class. At the relevant times, Suncorp held all B class shares. All A class shares were held by depositors. Holders of A class shares had limited rights to vote at general meetings. If in any financial year SGH made a loss, each holder of A class shares present at the Annual General Meeting had one vote on the resolutions for consideration of the accounts and the Directors' Report. At every General Meeting each holder of A class shares present had one vote on each resolution for the election of directors in the place of those retiring by rotation. Otherwise, holders of A class shares were not entitled to vote at any General Meeting of SGH.

26 In these circumstances it is plainly right to say that Suncorp controlled SGH. But that control was not absolute. Suncorp could not lawfully require SGH, or its board, to act in disregard of the interests of A class shareholders, and it could not use its powers to control General Meetings of SGH in disregard of the interests of those A class shareholders. In the present context the nature and extent of the objects of SGH and of the consequential limitations on the powers of Suncorp over the organs of SGH are very important. It is convenient to identify the limitations on Suncorp's powers by reference to the legislation that governed the affairs of building societies in Queensland in 1993, when the payments which are in issue in the taxation appeal in the Federal Court were made. That legislation (the *Building Societies Act* 1985) applied to SGH as a permanent building society that was registered under the repealed Act, the *Building Societies Act* 1886, and was deemed by the new Act to be registered under that Act[28].

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27 s 11.

28 *Building Societies Act* 1985, s 16.

The objects of SGH and the powers of Suncorp

27 Section 82 of the *Building Societies Act* 1985 required officers of building societies to act honestly in the exercise of their powers and the discharge of the duties of their offices[29], to exercise a reasonable degree of care and diligence in the exercise of those powers and the discharge of those duties[30], not to do any act or thing directed to an object that is not an object of the society[31] and not to make improper use of certain information[32] or the position held[33]. These provisions of s 82 were to have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of the office held or employment in relation to a building society[34].

28 For present purposes it is of particular importance to emphasise the prohibition against doing any act directed to an object that is not an object of the society. The objects of SGH did not include any reference to advancing any interests of the State. Rather, they focused upon the interests of members and depositors. That this should be so is hardly surprising when regard is had to the nature of a building society revealed by the definition of that term contained in the *Building Societies Act* 1886, and referred to earlier in these reasons.

29 Moreover, the control of a General Meeting of SGH, which Suncorp could undoubtedly assert, was control that could not be exercised for purposes foreign to the purposes of the society as a whole. As was said in *Ngurli Ltd v McCann*[35]:

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29 s 82(1).

30 s 82(2).

31 s 82(3).

32 s 82(4).

33 s 82(5).

34 s 82(9).

35 (1953) 90 CLR 425 at 438 per Williams ACJ, Fullagar and Kitto JJ. See also *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837-838 per Lord Wilberforce; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289-290 per Mason, Deane and Dawson JJ.

> "[T]he powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose. 'The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power', per Lord *Parker* in *Vatcher v Paull*[36]. … Voting powers conferred on shareholders and powers conferred on directors by the articles of association of companies must be used bona fide for the benefit of the company as a whole."

Although *Ngurli Ltd v McCann* concerned a company limited by shares, the same principles apply, with equal force, to the powers given to the directors and General Meeting of SGH.

30 Nor would it have been an answer to an allegation that a director of SGH had not acted in the interests of the society as a whole for that director to say that he or she had acted according to the wishes of the person who had, directly or indirectly, brought about the appointment of that director to the board. The position of nominee directors has given rise to some debate. It is not necessary to attempt, in this matter, to resolve all of those issues. It is enough to say that the fact that a director of a body corporate is nominated to office by another does not permit the director to act in disregard of the interests of the corporation as a whole[37]. Whether the statements by Jacobs J in *Re Broadcasting Station 2GB Pty Ltd*[38], about what must be shown to establish a breach of duty by such a director, are accepted (a question we need not consider) nothing in that decision, or other cases which have considered the matter[39], can or should be understood as denying the more basic proposition about the duty that we have earlier described: that directors may not act in disregard of the interests of the corporation as a whole.

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36 [1915] AC 372 at 378.

37 See the discussion by Street J in *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) (NSW) 307 at 310-311.

38 [1964-5] NSWR 1648.

39 See, for example, *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 at 165-166 per Mahon J.

31 Similarly, it is not necessary to consider the particular questions that may be presented where the constitution of the body corporate may positively permit account to be taken of other, external, interests[40]. The rules of SGH made no such provision. That is a matter of particular significance for present purposes. Unlike the body considered in *Inglis v Commonwealth Trading Bank of Australia*[41], or the body considered in both *State Bank of NSW v Commonwealth Savings Bank of Australia*[42] and the *State Bank Case*[43], there was no provision in the rules of SGH, or its governing statute, that it should pursue the interests of the State or the public or that its policies could be determined by the executive government.

32 It follows that the control which could be exercised by Suncorp over the affairs of SGH (whether through the board or at a General Meeting) was hedged about by the obligation not to disregard the interests of persons other than the State. Those other persons were corporators but it is not the presence or absence of corporators which is of critical significance to the application of s 114 in this case. There may be cases in which a corporation, which has corporators, is within the operation of s 114[44]. What matters, here, is that there were corporators who did not hold their interests on behalf of the State but did so because they were depositors. As a result, the body, in whose name stood the property on which it was said that the Commonwealth had imposed a tax was a body whose organs of management, in making decisions about that property, could not disregard the interests of persons other than the State.

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40 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 291; *Levin v Clark* [1962] NSWR 686.

41 (1969) 119 CLR 334.

42 (1986) 161 CLR 639.

43 (1992) 174 CLR 219.

44 cf *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 in which it was held that Qantas Empire Airways Ltd, a company limited by shares, all of which were held by or on behalf of the Commonwealth, fell within the description "corporation employing persons … on behalf of the … Commonwealth" where that was a description used in the rules of a registered organisation of employees.

33 In this case, that requires the conclusion that the entity concerned, SGH, was not the State for the purposes of s 114. Other features of the relationship between SGH and the State to which reference was made in argument – Suncorp's provision of a standby facility, the audit of SGH's financial statements by the Auditor-General[45], Suncorp's power to direct SGH to change its name – do not permit, let alone require, the opposite conclusion. At the relevant time, SGH was not the "State" for the purposes of s 114 of the Constitution.

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45 *Financial Administration and Audit Act* 1977 (Q), s 73, and the definition of "controlled entity" in ss 5(1) and 5A.

34 GUMMOW J. There was removed into this Court by order under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") that part of the cause pending in the Federal Court which involves two questions respecting the operation of s 114 of the Constitution. A case then was stated to the Full Court pursuant to s 18 of the Judiciary Act.

35 Section 114 states:

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

36 The first question is whether SGH Limited ("SGH") is the "State [of Queensland]" for the purposes of s 114. The consequence of an answer in the negative to the first question is that the second question, that of whether the tax in question is a "tax on property" for the purposes of s 114, does not arise. On 6 December 2001 the Full Court dealt with the case stated and I joined in the order of the Court answering the first question "No".

37 On 30 August 1999, the Commissioner of Taxation ("the Commissioner") disallowed objections by SGH to the assessment dated 15 March 1995 in respect of the year of income ended 30 June 1994. The Commissioner ruled that SGH was not the State of Queensland for the purposes of s 114 of the Constitution. A decision by the Commissioner upon such an issue cannot amount to a final and binding determination of a constitutional question between the Commissioner and the taxpayer. The making of such a determination is a paradigmatic exercise of the judicial power of the Commonwealth[46].

38 So it is that the question was committed to the Federal Court in the exercise of the jurisdiction conferred by Div 5 of Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the Taxation Administration Act") and also, with specific reference to the constitutional questions, by par (b) of s 39B(1A) of the Judiciary Act[47]. The burden of establishing that the constitutional question should be answered "Yes", as a step in proving the assessment to income tax excessive, rested upon SGH as the taxpayer: s 14ZZO of the Taxation Administration Act.

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46 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640, 646, 658-659.

47 Added by s 3 and Sched 1 of the *Law and Justice Legislation Amendment Act* 1997 (Cth).

39 The relevant facts are further detailed by Gleeson CJ, Gaudron, McHugh and Hayne JJ. The High Court Rules provide (O 35 r 1(4)):

> "The Court may draw from the facts and documents stated in the special case any inference, whether of fact or law, which might have been drawn from them if proved at a trial."

Constitutional interpretation

40 Before turning to consider the operation of s 114 upon the facts and circumstances of this case, it is convenient to refer to the subject of constitutional interpretation.

41 Questions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect.

42 The provisions of the Constitution, as an instrument of federal government, and the issues which arise thereunder from time to time for judicial determination are too complex and diverse for either of the above courses to be a satisfactory means of discharging the mandate which the Constitution itself entrusts to the judicial power of the Commonwealth. Thus, it is one thing to determine the validity of a law, said to be supported by one or more of the heads of power in s 51 of the Constitution, by regard to the settled principles recently outlined in the joint judgment of six Justices in *Grain Pool of WA v The Commonwealth*[48]. It may be another to construe the present scope of the term "a foreign power" in s 44(i) of the Constitution. There, as *Sue v Hill*[49] decided, it is necessary to have regard to changing matters and circumstances external to Australia, but in the light of which s 44(i) has effect from time to time.

43 As will appear, the construction of s 114 of the Constitution invites attention to a further consideration. The state of the law of the Constitution at any given time is to be perceived by study of both the constitutional text and of the *Commonwealth Law Reports*. Decisions of this Court dealing with the text and structure of the Constitution but not bearing directly upon a particular provision nevertheless may cast a different light upon that provision and so influence its interpretation.

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48 (2000) 202 CLR 479 at 491-495 [13]-[22].

49 (1999) 199 CLR 462 at 487-488 [50]-[52], 524-525 [162]-[163].

44 This indicates, as indeed do the decisions in *Grain Pool* and *Sue v Hill*, that questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of the judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the Parliament and the electors, the Constitution meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the Constitution.

Section 114

45 The second limb of s 114 is one of the few provisions of the Constitution which deals specifically with intergovernmental immunities. Reference is made in the joint judgment in *Brodie v Singleton Shire Council*[50] to the various senses in which the term "immunity" is employed. The concern in construing s 114 is not[51] with that doctrine ("the shield of the Crown") whereby an authority created by statute is sufficiently identified with the executive government of the enacting polity to attract the protection generally enjoyed by the executive of that polity from its own legislation[52]. The immunities for which s 114 provides apply not within the one polity but between the Commonwealth and the States, and their effect is to restrain the exercise of legislative power in certain circumstances. Further, as was pointed out by McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[53]:

> "there is no prohibition placed [by s 114] upon one State imposing upon another State a tax with respect to property of the other State within the area of the first State or with respect to dealings by the other State in such property".

46 Rather, s 114 speaks of one polity (in this case, the Commonwealth) imposing "any tax on property of any kind belonging to" another polity (here, the State of Queensland). The power of the Commonwealth Parliament conferred by s 51(ii) of the Constitution to make laws with respect to taxation is expressed to be "subject to this Constitution". Thus, to say in this case that s 114 confers an

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50 (2001) 75 ALJR 992 at 1010-1011 [91]-[95]; 180 ALR 145 at 171-172.

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

52 See *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 409-410 [32]-[33], 429-430 [105]-[106], 470-471 [227]-[228]; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 345-347 [14]-[17].

53 (1996) 189 CLR 253 at 288.

immunity upon the State is to say that s 114 places a restraint upon the exercise by the Parliament of the Commonwealth of the legislative power in s 51(ii) which otherwise supports the provisions of the *Income Tax Assessment Act* 1936 (Cth) relied upon by the respondent for the inclusion of the two receipts in question in the assessable income of SGH[54]. If the submissions by SGH respecting s 114 of the Constitution are accepted, the consequence is that s 15A of the *Acts Interpretation Act* 1901 (Cth) requires the reading down of the general terms of the taxing provisions upon which the respondent relies, so as to accommodate the operation of s 114.

47 Since the early decision of this Court in *The Municipal Council of Sydney v The Commonwealth* ("the *Sydney Council Case*")[55], the term "a State" in the phrase "a State shall not ... impose any tax" has not been given a narrow reading. It was decided in that case that the prohibition in s 114 applied to rates imposed in respect of Commonwealth land by the Municipal Council in the exercise of a power conferred upon it by a New South Wales statute; the municipal taxation was described by Griffith CJ as an exercise of the "sovereign right" of the State "by delegation to the municipality"[56].

48 In the *Sydney Council Case*[57], O'Connor J said that "to get at the real meaning" of s 114 "we must examine the context, consider the Constitution as a whole, and its underlying principles and any circumstances which may throw light upon the object which the Convention had in view, when they embodied it in the Constitution". His Honour then proceeded[58]:

> "From the very nature of the Constitution, and the relation of States and Commonwealth, in the distribution of powers, it became necessary to provide that the sovereignty of each within its sphere should be absolute, and that no conflict of authority within the same sphere should be possible. The principles laid down by *Marshall* CJ, in his historic judgment in *McCulloch v Maryland*[59], are as applicable to the Australian Commonwealth Constitution as to the United States Constitution, and it

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54 See the judgment of Windeyer J in *Victoria v The Commonwealth* (1971) 122 CLR 353 at 400.

55 (1904) 1 CLR 208.

56 (1904) 1 CLR 208 at 230.

57 (1904) 1 CLR 208 at 239.

58 (1904) 1 CLR 208 at 239-240.

59 4 Wheat 316 (1819) [17 US 159].

> must be taken that those principles and the controversies which had arisen in the United States in reference to their application, were within the knowledge of the Convention."

It should be added that, whilst *McCulloch* concerned federal "immunity", in 1870, in *The Collector v Day*[60], a principle of reciprocal immunity had been adopted by the United States Supreme Court; neither State nor federal government could tax the salaries of the officials of the other.

49 The conclusion O'Connor J reached in the *Sydney Council Case* was that s 114 was included as a specific example of the doctrine of intergovernmental immunities which at that time was seen by this Court as necessarily implicit in the Australian federal structure. O'Connor J said[61]:

> "What could be more natural than that the Convention should, while it had the opportunity, place the application of these principles to the property of the Commonwealth, at all events, as far as possible, beyond controversy by embodying them directly in the face of the Constitution."

Barton J spoke to the same effect[62]. However, as Higgins J later pointed out in the *Steel Rails Case*[63], the method adopted in s 114 for doing so was to use terms derived from or suggested by the *British North America Act* 1867 (Imp)[64], s 125.

50 The doctrine of intergovernmental immunities has had a varied history in the United States and remains in a state of flux[65]. In Australia the doctrine was overthrown in 1920 in the *Engineers Case*[66]. In his concurring judgment in that case, Higgins J turned s 114 to account as an indication in the text and structure

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60 11 Wall 113 (1870) [78 US 113].

61 (1904) 1 CLR 208 at 240.

62 (1904) 1 CLR 208 at 234.

63 *Attorney-General of NSW v Collector of Customs for NSW* (1908) 5 CLR 818 at 853, 855.

64 30 & 31 Vict c 3.

65 Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Federal Law Review* 1 at 17-21; Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 1237.

66 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

of the Constitution that the immunity doctrine had no sound basis. After noting that s 114 was an exception to the power conferred by s 51(ii), Higgins J said that this and other explicit exceptions[67]:

> "would not be necessary if the power to legislate on the subjects stated did not include, but for the exception, a power to make legislation binding on the States".

As already remarked, the earlier view was that s 114 was designed to put beyond controversy the adoption for Australia of the United States doctrine current in 1900.

51 The doctrine of intergovernmental immunities, as protective of the States, survived after *Melbourne Corporation v The Commonwealth*[68] in a much modified form. The implied limitation upon the legislative powers of the Commonwealth was said in the joint judgment of the Court in *Re Australian Education Union; Ex parte Victoria* to consist[69]:

> "of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ('the limitation against discrimination') and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments[70]".

52 With respect to the affectation of the Commonwealth by State legislative power, it is necessary to have regard to the *Cigamatic*[71] doctrine. The scope of that doctrine remains unsettled. In our judgments in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[72], McHugh J and I expressed the view that the *Cigamatic* doctrine is concerned with those aspects of Commonwealth executive power sourced in the Constitution rather than in

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67 (1920) 28 CLR 129 at 162.

68 (1947) 74 CLR 31.

69 (1995) 184 CLR 188 at 231.

70 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

71 *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372.

72 (1997) 190 CLR 410 at 458-459, 469-470. See the further observations by McHugh J in *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 421 [78].

federal statute; except to the extent that the latter are protected by s 109 of the Constitution, State law may apply to them.

53 The result is that, whilst the doctrine of which s 114 was a particular expression is no longer part of the law of the Constitution, s 114 remains. It will be apparent that s 114 will apply to the imposition of taxes on property in circumstances where neither the *Melbourne Corporation* nor *Cigamatic* doctrines would be offended. The section thus has been deracinated by the course of constitutional development in the decisions of this Court and no longer replicates any fundamental considerations of federalism which inform a present understanding of the Constitution.

54 This is an added reason to support what in *South Australia v The Commonwealth*[73] was accepted as "the strict view of the immunity conferred by the section". The constitutional phrase "any tax on property of any kind" belonging to the Commonwealth or a State does not confer exemption upon such property from any form of tax; the tax must be imposed by reference to the relationship between the taxpayer and the relevant property, and tax the ownership or holding thereof.

55 In *South Australia v The Commonwealth*, Mason CJ, Deane, Toohey and Gaudron JJ said that[74]:

> "the adoption of a broad view of the immunity might lead to anomalies in the case of government-owned corporations formed with a view to their competing on favourable terms with private enterprise. One illustration, germane to the present case, will suffice. Were the immunity to extend to a tax on income, as the immunity conferred by words similar to s 114 in s 87(b) of the *Indian Act* 1970 (Can) has been held to extend[75], the Commonwealth Parliament would be denied power to subject a corporation owned by a State to liability to pay income tax even if the corporation is engaged in commercial competition with private enterprise."

"A State"

56 It appears from the above statement that "government owned corporations" are to be treated as answering the description in s 114 of "a State". It is here that the critical issues arise. The constitutional status and standing of

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73 (1992) 174 CLR 235 at 248.

74 (1992) 174 CLR 235 at 248-249.

75 *Nowegijick v The Queen* [1983] 1 SCR 29.

statutory corporations gives rise to a range of questions beyond those immediately involved here; the decision in *Airservices Australia v Canadian Airlines International Ltd*[76] provides illustrations. Again, in *Austral Pacific Group Ltd (In liq) v Airservices Australia*, Gleeson CJ, Gummow and Hayne JJ said[77]:

> "Airservices is a body corporate which, while it is charged with the performance of what may be classed as governmental functions, is not part of the executive government of the Commonwealth[78]. Airservices is sued by Austral Pacific as the Commonwealth within the meaning of s 75(iii) of the Constitution but it does not necessarily follow that Airservices attracts the preferences, immunities and exceptions enjoyed by the executive government in respect of State laws and identified with the *Cigamatic* doctrine[79]."

57 In the present case, it was accepted in all the submissions that, consistently with *Deputy Commissioner of Taxation v State Bank (NSW)*[80], the term "a State" in s 114 is "wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State". However, the Commissioner contends that a corporation formed under general, rather than particular, legislation cannot be "a State" (nor, it would follow, "the Commonwealth") for the purposes of s 114. This is said to be so even if all the issued shares in such a corporation be owned by the body politic. Because SGH was formed under the law of Queensland providing generally for building societies, the Commissioner says that it follows that SGH cannot be "a State".

58 There is some support for this approach to s 114 supplied by the United States decisions respecting intergovernmental immunities which the framers of the Australian Constitution had in view. Cooley observed[81] that the inhibition respecting the use of the taxation power extended to protect the "means or

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76 (2000) 202 CLR 133.

77 (2000) 203 CLR 136 at 143 [14].

78 *Re Residential Tenancies Tribunal (NSW); Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 458-460, 470-472.

79 *Re Residential Tenancies Tribunal (NSW); Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 458, 464-465.

80 (1992) 174 CLR 219 at 230.

81 *The General Principles of Constitutional Law in the United States of America*, 2nd ed (1891) at 59.

agencies" through which governments performed "their essential functions", but continued[82]:

> "But the sovereignty whose means or agencies of government would be affected by the tax might render it lawful by its assent, as has been done in some cases."

In *Thomson v Pacific Railroad*[83] the Supreme Court referred to *McCulloch v Maryland* and said that, in *McCulloch*, the Court[84]:

> "did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence, or any of its qualities, to State legislation."

The complainants in *Thomson* had submitted that the transcontinental railway, to be known to history as the Union Pacific[85]:

> "being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority".

But the taxpayer was incorporated under the law of Kansas, and the Supreme Court concluded[86]:

> "We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its

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82 *The General Principles of Constitutional Law in the United States of America*, 2nd ed (1891) at 60.

83 76 US 579 (1869).

84 76 US 579 at 589 (1869).

85 76 US 579 at 587 (1869).

86 76 US 579 at 590-591 (1869).

> existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection."

59 Section 102 of the Constitution suggests an alertness to the distinction between utilities (there, railways) which are operated by a public body synonymous with the notion of "a State" and those constituted under the law of a State but distinct from it. Section 102 empowers the Commonwealth Parliament in certain circumstances to forbid "as to railways, any preference or discrimination by any State, or *by any authority constituted under a State*" (emphasis added). Quick and Garran[87] wrote that it was clear from the use of the term "any State" that the section "applies to the Government railways of the States, whether controlled directly by the Executive Government of the State, or vested in a corporate body of Railway Commissioners"; they added[88]:

> "It seems that the subsequent words, referring to preferences made 'by any authority constituted under a State,' are wide enough to include not only Railway Commissioners, but also railway companies incorporated by an Act of the Parliament of a State. The only importance of the question seems to be that if privately-owned railways are not included in this section, they will be subject to the full operation of the trade and commerce power, without limitations which are placed by this section upon the power of the Parliament."

60 There also is some support for the Commissioner's submission in the judgments of the majority in *The Commonwealth of Australia v Bogle*[89]. One issue there was whether certain State legislation applied to a corporation formed under the *Companies Act* 1938 (Vic), on the initiative of the Executive Government of the Commonwealth as a company limited by guarantee. In deciding that the State legislation did apply, Fullagar J observed[90]:

> "It is said that the company was formed at the instance of the Commonwealth, that the Commonwealth through the Minister is in a position under the articles to control the company, and that the ultimate financial interest is that of the Commonwealth. But none of these things can affect the legal character of the company as a person suing in the

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87 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 905. See also *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 354-355 per Latham CJ.

88 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 905.

89 (1953) 89 CLR 229.

90 (1953) 89 CLR 229 at 267-268.

> courts. If the company were a company limited by shares, it could make no difference that the Commonwealth held ninety-nine per cent of the shares. It is said (with perhaps more force) that the company is in possession and control of property of the Commonwealth, and that its activities are activities in which the Commonwealth, in the course of the exercise of the immigration power, is vitally interested. But again I am unable to regard these matters as affecting in any way the legal nature of the company. *Having been incorporated under the Companies Acts of the State, it seems to me that it must be subject to the Companies Acts and all other State legislation which in terms applies to such companies*. It may be that the Commonwealth Parliament could, under s 51(xxvii) and (xxxix) of the Constitution, enact legislation conferring immunities on the company and prevailing over State legislation by virtue of s 109. But no such question need be considered, because no such legislation has been enacted." (emphasis added)

61 In the present case, the Commissioner puts his submission on the footing that the procuring by a body politic of incorporation under the general law of a State is the manifestation by that body politic "of a deliberate choice" not to engage the immunities conferred by s 114. This suggests that the operation of s 114 is avoided by some process of election or waiver by the executive government of the body politic otherwise entitled to the benefit of the immunity. Questions respecting the effect of consent and waiver upon the absence of legislative power under the terms of the Constitution have given rise to various differences of judicial opinion. Examples are provided by *Brown v The Queen*[91] and *Re Wakim; Ex parte McNally*[92].

62 In contrast to the provisions considered in those authorities, s 114 does deal specifically with consent to what otherwise would be an infraction of its provisions. However, it does so in a limited fashion. With the stipulated consent a State may raise or maintain a naval or military force. But the consent must be given by the Parliament of the Commonwealth, not merely the executive government. No such consent provision attaches to the second limb of s 114. It is true that statements by Barwick CJ, Mason J and Murphy J in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*[93] support the proposition that this constitutional immunity may be waived in respect of cases where it

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91 (1986) 160 CLR 171.

92 (1999) 198 CLR 511 at 546 [24], 577-579 [114]-[117], 611-612 [211]-[214].

93 (1979) 145 CLR 330 at 337-338, 357, 357 respectively. The strength to be attached to the statement by Murphy J is diminished by his Honour's apparent reading of the provision respecting parliamentary consent in the first limb of s 114 as applying also to the second limb.

otherwise operates. But it is said that the waiver must be by the Parliament of the body concerned and must be expressed in plain terms. Those conditions do not apply here. This makes it unnecessary further to pursue the question of waiver or consent. However, it may be added that, to the extent that United States authority supports the Commissioner's submissions, that authority concerned the displacement of implications upon which the theory of intergovernmental immunities was based, not any specific constitutional text such as s 114.

63 The immediately significant consideration is that to introduce a distinction for the purposes of s 114 between a "general" and a special or particular law of corporations would be to complicate the operation of the section, which is concerned with matters of substance rather than of form[94].

64 In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*[95], Stephen J said of the task of the Court in a case such as the present that "the primary task is that of statutory interpretation rather than any mechanical application of supposed tests". In that spirit, SGH and the Queensland Attorney-General, who intervened in its support, emphasised such matters as the "public character" of SGH and the public policy imperatives which were associated with its formation; the financial connection between SGH and the State, including the auditing of its accounts by the Auditor-General in the 1994 income tax year; and the control which Suncorp Insurance and Finance ("Suncorp") (accepted to be the State of Queensland for this purpose) was in a position to exert over SGH.

65 It is the last of these matters that is the most significant[96]. If the State did not control the conduct of the affairs of SGH, the State cannot be said to be carrying on the activities of government through the medium of SGH as its agent or instrument.

The structure of SGH

66 The *Building Societies Act* 1985 (Q) ("the 1985 Act") empowered SGH to raise funds by the issue of shares (s 51(1)) or by the receipt of money on deposit (s 53(1)). There was no provision corresponding to that in s 11(1) of the *Suncorp Insurance and Finance Act* 1985 (Q), the statute which provided (s 7) for the constitution of Suncorp and specified its powers and authorities (s 8). Section 11(1) stated:

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94 *South Australia v The Commonwealth* (1992) 174 CLR 235 at 249.

95 (1979) 145 CLR 330 at 347.

96 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 347-349, 354, 371.

> "Every policy or contract of insurance or indemnity issued or entered into within the authority of this Act is guaranteed by the Government of Queensland and any liability arising under such guarantee shall be payable out of the Consolidated Revenue Fund, which is hereby to the necessary extent appropriated accordingly."

The Consolidated Revenue Fund was established by s 34 of the *Constitution Act* 1867 (Q).

67 Paragraph 12 of the stated case states:

> "In the financial year ended 30 June 1994 Suncorp held 100% of the 'B' class permanent voting shares issued by the Taxpayer. Each of the Directors had a non beneficial shareholding of 100 shares, and all of the 'A' class shares were held by depositors of the Taxpayer."

68 There were 33,070,588 "B" class shares of $1.00 each, issued and fully paid. The number of "A" class shares which were issued does not appear. It was suggested in argument that the figure of 2,214,400,000 shown in the balance sheet as at 30 June 1994 included "A" class shareholders and depositors who were not shareholders.

69 Where the question of control concerns a corporation with an issued share capital the matter ordinarily is approached by looking, as did Kitto J in *Mendes v Commissioner of Probate Duties (Vict)*[97], to the exercise of voting power at general meetings. His Honour said[98]:

> "The board binds the company by what it does within the authority which the articles of association confer upon it, but its decisions are decisions made *for* the company, not *by* it. Only the decisions of the company in general meeting are decisions *of* the company; and this is true however wide may be the powers of the board and however few and limited the powers of the general meeting." (original emphasis)

He added[99]:

> "If in the general meeting one person has the majority of votes on some subjects and another has the majority of votes on other subjects, neither

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97 (1967) 122 CLR 152.

98 (1967) 122 CLR 152 at 160.

99 (1967) 122 CLR 152 at 165.

can truly be said to control the company. The control is divided between them."

70 The share structure of SGH is explained by Gleeson CJ, Gaudron, McHugh and Hayne JJ. From that analysis and what was said by Kitto J in *Mendes*, it follows that Suncorp (and thus the State) did not control SGH; it shared control with the "A" class shareholders. Moreover, as their Honours point out, any degree of control exercised by Suncorp could not be exercised for purposes foreign to the purposes of SGH as a whole. That limitation would, for example, extend to the making of a decision that SGH be wound up voluntarily under s 130(1)(b) of the 1985 Act.

71 Where the corporation in question lacks corporators but is constituted with a board of directors, questions of control may be determined by looking to the conduct of the directors. *State Bank of NSW v Commonwealth Savings Bank of Australia*[100] was such a case. The State Bank was constituted by the *State Bank Act* 1981 (NSW) with no corporators[101]. The proposition advanced by SGH that this decision shows that in any case sufficient control may be established by the presence of a power to appoint directors is too widely drawn.

72 In any event, Gleeson CJ, Gaudron, McHugh and Hayne JJ demonstrate that such control over the affairs of SGH as Suncorp exercised through the mechanism of the board was hedged about by an obligation not to disregard the interests of persons other than the State of Queensland.

73 Another aspect of the question of "control" concerns the funding arrangements which enable the entity in question to exercise its powers and discharge its functions. The sourcing of finance in appropriations by the legislature under the relevant constitutional provisions and the statutory classification of the moneys otherwise raised or received by that entity as part of the Consolidated Revenue Fund are indications that the entity is an agent or instrument of the Commonwealth or State for the purposes of s 114. However, in the case of SGH, unlike Suncorp, there is no provision to any such effect[102]. The circumstance that at the time of the receipts in question in this litigation SGH was subject to audit by the Auditor-General under Pt 6 of the *Financial Administration and Audit Act* 1977 (Q) is not of decisive importance.

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100 (1986) 161 CLR 639.

101 (1986) 161 CLR 639 at 645-646.

102 cf the financial structure of the Civil Aviation Authority considered in *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 260-263 [369]-[379], 267-269 [396]-[403].

Conclusion

74 For these reasons, I joined in the order pronounced on 6 December 2001.

75 KIRBY J. Two questions have been removed into this Court pursuant to the *Judiciary Act* 1903 (Cth)[103]. Each question concerns the construction of s 114 of the Constitution[104]. This Court has said that s 114 has as its fundamental purpose "the protection of the property of the Commonwealth and the States from the imposition of taxation by each other in the interests of their respective financial integrity"[105]. However, in *Queensland v The Commonwealth (The Fringe Benefits Tax Case)* [106], Gibbs CJ observed that "[i]t cannot be said that the decisions of this Court contain a clear exposition of the meaning and scope of s 114.[107]"

76 Having heard argument on the first question, the Court came to a firm view, by majority, that an answer could be given to the effect that the party propounding that it was an emanation of the State of Queensland was not so. This conclusion meant that it was unnecessary for the Court to answer the second question. I was of the contrary opinion. In my view the plaintiff was "the State" for the purposes of s 114 of the Constitution. I would have ordered that the hearing continue so that the second question might be answered and final orders made conformably with my conclusion on the first question.

77 My opinion could not alter the disposition of the proceedings. Because it is a minority view I will state it as briefly as I can. In the joint reasons an opinion is expressed that it is unnecessary to embark upon the "troubled waters" of the preferable approach to constitutional interpretation[108], concerning whether a prohibition such as that stated in s 114, is to be construed "in accordance with the meaning of the prohibition at the time when the Constitution was enacted"[109]

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103 s 40.

104 The section is set out in the reasons of Gleeson CJ, Gaudron, McHugh and Hayne JJ ("the joint reasons") at [5]; reasons of Gummow J at [35]; reasons of Callinan J at [125]. The questions reserved are set out in the joint reasons at [3]; reasons of Gummow J at [36]; reasons of Callinan J at [123].

105 *Deputy Commissioner of Taxation v State Bank of New South Wales* ("the *State Bank Case*") (1992) 174 CLR 219 at 229.

106 (1987) 162 CLR 74 at 92.

107 Discussed in Morabito, "The Constitutional Restriction on Taxes Imposed on Crown Property", (1998) 1 *Journal of Australian Taxation* 41.

108 Joint reasons at [14].

109 *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 615 per Mason J. The relevant passage appears in the joint reasons at [14].

or in some other way. I hold to the other way[110]. It is a serious mistake, in my opinion, to attempt to construe any provision of the Constitution, including a prohibition such as that contained in s 114, from a perspective controlled by the intentions, expectations or purposes of the writers of the Constitution in 1900[111].

78 As the joint reasons point out, this Court has already specifically rejected such an approach to the meaning of s 114[112]. Inherent in that rejection is the recognition that, at least in respect of what is "the Commonwealth" or "a State" for the purpose of s 114, the section is to be given a broad and not a narrow meaning[113]. It is to be construed in a way harmonious with its purposes that lie deep in the nature of a federal polity[114]. When those purposes are fully appreciated it will be realised that the section speaks to succeeding generations in a way that adapts to the significantly altered manner in which the political units of the Australian federation manifest themselves today when compared, say, with the equivalent manifestations of 1901 or of 1950, 1980 or even of 1990.

79 The past two decades in Australia and elsewhere have seen very large changes in the notions of governmental responsibilities and how they are to be fulfilled: federal, State and local[115]. Governments now pursue governmental purposes through legal instrumentalities and agencies sometimes quite different from those created earlier in the history of the Commonwealth. Many such instrumentalities now involve "outsourcing" of governmental functions to the private sector[116]. Others (like Qantas Airways Ltd[117] and Telstra Corporation

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110 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600-601 [188]-[191].

111 cf *The Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at 522-525 [110]-[118].

112 *State Bank Case* (1992) 174 CLR 219 at 229. See joint reasons at [15].

113 Stone, "Immunity from taxation under section 114 of the Constitution", (1992) 66 *Australian Law Journal* 601.

114 cf Morabito, "The Constitutional Restriction on Taxes Imposed on Crown Property", (1998) 1 *Journal of Australian Taxation* 41 at 55-56.

115 Seddon, *Government Contracts*, 2nd ed (1999) at 11 [1.8].

116 Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law", (1992) 3 *Public Law Review* 186; Fredman and Morris, "The Costs of Exclusivity: Public and Private Re-examined", (1994) *Public Law* 69.

117 cf *R v Portus; Ex parte Federation Clerks Union of Australia* (1949) 79 CLR 428 at 434-435, 438, 441.

Ltd) involve the use of private corporations to manifest the governmental purpose. In the present case, the instrumentality or agency in question is a building society, formed in accordance with State law but with very special features. Once one looks past matters of form to matters concerning its origins, purposes, substance and powers, the building society in this case is seen for what it truly is: not just another ordinary building society, formed solely for the purposes of its members and depositors, but a special building society with origins in State objectives, created for State purposes, controlled by a State manifestation, established pursuant to amended State legislation to do the business of the State and audited by the State Auditor-General under State law.

80 This, then, is the essence of my difference from the majority. It has its origin in the approach that I take to constitutional interpretation. But it is also connected with what I regard as the significant and relevant changes in governmental activities in recent years and the new and different instruments by which such activities are now accomplished. The Constitution – as the fundamental law of government in Australia – keeps pace with such changes.

81 When the approach that I favour is adopted, the answer to the first question on the basis of the agreed facts is clear: the plaintiff is "the State". It is therefore within the scope of the immunity from federal taxation provided by s 114 of the Constitution. Any other view involves the "strict construction" of the section that this Court has expressly disclaimed[118]. It is inconsistent with other established authority, with the text and purposes of the Constitution and with the application of the Constitution to contemporary realities and to the facts of the present case.

The origins and meaning of s 114 of the Constitution

82 *History: Other constitutions*: To make good the foregoing propositions I will start by addressing some remarks to the origins of s 114 of the Constitution, its purposes in the context of our federal constitution and the authority of this Court about the way in which its meaning should be approached when one is dealing not with the State *as such* but with an instrumentality, agency or emanation of the State. It is useful to start with a reference to the position in other federations[119].

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118 *State Bank Case* (1992) 174 CLR 219 at 229.

119 In addition to the provisions in the United States, Canadian and Indian constitutions referred to here there are similar provisions controlling taxation of the constituent polities making up other federations: see eg Basic Law for the Federal Republic of Germany 1949, Arts 105(2)(2a), 106(2); Federal Constitution of Malaysia, Arts 73,

(Footnote continues on next page)

83 The United States Constitution contains only one provision expressly limiting a polity of the federation from burdening the others by imposts. This is the provision forbidding a State, "without the Consent of Congress" from levying "any Duty of Tonnage" or keeping any troops or ships of war in time of peace[120]. This asymmetrical provision became the original source of the proposal that ultimately became s 114 in the draft Australian Constitution presented to the Sydney Convention in 1891. However, that clause extended the prohibition to one upon a State imposing "any tax on any land or other property belonging to the Commonwealth"[121]. In committee, Sir Samuel Griffith proposed that there be added to the clause: "nor shall the Commonwealth impose any tax on any land or property belonging to a State". This was agreed. The clause substantially assumed its present form at the Adelaide session in 1897.

84 The framers of the Australian Constitution were obviously aware that the United States Constitution had included no such broad inhibition upon taxation on the property of the several States of that federation. But they were also aware of the fact that the Supreme Court of the United States had interpreted the Constitution of that country as implying that no State could tax the "property and lawful agencies and instrumentalities of the Federal Government, no matter in whose hands they may be found"[122]. They knew that, at the time shortly before Federation, this implied immunity had developed in the United States to a substantial degree – including so as to prohibit a State from taxing the whole or part of the stock of a corporation "if made up of … public funds"[123]. The explanation given in the cases for such a prohibition had been that, otherwise,

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110(1); Constitution of the United Mexican States, Art 115(iv); Constitution of the Islamic Republic of Pakistan 1990, s 165.

120 US Constitution, Art 1 s 10; *Graves v New York; Ex rel O'Keefe* 306 US 466 (1939); *South Carolina v Baker* 485 US 505 at 523 (1988); cf Powell, "The Waning of Intergovernmental Tax Immunities", (1945) 58 *Harvard Law Review* 633; Powell, "The Remnant of Intergovernmental Tax Immunities", (1945) 58 *Harvard Law Review* 757.

121 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 948.

122 Quick and Garran at 949; Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia", (1969) 7 *Melbourne University Law Review* 15.

123 Quick and Garran at 949.

"[I]f such power were recognized in the States it might be carried to such extent as to, in effect, destroy this power in Congress"[124].

85 Somewhat similar reasoning came to be adopted in the early days of this Court in the guise of the doctrine of implied prohibitions upon governmental instrumentalities[125], until that doctrine was swept aside in 1920 by the *Engineers Case*[126]. However, at the Conventions, the founders had enjoyed the advantage of a particular provision in the Canadian constitutional instrument which they elected to adopt and copy. It said[127]: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation".

86 The Canadian provision was to become a basis for similar constitutional measures in the instruments of government of several British dominions and former colonies and possessions that adopted a federal system of government. The provisions of s 114 of the Australian Constitution were the first that followed the substance of the Canadian template. However, there were many others. Thus Art 289(1) of the Constitution of India 1949 states:

> "(1) The property and income of a State shall be exempt from Union taxation.
>
> (2) Nothing in clause (1) shall prevent the Union from imposing … any tax to such extent … as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State …

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124 Quick and Garran at 949. See also *The Collector v Day* 78 US 113 at 127 (1870); Morabito, "Commonwealth Taxes, State Governments and the Doctrine of Intergovernmental Immunity", (1997) 26 *Australian Tax Review* 182.

125 eg *D'Emden v Pedder* (1904) 1 CLR 91; *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 163.

126 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 150-151; see also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 81; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 383; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 214-215; *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 453; *State Chamber of Commerce & Industry v The Commonwealth* (1987) 163 CLR 329 at 355-356; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 231-232.

127 *British North America Act* 1867 (Imp), s 125 (now Canadian Constitution, s 125).

(3) Nothing in clause (2) shall apply to any trade or business … which Parliament may by law declare to be incidental to the ordinary functions of Government."

87 Perhaps unsurprisingly, given its simple and apparently absolute terms, the Canadian immunity has been afforded a broad ambit by successive court decisions in that country[128]. A public corporation will enjoy the same taxation immunities as the possessions of the Crown[129] and even a private corporation would enjoy those immunities if the requisite public character is established[130]. The provision of the Indian Constitution, on the other hand, has been given a narrow or strict interpretation[131]. Thus in India, State public corporations have been rendered subject to Union taxation. The fact that the bulk of the capital of the corporation was contributed, and income received, by the State in question has been held insufficient to attract the Art 289 exemption[132].

88 *Necessity of a broad approach*: This, then, is the historical context in which this Court has been called upon to give meaning to s 114 of the Australian Constitution. Like the Canadian predecessor it is short and comparatively straightforward. Its provenance and conceptual expression suggests a broad application. So do various internal indications appearing in the language. Thus although for convenience in these proceedings this Court has separated the questions as to whether the plaintiff is "the State" and whether the propounded

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128 *Great West Saddlery Co v The King* [1921] 2 AC 91 (PC); *Attorney-General of British Columbia v Attorney-General for Canada* [1924] AC 222 (PC); *Caron v The King* [1924] AC 999 at 1006 (PC); *Attorney-General of Alberta v Attorney-General for Canada* [1939] AC 117 (PC); *Reference re Debt Adjustment* [1942] SCR 31 affd [1943] AC 356 (PC); The Canadian decisions have sometimes adopted an even wider view of the immunity than has been adopted by this Court: Morabito, "The Constitutional Restriction on Taxes Imposed on Crown Property", (1998) 1 *Journal of Australian Taxation* 41 at 55-56.

129 *City of Halifax v Halifax Harbour Commissioners* [1935] SCR 215.

130 *Attorney-General of British Columbia v Attorney-General for Canada* [1924] AC 222 (PC); *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 (PC); *Regina Industries v City of Regina* [1947] SCR 345.

131 *In re Sea Customs Act s 20(2)* AIR 1963 SC 1760; (1964) 3 SCR 787; *New Delhi Municipal Committee v State of Punjab* AIR 1997 SC 2847 at 2900 [168], 2904 [174]; cf at 2880 [104].

132 *Andhra Pradesh State v Income-Tax Officer* (1964) 7 SCR 17.

tax falls upon "property" of a State, they are in truth aspects of a composite phrase[133].

89 The prohibition in s 114 is upon the imposition of a federal tax on "property *of any kind* belonging to a State". The wide ambit of the section is signalled expressly by the words "of any kind"[134]. Such an ambit is also marked by the fact that s 114 allows no relevant express provision for waiver. Whereas such provision is made with respect to the imposition of State taxes upon the Commonwealth ("without the consent of the Parliament of the Commonwealth") there is no such provision for the Parliament of a State giving a like consent. No such consent is therefore contemplated. Moreover the "property" that is exempt is immune so long as it "belongs" to the State. This phrase clearly envisages property owned directly by the State as such, being the polity created by the Constitution out of the colonies admitted into the Commonwealth[135]. But it also envisages property owned indirectly (through statutory agencies, private corporations and, I would suggest, building societies) so long as such instrumentalities or agencies fairly answer to the description of "the State" for the purposes for which the immunity from taxation is afforded by s 114.

90 This view of the section, which its language, history and origins suggest, is also confirmed by the opinions about its ambit expressed from the start by knowledgeable commentators. Thus, even in 1901, Dr John Quick and Mr Robert Garran stated their opinion that the exemption of State property from taxation was secured, not just in respect of property held by the State *eo nomine* but also, as in the United States, by "necessary governmental instrumentalities of the States"[136]. The authors appear to have regarded such a broad application of s 114 as inherent in the character of a federal system of government and the divided sovereignties that such a system necessarily entails.

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133 In the context of the interpretation of ordinary legislation this Court has repeatedly said that it is a mistake to dissect statutory provisions into words and phrases. The ordinary unit of communication in the English language is the sentence: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 at [109]. There is no reason to adopt a different approach to constitutional interpretation.

134 This is a point noticed by Murphy J in *Bevelon Investments Pty Ltd v Melbourne City Council* (1976) 135 CLR 530 at 551; cf Morabito, "The Constitutional Restriction on Taxes Imposed on Crown Property", (1998) 1 *Journal of Australian Taxation* 41 at 54.

135 *Commonwealth of Australia Constitution Act* 1900 (Imp), (63 & 64 Vict c 12), s 6.

136 Quick and Garran at 950.

91 *Limitations of a check-list*: Contrary to the submissions of the Commonwealth, outlined in the reasons of Callinan J[137], the correct approach to the question presented by these proceedings does not therefore involve looking for six or more, or fewer, aspects or attributes of a relevant corporation with a view to discerning its true character for the purposes of s 114. That is an unconceptual approach to the task before this Court. If adopted, it would lock the Court into solving this case, and all future such cases, by reference to the factual features that have presented themselves in past cases to this time. Effectively, it would tend to freeze the protected manifestations of the federal and State polities into the organisations, agencies and institutions by which they have manifested themselves in the past. This is not permitted by a correct approach to the task of giving meaning to a Constitution. Facts continue to change. Governmental institutions and organisations continue to evolve. The responsibilities of government constantly adapt to meet the perceived needs of the people in the representative democracy established by the Constitution. The Constitution is not a straight-jacket confining the emanations of a State or of the Commonwealth protected by taxation immunity to those that conform to a six point "checklist". In saying this I do not deny that the characterisation required by s 114 may not sometimes be assisted by reference to indicators that have been found helpful in the past. But the search must ultimately be for whether the propounded emanation represents the State or federal polity so as to attract the immunity of s 114 not whether it secures a high score on the six point checklist.

92 A glance at past decisions of this Court on s 114 indicates that the disputed cases have been comparatively few: five or six major ones at most[138]. Given the many changes that have occurred in Australia in governmental functions and institutions over the past century, this comparative paucity of litigation suggests (as one would expect) a high degree of mutual respect and flexibility among the several polities of the Commonwealth in avoiding taxation of each other's agencies and instrumentalities.

93 It would, I imagine, have been possible in the early days of the interpretation of s 114, for this Court to have adopted a strict approach to the operation of the section and to the references in it to "the Commonwealth" and "a State", much as the Supreme Court of India, with its different constitutional text,

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137 Reasons of Callinan J at [131].

138 The application of s 114 was raised but not argued in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 643, 666. That was a case involving the purported imposition of a State stamp duty law upon a lease of shop premises upon land held by a federal authority for federal purposes.

was later to do. Such a view might have been sustained by a literal interpretation of the section. More recently it could possibly have been supported by a principle influenced by modern views about taxation, namely that exemptions should be kept to a minimum, reserved to the traditional, indispensable or "core" activities of government and not extended to business, commercial or trading activities for which income and profit are inherent objectives[139]. Upon such a view, to the extent that government entered upon such activities, its instrumentalities should have no tax advantages over private competitors in the market place but should pay taxation in the same way as other business, commercial or trading entities. I do not doubt that this would have been a legitimate and defensible interpretation of s 114 of the Constitution, however difficult it might have been to apply in particular cases[140].

94 However, it was not the approach that this Court adopted. And no-one in these proceedings advocated such a changed approach. Perhaps that was because the several polities before the Court – federal and State – have, through various instrumentalities, each engaged in business, commercial and trading activities of many kinds. No party and no intervener suggested a root and branch revision of current doctrine about s 114. When first adopted, that doctrine was doubtless influenced by the fact that, even in colonial times, the polities that are now the States of the Commonwealth were engaged in "a wide range of governmental functions which were not traditional and inalienable"[141]. The colonial governments in Australia had been engaged in the provision of railways, banking and even butchering services through various entities which they severally controlled. Such arrangements continued after federation. The new Commonwealth quickly followed suit. This is therefore the setting in which the immunity in s 114 fell to be interpreted. It helps to explain the position adopted by this Court in a unanimous opinion stated a decade ago[142]:

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139 cf *South Carolina v United States* 199 US 437 (1905); *National League of Cities v Usery* 426 US 833 (1976).

140 The Canadian cases have not generally developed a distinction between commercial and non-commercial activities of governmental corporations: *Re City of Toronto and Canadian Broadcasting Corporation* [1938] OWN 507; Hogg, *Constitutional Law of Canada*, 4th ed, (1997) at 620-624; *Laskin's Canadian Constitutional Law*, 5th ed, (1986) vol 2 at 840-846; cf *Re Exported Natural Gas Tax* [1982] 1 SCR 1004 at 1079.

141 *State Bank Case* (1992) 174 CLR 219 at 231-232 referring to *Heiner v Scott* (1914) 19 CLR 381 at 392 per Griffith CJ.

142 *State Bank Case* (1992) 174 CLR 219 at 230-231.

> "Once it is accepted that the Constitution refers to the Commonwealth and the States as organisations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government."

95 *Polities acting through instrumentalities*: Several other points about s 114, expressed in decisions of this Court, support the submission that the section is to be given a broad application, with attention focussed on objects and purposes rather than on form and on particular arrangements that are bound to vary over time and as between different institutions established as emanations of the polity concerned. The mere fact that the Commonwealth or a State engages in activities that, in other times or places and even elsewhere in Australia or contemporaneously, are conducted by non-governmental, private bodies is not determinative of the character of the instrumentality concerned for the purposes of s 114 or analogous purposes. Thus banks[143], railways[144] and superannuation boards[145] have sometimes been identified as emanations of the States for relevant purposes.

96 It follows that the list of features regarded as relevant in particular circumstances is not closed. Still less is it determinative of the *character* of the propounded instrumentality as a manifestation of the polity concerned. The possession of traditional, or generally accepted, governmental features will certainly assist in the task of giving an affirmative characterisation. But the decisive question is always whether the instrumentality, with its history, purposes, manner of organisation, governance, functions and systems of control represents an instrument or agency by which the Commonwealth or a State is to

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143 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 52; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 644.

144 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488.

145 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 284.

"operate in a particular field through a corporation created for the purpose"[146]. Alternatively, the question is whether it can be said that a corporation has been created with some connections with the Commonwealth or State concerned but with a purpose that it should "perform its functions independently of the [polity], that is to say otherwise than as a [federal or State] instrument, so that the concept of a [federal or State] activity cannot realistically be applied to that which the corporation does"[147].

The evidence suggests an emanation of the State

97 *History and purpose of SGH*: It remains to apply the foregoing principles to the facts of the present case. Most of the relevant facts are set out in other reasons[148]. Ultimately, characterisation of multiple facts for constitutional purposes always involves an element of judgment and opinion. Different people can see exactly the same facts and come to different conclusions about their classification for such purposes. So it is in this case. However, in my view, consistently with the unchallenged doctrine of this Court, the relevant features of the history, purposes, manner of organisation, governance, functions and systems of control of SGH Limited ("SGH") combine to render it an emanation of the State of Queensland for the purposes of s 114 of the Constitution. I must explain why.

98 The history speaks powerfully in favour of this conclusion. SGH owes its origins and existence to a particular political and economic crisis that in 1976 faced the Government of the State of Queensland. That crisis involved seven building societies in that State, incorporated under the then applicable law[149]. The societies were on the point of financial collapse. Such a collapse would have been seriously damaging to the economy of the State. What followed, leading to the creation of the body that was later renamed as SGH, involved decisive governmental action for what was obviously a legitimate and proper purpose of the State as a polity.

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146 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 338 per Kitto J; *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 644.

147 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 337-338; *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 644.

148 Joint reasons at [1]-[2]; reasons of Gummow J at [37]; reasons of Callinan J at [112]-[122].

149 *Building Societies Act* 1886 (Q).

99 Under State Government encouragement and direction, the existing State Government Insurance Office ("SGIO") (which for relevant purposes is accepted as an instrumentality and manifestation of the State), established a body that originally bore the name "SGIO Building Society". That name itself reflects, in its terms, the involvement of the "State Government". The body so established became the vehicle by which the assets and liabilities of the seven collapsing building societies were taken over by the State Government. The SGIO was later renamed "Suncorp" in accordance with the modern tendency to give public sector bodies a private corporate appearance (the later corporate manifestations of the Postmaster-General in the federal sphere represent an analogy). By direction of Suncorp, the name of SGH was adopted; but the substance remained the same. The body existed to effect the State Government purposes. They remained exactly the same. The plaintiff is still a "State Government" body. The "S" and "G" of its name effectively gave the game away. Whilst adoption of a name could not foreclose the constitutional question, in the present case the name reflected the reality.

100 Nor were the foregoing changes effected purely by private corporate initiatives. Public legislation was required. Its passage was secured from the State Parliament by the State Government. The *Building Societies Amendment Act* 1976 (Q) conferred on the State Registrar of Building Societies ("the Registrar") the power to direct the transfer of engagements or property from one building society to another[150]. A "contingency fund" was created to be held by the State for the protection of persons with investments in building societies[151]. This fund was maintained by a general levy on building societies. The State Government then applied for incorporation of SGH (under its original name). The Registrar, with the State Treasurer's approval, directed the transfer of all assets and liabilities of the collapsing building societies to SGH (under its earlier name). The State Treasurer then instructed SGIO to provide financing to the new society. It did so specifically to restore confidence in the building society industry. This involved SGIO providing to SGH (under the name SGIO Building Society) loan funds of at least $1 million and a standby facility of $43 million, representing the consolidated liabilities of the seven collapsing societies by now assumed by the new specially created "State Government" building society.

101 Against the background of the foregoing history and having regard to the purposes which that history discloses (as explained to the State Parliament by the

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150 s 38C.

151 s 36A.

State Treasurer, Sir Gordon Chalk)[152] it cannot be doubted that SGH owed its existence and functions to the specific State governmental objective, necessary to the times. The Treasurer said[153]

> "While some people think that the entry of the SGIO into this particular type of operation is in some way undesirable, it is necessary if we are to provide funds and so protect every person involved in the problems confronting the societies.
>
> The only source from which they could become available and which is accessible to me is the SGIO."

102 The "we" and "me" referred to in this passage from *Hansard* was not the Treasurer personally – but the Government of the State, for declared State purposes, requiring specific State legislation which the State Parliament, for the objects revealed, approved without division for the protection of the investors and people of the State and the State economy.

103 *Disbursement of the State funds*: When in 1985 the original building society legislation was repealed and replaced[154], new legislation established a new Contingency Fund to which the funds in the earlier contingency fund were transferred. SGH continued to make contributions to this Fund. In 1993, the crisis just described having passed, the Parliament of the State provided for the disbursement of the latter Fund[155]. It was pursuant to that Act[156] that the State, on 5 July 1993, paid SGH the sum of $23,002,000. On 28 July 1993 a further sum of $2,011,095 was paid by the State to SGH as an *ex gratia* payment[157]. It was these payments that were assessed by the respondent Commissioner of Taxation for federal taxation under the *Income Tax Assessment Act* 1936 (Cth). This was so although the moneys in question were of State origin under State control and directly derived from the disbursement of the Fund initially created on the initiative of the State under a State law and maintained as long as deemed necessary for the State Government purposes described.

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152 *Queensland Parliamentary Debates*, Legislative Assembly, 13 April 1976 at 3640.

153 *Queensland Parliamentary Debates*, Legislative Assembly, 13 April 1976 at 3640.

154 *Building Societies Act* 1985 (Q).

155 *Building Societies Fund Act* 1993 (Q).

156 s 11.

157 Pursuant to *Financial Administration and Audit Act* 1977 (Q), s 106.

104 *Control of SGH*: To the foregoing features of the history, purposes and manner of organisation of SGH (including under its original, significant name) should be added a number of aspects of the governance, functions and systems of control of SGH. To a large extent these are described sufficiently for my purposes in the joint reasons[158]. I agree with the conclusion there stated that Suncorp, the new name for SGIO, is an undisputed manifestation of the State-controlled SGH[159].

105 It is true that such control on the part of Suncorp was not to the total exclusion of the legal duties imposed by the general law of building societies on the directors, whom Suncorp controlled. However, those duties do not in my opinion contradict, or relevantly diminish, the powers lawfully reserved to the State's control through Suncorp. The power of a State to appoint directors to a corporation is a feature that may suggest that the corporation is a manifestation of the State. The fact that the corporation and directors must obey other laws, of general application, does not erode the relevance of control for the character of the institution. Otherwise, no private corporation could be an emanation or agency of the Commonwealth or a State. Nor does the general law governing building societies alter the public character of this particular corporation – utilising, as it did, the features of a statutory building society – or its characterisation as an instrumentality of the State for constitutional purposes for the achievement of State purposes.

106 Far from the utilisation of the elements of a manifestation as a building society (with the duties that this entailed under the applicable legislation) constituting a reason for distinguishing SGH from the State, the opposite is the case. Given the specific State purposes of rescuing ailing building societies and restoring confidence in that particular industry, the creation of a State-guaranteed building society for that purpose was a predictable, and certainly permissible, way of going about the legitimate State object that recommended itself both to the State Government and Parliament. In a sense, the course adopted was modelled on the moves much earlier in Australian history, in colonial times, long before the creation of the Reserve Bank of Australia, to set up publicly owned and controlled banking corporations to infuse confidence amongst depositors in the security of the local banking industry. The fact that a corporate or building society vehicle was used for that purpose in this case did not mean that it was any the less an emanation of the polity creating, and underwriting, that vehicle. To point to general legal duties and to say that their existence robs SGH of its State

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158 Joint reasons at [23]-[26].

159 Joint reasons at [26].

character is to allow a matter of detail to divert the task of constitutional characterisation from the principal features that derive from the history, purposes, manner of organisation, governance and functions of this particular building society. In my view, that approach is wrong. Constitutional characterisation, above all, requires that the interpreter should avoid narrowing the focus of the legal lens.

107 SGH was only viable because of the funds initially provided by SGIO, which funds continued at all material times. The State (Suncorp) through its board nominees had the power to determine whether dividends would be directed towards itself (as the sole holder of "B" class shares) or towards individual depositors (as holders of "A" class shares). There is no suggestion that the board ever resolved to take the latter course. The State (Suncorp) through its board nominees and shareholders had the power to ensure that any surplus in winding up was distributed to the State by repayment of the deposits which sustained the "A" class shares. The financial nexus to the State was powerful. It was unbroken. And above all, it was maintained and exercised for State purposes.

108 *State auditing of SGH*: The fact that State financial legislation governs the affairs of the entity is a "strong indication" that the instrumentality in question is properly to be characterised as part of the State[160]. In a sense this is self evident. Unless a body is an aspect or manifestation of the State, it is almost unthinkable that the State Parliament would subject it to the rigours and costs of State auditing. In the present case SGH's financial statements were subject to audit by the State Auditor-General under the *Financial Administration and Audit Act* 1977 (Q) as a "controlled entity" of a "public sector entity" within the meaning of that Act. This statutory status, with its coercive consequences, reflects the realities previously described. SGH was a State entity created for State purposes, controlled by the State and performing its functions as a building society precisely because that was considered to be the most effective way of achieving, and then maintaining, the State Government purpose explained at the time of its creation and maintained thereafter.

Conclusion and orders

109 It follows that, in my view, SGH was the "State" [of Queensland] for the purposes of s 114 of the Constitution. I would answer the first question reserved in the affirmative. I would have ordered that the hearing of the proceedings

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160 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 341; *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 645, 651.

continue so that the remaining question might be answered, and the matter concluded, conformably with the foregoing reasons.

110 It is inherent in my approach that I would leave open a point raised in the submissions of the intervener for South Australia, that inherent in and critical to the capacity of a State to function as a government[161] is its capacity to determine where it will deploy the financial resources of the State, whether in the Consolidated Revenue Fund or in instrumentalities, authorities, or corporations acting as agents of the State and that taxation upon those financial resources necessarily interferes in that capacity. That submission is a reminder of the federal context within which, and a purpose for which, s 114 was included in the Constitution.

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161 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 232.

111 CALLINAN J. The issue in this case is whether a building society[162] which was established on the initiative of the State of Queensland is the "State" within the meaning of s 114 of the Constitution as at the dates of the receipt of two payments from a contingency fund established by the State of Queensland, 5 July 1993 and 28 July 1993.

Facts

112 In 1976 a serious question arose as to the financial solvency of seven building societies in Queensland which had been incorporated under the *Building Society Act* 1886 (Q) ("the Act").

113 The government of Queensland became concerned about the consequences to lenders to, and borrowers from these societies. It was also concerned about the impact which failure of these societies might have upon the confidence of investors in, and lenders to building societies generally. The State Government resolved to rescue the failing societies. The means adopted included the creation of a new building society, the applicant in these proceedings, which would be supported financially by the State Government Insurance Office (now Suncorp), a large and stable financial corporation established and owned by the State and accepted by the parties as the State for the purposes of s 114 of the Constitution[163]. The intention was that the applicant would assume the liabilities and acquire the assets of the seven imperilled societies.

114 In order to achieve the government's purpose the Parliament of the State amended the Act by the *Building Society Amendment Act* 1976 (Q) ("the Amendment Act"). Section 38C of the Act as amended conferred upon the Registrar of Building Societies a power to direct that the engagements and property of one building society be transferred to another. Section 36A of the Act created a "contingency fund" to be held by the State for the protection of building society subscribers, contributors, lenders to, or depositors of money with building societies, to be funded by compulsory levies upon all building societies.

115 On 10 May 1976 not fewer than 100 persons qualified by the Rules of the applicant applied to the Registrar for the registration of the applicant under the Act. The application was granted and the fact of registration notified in the Queensland Government *Gazette* of 11 May 1976.

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162 SGH Limited was established under a different name but it is convenient to refer to it as SGH Limited ("the applicant"). It is also now a company subject to the companies legislation.

163 *State Government Insurance Office (Queensland) Act* 1960 (Q) and *Suncorp Insurance and Finance Act* 1985 (Q).

116 The Registrar of Building Societies then exercised power under s 38C (with the Treasurer's approval) to direct that all of the assets and liabilities of the seven unstable societies be transferred to the applicant.

117 Some financial support was provided by Suncorp on the instructions of the Treasurer of the State of Queensland to the applicant. The support, which was no doubt essential for the applicant to operate effectively, particularly in its early days, was nonetheless relatively modest: a loan of the order of $1 million; and a stand-by facility of $43 million being the sum of the liabilities assumed by the applicant.

118 The applicant thereafter operated as a building society between 1976 and 1985. It was obliged to, and did, make contributions to the contingency fund under the Act.

119 The Act was repealed by a new act enacted in 1985, the *Building Societies Act* 1985 (Q) (the "new Act"). The funds in the contingency fund were transferred to a new contingency fund established under the new Act. The applicant remained a contributor to the new fund.

120 Presumably because the crisis in the building societies business had passed, the *Building Societies Fund Act* 1993 (Q) ("the disbursement Act") provided for the disbursement of the fund. Pursuant to s 11 of the disbursement Act the amount of $23,002,000 was paid to the applicant. Subsequently it received the further sum of $2,011,095 as an ex gratia payment from the State pursuant to s 106 of the *Financial Administration and Audit Act* 1977 (Q). Pursuant to that Act its accounts were audited by the Auditor-General of Queensland. During the financial year ending 30 June 1994 the applicant carried on business in all respects as a conventional building society.

121 On 15 March 1995 the respondent assessed the applicant under the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA") for income tax on the two payments to which I have referred. The applicant objected to the assessments, asserting that it was the State within the meaning of s 114 of the Constitution. The objection was disallowed on 30 August 1999 on the grounds that the payments made to the applicant were bounties or subsidies assessable under s 26(g) of the ITAA, that the applicant was not the State within the meaning of s 114 of the Constitution, and that in any event, the tax was not a tax on property for the purposes of that section of the Constitution.

122 The applicant appealed against the disallowance of its objection to the Federal Court of Australia.

Proceedings in the High Court

123 Application was made for the removal of part of the matter into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). That application was granted and a case was stated for the consideration of the Full Court of this Court. The facts which were stated are essentially those that I have summarized. The two questions asked in the stated case are as follows:

(a) whether SGH Limited is the "State" for the purposes of s 114 of the Constitution;

(b) whether the tax in question is a "tax on property" for the purposes of s 114 of the Constitution.

124 When the matter came on for hearing in this Court, the parties, and those states which intervened, were all directed to complete their arguments on the first question following which the Court retired and reconvened to announce that it was in a position to answer the first question, in the negative, that reasons for this answer would be given later, and that, accordingly it was unnecessary to consider the second question.

125 Section 114 of the Constitution is as follows:

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

126 Section 26(g) of the ITAA provides as follows:

> "Subject to section 25B, the assessable income of a taxpayer shall include–
>
> (g) any bounty or subsidy received in or in relation to the carrying on of a business (other than subsidy received under an agreement entered into under an Act relating to the search for petroleum), and such bounty or subsidy shall be deemed to be part of the proceeds of that business".

127 The parties are agreed that the question whether a corporation of the applicant's kind may be characterised as the State for constitutional purposes may only be answered by examining the particular characteristics of the corporation in

question in order to discern the degree and extent of governmental purpose, participation, and benefit in and from the corporation and its activities.

128 In *Inglis v Commonwealth Trading Bank of Australia*[164] Kitto J said:

> "The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character … The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?"

129 The observations of his Honour, although directed in terms to a creature of the Commonwealth, apply with equal, if not greater force to a creature of the State. The words "peace, welfare and good government" which are to be found in s 2 of the *Constitution Act* 1867 (Q) are very wide, and do not have to be construed by reference to specific heads of power of the kind conferred by s 51 of the Constitution upon the Commonwealth. Almost from the inception of colonial government in this country a somewhat different view had been taken of the activities upon which a colony or a State might embark, from those conventionally undertaken by or on behalf of the State of the United Kingdom. The colonies and their successors, the States, have for example always had a heavy involvement in the construction and operation of public transport, particularly railways, and from time to time have engaged in a wide variety of banking businesses. Accordingly, little assistance is likely to be derived in this country from an identification and characterization (as a commercial or public one) of the actual activity in which the corporation is engaged, particularly if it is a corporation of the State.

130 The most recent case in this Court in which a like question to the one which arises here was considered, is *Deputy Commissioner of Taxation v State Bank (NSW)*[165]. From that case a number of principles can be distilled: that the integrity especially the financial integrity, of each of the polities of the Commonwealth is so important that s 114 should be given no narrow construction; that accordingly, in an appropriate case a corporation, as an agency

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164 (1969) 119 CLR 334 at 337-338.

165 (1992) 174 CLR 219.

or instrumentality of one of these polities, may be sufficiently close to it to be identified with, and therefore be the State within s 114 of the Constitution; that particular Rules stated in other, related but not identical contexts, such as the doctrine of the immunity of a body from suit by reason of the shield of the Crown, do not apply to, or influence the resolution of an issue arising under s 114; and, "State" should generally be given the same meaning throughout the Constitution, for example as it has in s 75 thereof.

131 In the past, this Court has tended to look for six particular aspects or attributes of a relevant corporation with a view to discerning the true character of the corporation in question for the purposes of s 114 of the Constitution. The parties are agreed that such an exercise is appropriate here, although they differ as to the importance to be attached to the presence or absence of various of these aspects or attributes. The matters that have tended to influence the Court in the past are these[166]: the absence or otherwise of corporators; an explicit obligation of the corporation to conduct its affairs to the greatest advantage of the relevant polity; the participation of the executive government in the process of formulating policy and making decisions; the right or otherwise of the government to appoint directors, and the source of, and responsibility for their remuneration; the destination of profits; and, the obligation or otherwise of the Auditor-General to audit the accounts of the corporation.

132 As will appear, only one of those questions may be answered in an unqualified way here in favour of the applicant, and that is the last. The accounts are subject to audit by the Auditor-General of Queensland.

133 Whilst the Act was amended to enable effect to be given to the scheme for the effective absorption of the imperilled building societies by and into the applicant, no separate Act to enable it to be incorporated was enacted. The applicant was established under the Act and became amenable to it in the same way as all other surviving building societies.

134 Neither the Act nor the objects of the applicant itself require it to conduct its affairs to the advantage of the State of Queensland, or of Suncorp, or to serve any other public interest.

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166 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 274; *Inglis v The Commonwealth Bank of Australia* (1969) 119 CLR 334 at 339; *Superannuation and Investment Trust v Commissioner of Stamp Duties (SA)* (1979) 145 CLR 330; *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219.

135 The government has no say, certainly not any direct say, in the formulation of policy, or the conduct of the business of the society, although it does have a capacity to control the Board, a matter upon which the applicant relies, and which will require some further consideration. The point may however be made that the applicant's dealings with Suncorp as a lender and the provider of a stand-by facility were ordinary commercial dealings in respect of which the applicant paid interest and fees.

136 The possibility of a high degree of control by Suncorp arises in this way. Suncorp has power to appoint and remove three of the six directors for which the Rules make provision, and in particular it appoints the chairman who has a casting vote, as well as a deliberative vote. Suncorp was, at the material times, the owner of and had control of all "B" class shares which were voting shares. The other shares, "A" class shares, were held by a large number of shareholders, being persons who lent money to the society but whose votes could not prevent the appointment by Suncorp of three of the directors, including the chairman.

137 No dividend or any other funds surplus to the applicant's requirements were payable to Suncorp or to the State. As I have said, interest and fees on an ordinary commercial basis however, were. Neither the State nor Suncorp directly invested any of its funds in the applicant, and "A" class shareholders had rights to dividends, and subject to a qualification to which I will refer, any surplus of assets over liabilities on its winding up.

138 The only question to be answered, as I have said, in an unqualified way favourable to the applicant is that its accounts are subject to audit by the Auditor-General of Queensland.

139 The applicant seeks to deal with the answers to the questions usually asked in this type of case and generally so far answered adversely to it, in a number of ways.

140 As to the absence of corporators the applicant submits that their mere presence does not provide an indication that it is not relevantly the State: that in principle, a statutory corporation limited by shares, but all of which are vested in the State should have no different characterization from a statutory corporation without share capital. The problem for the applicant here however is that the shares are not entirely vested in the State. Statutory corporations, the applicant submits, may enter into contractual arrangements with others which confer rights to profit or control which are the functional equivalent of shares. This argument does not carry very much weight. It is the nature of the legal personality itself, and not its capacity to interact and deal with other legal personalities which defines its true nature. And I do not accept, as submitted, that a true statutory corporation which is the State would not at least endanger its status if it were to issue a new class of shares to its employees for the purpose of providing incentive payments by way of dividend.

141 The applicant further submitted that the rights attaching to the "A" class shares being redeemable or withdrawable shares of the kind conditionally issued to depositors with a building society, were of limited strength or scope. This was so, the applicant argued, because the "A" class shareholders had no right to vote at a general meeting unless the meeting were an annual general meeting for a year in which there had been a loss from the transactions of the society. Similarly, the applicant referred to the Rules of the society which ensured that the directors, in respect of whose election the "A" class shareholders may vote, remained a permanent minority whilst Suncorp had at least $1 million advanced to the society. Furthermore, the "A" class shareholders could only receive a dividend if the directors so resolved, and the directors being the appointees of Suncorp were unlikely so to resolve.

142 I do not think there is great force in these submissions in this case. Prudent lenders to corporations very often insist upon some measure of control, albeit perhaps at some risk of liability if the corporation fails[167], whilst money is outstanding, in order to better protect their loans or outstandings. And even though the majority of the directors might effectively be controlled by Suncorp they nonetheless are bound to comply with their obligations under the Rules and the Act. Those who choose to become "A" class shareholders do so voluntarily and in the knowledge that the Rules will define their rights to vote, to dividends and otherwise.

143 The last point in regard to this aspect of the matter that the applicant makes, is that, because the applicant would have the ability to repay its depositors who are also its "A" class shareholders it could thereby extinguish their rights as shareholders and accordingly deny them any right to participate in a division of a surplus on a winding up. It is unlikely that the directors could, as a matter of law, in those circumstances, extinguish the "A" class shareholder's right to participate[168]. Whether that is so it is unnecessary to decide finally because such a decision would shed no light upon whether the applicant, which has voluntary shareholders who are deemed to know the Rules and to have agreed to them, is the State or not.

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167 See the definition of "director" in the Corporations Law (Cth) s 9, which covered persons not validly appointed as a director, but who acted in the position of director, or in accordance with whose instructions or wishes the directors of the company or body were accustomed to act.

168 The general rule is that directors are bound to act solely in the interests of the shareholders as a whole and not for a class of shareholders. See *Pilmer v Duke Group (In Liq)* (2001) 75 ALJR 1067 at 1071 [18]; 180 ALR 249 at 255.

144 The next matter which the applicant emphasises is the existence of the right of Suncorp (whilst it had at least $1 million on loan) to appoint three directors and to nominate which directors might be elected chairman and deputy chairman. The applicant submits that this is an especially significant matter because the chairman had a casting vote, in addition to a deliberative vote. This capacity to control the composition of the Board was reinforced by two other provisions of the Rules: one rendering a director appointed by Suncorp exempt from an obligation to retire by rotation or from removal from office at any general meeting; and another, which provided that a quorum of a meeting of directors was three including two of those appointed by Suncorp.

145 It is right, in my opinion, in deciding a case of this kind to look to the outer limits of the rights and obligations of the relevant parties under the relevant enactment and rules, rather than to the extent to which, in practice, rights might be exercised or liabilities assumed. The provisions in the Rules to which I just referred do indeed give Suncorp a significant capacity to control the applicant but only whilst its loan to the applicant is outstanding. I do not see this as far removed however from conventional commercial arrangements which entitle a lender to view, for example, on a regular basis, a borrower's management accounts, and to insist upon the taking of remedial and other steps by the Board of a borrower, if the ratio of annual earnings to interest payable or net tangible assets to liabilities falls below a certain level. Special provisions to give assurance or protection to a lender whilst a debt is outstanding have nothing to say about the true nature of a corporation for the purposes of s 114 of the Constitution.

146 Whilst the applicant accepts that the corporation's activities did not have a public character in the sense that the society was not, at the relevant dates, serving any particular public purposes, it submits that it was nonetheless established as a matter of government policy to inject stability into the business of building societies, and, no doubt, into the building industry in the State of Queensland as well. That does not however mean that the applicant is a State, rather than a business corporation. Much legislation is enacted with commercial objectives in mind. Legislation under which other legal personalities for example, co-operatives, may be established were enacted for similar purposes so that the public, might derive benefits, such as the encouragement of particular primary industries, the closer settlement of the areas in which their affairs were to be conducted, and the enhancement of a State's economy or a section of it, by the establishment, before modern competition policies were pursued, effectively of single purchasing and selling desks. Such co-operatives were no more constitutional manifestations of the States, than the applicant is here.

147 The applicant submits that there is a close financial relationship between Suncorp and it. But as I have pointed out the financial support provided, although no doubt very useful, indeed essential at the time, was by way of a loan and related facility, and not investment, and was provided on ordinary

commercial terms. The other matter relied on, the fact that the Board (albeit dominated as it is by nominees of Suncorp) has the power to determine the direction of earnings is not unique and is of no great weight in the circumstances.

148 The last matter, that the applicant's financial statements were required to be audited by the Auditor-General under the *Financial Administration and Audit Act* 1977 (Q), is a relevant consideration. The requirement arises however, only because of the extended definitions of a "controlled entity" and of a "public sector entity" contained in that Act. Although relevant, this matter is certainly not decisive, and assumes relatively little significance in the light of the factors that point in the other direction.

149 The applicant concluded its argument by urging that Suncorp has a high degree of control over the applicant, and a degree of control which is inconsistent with its characterization as other than a corporation performing functions of the State. To put the matter this way is to do little more than summarize the other propositions on which the applicant relies, and which I have rejected for the reasons I have given. Had the State wished to operate as the State in the building society business then it could, and almost certainly would have chosen to do so by a vehicle different from the applicant, differently established, by a vehicle exclusively owned and operated by the State, free of others having real rights which must be acknowledged and observed, and employing funds directly invested rather than lent by the State. Nor do I think it irrelevant that the connexion and financial arrangements of the applicant are not with the State directly, but with a corporation in turn created by the State.

150 It is for these reasons that I joined with the other members of the Court in answering the first question in the negative, and in the orders pronounced by the Chief Justice.