IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B63 of 2013

BETWEEN

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

First Plaintiff

THE ELECTRICAL TRADES UNION OF EMPLOYEES QUEENSLAND

Second Plaintiff

AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION

Third Plaintiff

QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES

Fourth Plaintiff

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION

Fifth Plaintiff

AUTOMOTIVE, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND

Sixth Plaintiff

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (FEDERAL)

Seventh Plaintiff

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (STATE)

Eighth Plaintiff

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, QUEENSLAND BRANCH

Ninth Plaintiff

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, QUEENSLAND BRANCH

Tenth Plaintiff

and

QUEENSLAND RAIL

First Defendant

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Second Defendant

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ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the defendants.

Part IV Constitutional and Legislative Provisions

3. The NSW Attorney adopts the first defendant's statement of applicable legislative provisions.

Part V Argument

Issues presented

4. In summary, the NSW Attorney submits as follows:

   (a) Now as before federation, State Parliaments may create artificial legal entities that are not corporations. Whether or not such an entity is created as a corporation is determined by reference to the intention of the relevant State Parliament;

   (b) Section 51(xx) of the Constitution is not engaged in relation to entities that are not corporations. The Commonwealth Parliament lacks power to legislate for the incorporation of corporations formed within the limits of the Commonwealth pursuant to s 51(xx), as recognised in New South Wales v Commonwealth (The Incorporation Case) (1990) 169 CLR 482. Corporations for the purposes of s 51(xx) are bodies created as such, necessarily under State legislation in the case of domestic corporations.

   (c) Accordingly, reference to a broad definition of "corporation" embracing many types of artificial legal entity – such as that advocated by the plaintiffs (and the Commonwealth, as a result of what is said to be the protean and elastic character of the concept of a corporation: see Submissions of the Attorney-General of the Commonwealth ("Commonwealth Submissions") at [16], [46]) – does not

determine whether an entity is created as a corporation or is a corporation for the purposes of engaging s 51(xx).

Historical considerations in relation to corporations

5. The NSW Attorney adopts the first defendant's submissions summarising common law and legislative developments concerning companies and corporations in the United Kingdom and colonial Australia: see First Defendant's Submissions ("FDS") at [13]-[27]. The history of legislative developments in NSW illustrates the extent to which, before federation, State legislatures gave corporate attributes to unincorporated entities as well as providing for the incorporation of companies, as an aspect of what the plurality in New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1 at [113] described as a "legislative and litigious ferment" in the decades prior to the Sydney Convention of 1891.

6. The concern that certain contracts entered into by unincorporated associations or co-partnerships may be void by virtue of the membership or shareholding in them of "certain spiritual persons" was addressed by NSW Governor and Legislative Council in October 1839, in the first colonial legislation addressing joint stock partnerships, "An act to make good certain contracts which have been, or may be entered into by certain banking and other co-partnerships" (3 Vic No 21): see P Lipton, "A History of Company Law in Colonial Australia" (2007) 31 Melbourne University Law Review 805 at 810.

7. Having addressed by enactment the problem that joint stock companies (which were not incorporated) could not sue or be sued in their own name, the NSW Governor and Legislative Council made further provision "to facilitate all subsequent proceedings" against the "divers Banking and other Companies" in the colony that were entitled to sue and be sued in the name of their chairman, secretary or other named officer by enacting "An Act for further facilitating proceedings by and against all Banking and other Companies in the Colony, entitled to sue and be sued in the name of their Chairman, Secretary, or other Officer" (NSW) in July 1842 (6 Vic No 2) ("1842 Act").

8. The 1842 Act explained in its preamble that no provision had yet been made to compel companies entitled to sue and be sued in the name of those officers to fill vacancies in those positions caused by the death, resignation or removal of a relevant officer. The

1842 Act required "all Banking, Trading and other Companies in the said Colony ... empowered to sue, or be sued, in the name of their Chairman, Secretary, Treasurer, Managing Director, or in the name of any other person or Officer for that purpose particularly named" to proceed "with as little delay as possible" to elect some other person in the stead of any such officer upon his "death, resignation, removal or retirement". Should there be no election within a month of the death, resignation or removal:

> ... then all the privileges of the said Company ... conferred upon them by any Act of the said Governor and Council, shall utterly case and determine, and thenceforth it shall and may be lawful for any person or persons to commence and sustain an action against any individual Shareholder, or against any number of Shareholders in or belonging to any of the said Companies, so losing its privileges as aforesaid.

9. The long title of the Companies (Process) Act 1848 (NSW) (11 Vic No 56) is "An Act to enable any Joint Stock Company to sue any of its own Members; and to enable any Member of any such Joint Stock Company to sue any such Company; and for other purposes". The Companies (Process) Act states in its preamble that "it is expedient to extend the provisions" of earlier Acts permitting "Banking and other Companies" to sue and be sued in the name of specific officers of those companies. By s 1 of the Companies (Process) Act, any member of any "Joint Stock Company now established and carrying on business ... in the said Colony" (or any future company meeting that description) was allowed to sue the company officer appointed for the purpose of enabling the company to sue and be sued, in relation to any "claim or demand ... against such Company, or the funds or property thereof". Section 3, concerning the prosecution of members for larceny, fraud, forgery or other crimes with the intent to injure or defraud "such Company, or Corporation" distinguishes between members of such a joint stock company and members of a corporation. Like the 1842 Act, nothing in the Companies (Process) Act suggests any legislative intention to incorporate joint stock companies the subject of its provisions.

10. Limited liability partnerships were legalised in NSW in 1853, by An Act to legalise Partnerships with Limited Liability (NSW) (17 Vic No 19). Such partnerships did not thereby become incorporated. The general permission in relation to these partnerships under the 1853 legislation was removed by the Companies Act 1874 (NSW) (37 Vic

No 19), replicating much of the English Companies Act 1862. Section 3 of the Companies Act 1874 limited the size of a "company association or partnership ... that has for its object the acquisition of gain by the company association or partnership or by the individual members thereof" unless registered as a company under the Act, with limited exceptions (companies formed in pursuance of another Act, a royal charter or letters patent, or formed for mining purposes).

11. The Companies Act 1874 (and corresponding enactments in other colonies, equivalent to the English Companies Act 1862) made detailed provision for the formation of "an incorporated company with or without limited liability" (s 5), by means of a memorandum of association complying with the Act's requirements for registration. Companies were incorporated by registration: s 17.

12. Further provision in relation to compromises and arrangements with the creditors of "any Company, Association or Society" entitled or liable to be wound up under the Companies Act 1874 was made by the Joint Stock Companies Arrangement Act 1891 (NSW) (55 Vic No. 9): see s 6.

13. Notwithstanding the variety of corporate attributes conferred on unincorporated associations in the Australian colonies prior to federation, as well as differing requirements for incorporation of companies, as noted in Work Choices (at [111]), at the time of the 1891 Convention Sir Samuel Griffith was of the view that "the states may be trusted to stipulate how they will incorporate companies": Official Record of the Debates of the Australian Federal Convention (Vol 1) (Sydney), 3 April 1891, pp 685-686.

14. Accepting that definitive conclusions as to the scope of s 51(xx) are unable to be drawn from the Convention Debates and drafting history of the provision (Work Choices at [119]), and that the concern addressed by the provision had expanded from "recognition of the status of artificial juristic entities created in a State or elsewhere" (Work Choices at [111]) by the time of the 1897 convention (Work Choices at [118]), it is nevertheless revealing that the use of the word "formed", a "past participle used adjectivally" (Incorporation Case at 498 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) excluding the process of incorporation was consistent through the successive drafts, as the plurality noted in the Incorporation Case at 501-

502. The States were given and retained the role of creating corporations. As their Honours pointed out in the Incorporation Case (at 502):

> There is thus no ground for thinking that s. 51(xx) was framed with the intention of conferring upon the Commonwealth the power to provide for the incorporation of companies. Indeed, the history of the paragraph plainly indicates that the draftsmen of the provision did not contemplate that it should confer any power otherwise than in respect of corporations already formed.

15. The plurality in the Incorporation Case proceeded (at 503) to quote Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901) p 607, which stated in respect of s 51(xx) that: "[i]t would ... seem that this provision refers to companies created under State laws. Such bodies, once launched, will come within the control of Federal legislation." Contrary to the plaintiffs' submission (Plaintiffs' Submissions ("PS") at [22], [24]), neither the 1897 Convention Debates (during which Mr Barton argued that the word 'corporation' "extends to everything under the Companies Act": see Official Record of the Debates of the Australian Federal Convention (Vol 3) (Adelaide), 17 April 1897, pp 793-794) nor the commentary in Quick and Garran support the suggestion that a "broad notion" of a corporation, extending beyond companies created under State laws, was intended in s 51(xx).

16. No party or intervener in Work Choices sought to re-open the Incorporation Case, so there was no occasion for reconsideration of what was decided in that case: Work Choices at [137].

Creation of artificial legal entities by State Parliaments

17. Before the series of legislative developments in the Australian colonies referred to above, there was authority for the proposition that the creation of a legal entity as a corporation was a question of legislative intention. In Conservators of the River Tone v Ash (1829) 10 B & C 349; 109 ER 479, the first question arising was whether the Conservators of the River Tone, who were authorised under statute inter alia to take land in succession, to sue and be sued and to make by-laws, were a corporation. This was held to be a question of legislative intention, determined by the statutory terms used: at 376 per Bayley J, 384 per Littledale J (explaining that "[t]o create a corporation by charter or Act of Parliament it is not necessary that any particular form

of words be used"), 391 per Parke J. The relevant statute was held to give rise to a manifest intention to make the Conservators a corporation. Words of incorporation had not been enacted, but were not required in view of the "necessary implication" arising from the Act: see at 387 per Littledale J, 391 per Parke J.

18. Creation of an artificial legal entity with corporate attributes is insufficient to give rise to a necessary implication of the type identified in Conservators of the River Tone v Ash. As Farwell LJ (whose judgment was adopted by the House of Lords on appeal) pointed out in Taff Vale Railway Company v Amalgamated Society of Railway Servants [1901] AC 426 ("Taff Vale") at 429, which concerned a trade union's liability to be sued, "it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents", even if the entity is unknown to the common law. In each case the question for a court in dealing with such an association is what the "Legislature has legalised". The liability to be sued was "clearly and necessarily implied" in the relevant statute: at 441 per Lord Shand, see also at 436 per the Earl of Halsbury, 440 per Lord Shand, 442 per Lord Brampton (distinguishing a "corporation in the strict sense" from a "corporate body"). The implication of a power to sue and be sued, together with the other corporate attributes of trade unions, did not however give rise to the further implication that a trade union is a corporation; see also Bonsor v Musicians' Union [1956] AC 104.

19. By contrast with Taff Vale, the implication of perpetual succession in the Act in question in the earlier decision in Ex parte Newport Marsh Trustees (1848) 16 Sim 346; 60 ER 907 led Shadwell VC to state that the body created by that Act "must be taken to be a corporation": at Sim 351. In the Vice Chancellor's view, this was a result of the "necessary construction of the Act" in view of "the very constitution of the body itself, and ... the powers given to it by the Act", notwithstanding "whatever might be the intention of the Legislature". To the extent this decision is inconsistent with the approach to the identification of the necessary legislative intention required to create a corporation in Conservators of the River Tone v Ash and with the distinction drawn between a corporation and other types of "corporate bodies" in Taff Vale, it should not be followed.

20. Noting Taff Vale, in Chaff and Hay Acquisitions Committee v JA Hemphill & Sons Pty Ltd (1947) 74 CLR 375, Starke J accepted that the appellant Committee was "not a corporation in the strict technical sense according to the principles of English law in force in both South Australian and New South Wales": at 389, see also at 386 per Latham CJ, 395 per Williams J, 394 per McTiernan J (dissenting, but not on this point). This was not decisive, in his Honour's view, because the Committee was nevertheless an artificial legal person "endowed with the essential characteristics and attributes of a body incorporated by English law": at 389-390.

21. The issue on the appeal to this Court in Chaff and Hay concerned whether the Committee was, as the Full Court of the Supreme Court of NSW had held, a legal entity capable of being sued, not only in South Australia but as a "foreign corporation" in other countries (relevantly NSW). Both Latham CJ and Starke J accepted, consistent with Conservators of the River Tone v Ash, that "it was not essential that express words of incorporation should be used in order to create a body as a corporation" (at 384 per Latham CJ, see also at 388 per Starke J), but Starke J explained that "if it had been intended to incorporate the' [Committee], 'one would have expected the well-known precedents to be followed with express words of incorporation'": at 388. No necessary intention to incorporate the Committee could be or was identified in the relevant legislation.

22. The recognition by the majority in Chaff v Hay that the Committee had a separate legal personality to its members under the law of its creation, so was capable of being sued in NSW, does not – contrary to the Commonwealth's submissions (at [46]) – illustrate a "distillation" of the concept of a corporation applicable to the construction of s 51(xx) of the Constitution. Rather, the reasoning in Chaff v Hay indicates the preservation of the distinction between the corporation as created by legislation and known in English law, and other types of artificial legal entities, a distinction applied in Williams v Coulthard [1948] SASR 183 at 191 and St Leonards Municipality v Wilkins (1966) 15 LGRA 62 at 66-67. As Mason J pointed out in Church of Scientology v Woodward (1982) 154 CLR 25 at 56 by reference to Chaff v Hay, "[t]he authorities suggest that it is possible to incorporate a statutory body by implication or to endow it with an artificial legal personality falling short of incorporation" by providing that it is to have certain characteristics: see also R v Duncan; Ex parte

Australian Iron & Steel Pty Ltd (1983) 158 CLR 535 at 587 per Deane J. A similar point was made by Toohey, McHugh and Gummow JJ in Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld) (1995) 184 CLR 620 at 664:

> It is true that the legislature may modify what would be considered orthodox notions of a corporation ... Further, the legislature may provide for the creation of a body which, as distinct from the natural persons composing it has legal personality, whether or not the legislature chooses to identify its creature by the term 'corporation'. Indeed, s 58 of the 1904 Federal Act was, as we have indicated, construed as having that effect even though the term 'corporation' was not used in it. The creation of a distinct legal personality flowed from the endowment of registered organisations with perpetual succession, capacity to purchase and deal with property and the requirement of a common seal.

23. The recognition that a trade union, if registered, may have separate legal personality and "the full character of a corporation" (Williams v Hursey (1959) 103 CLR 30 at 52 per Fullagar J, Dixon CJ and Kitto J agreeing) as a result of the statute providing for its registration (which statute, as the plaintiffs point out, will typically contain "detailed constitutive requirements": PS at [27]) indicates nothing more than the decisive character of legislative intention discerned from clear legislative language in this context (and the power of the Commonwealth to create corporations under provisions other than s 51(xx), discussed in the Incorporation Case at 500-501). Justice Fullagar's description in Williams v Hursey (at 53) of the "difficulties" involved in Taff Vale and other English cases concerning registered organisations based on a rejection of the notion of "qualified" legal personality – reflected in the remark "a registered trade union either had or had not a personality distinct from its members"– does not countenance the possibility, accepted in the other cases referred to above (at [21]), that without qualifying the separate legal personality conferred, the legislature may nonetheless create an entity "with an artificial legal personality falling short of incorporation": Church of Scientology v Woodward at 42.

24. In view of Chaff and Hay, Burbury CJ observed in the Supreme Court of Tasmania in St Leonards Municipality v Wilkins (1966) 15 LGRA 62 at 66 that:

> It is trite law that it is not necessary for express words of incorporation to be used in an Act of Parliament so long as manifest intention to create a corporation can be spelt out of the statute. ... But in a modern statute by which it is intended to create a corporation it may be expected that express words of incorporation would be used.

25. Consistent with that expectation and with the principles set out above regarding legislative capacity to create artificial legal entities possessing corporate attributes that are not corporations, in the absence of words of incorporation the requisite intention to incorporate an entity does not inevitably arise by necessary implication from the statutory conferral of attributes from which an intention to create an entity with a distinct, continuing legal personality may be discerned: Borough of Salford v Lancashire County Council (1890) 25 QBD 384 at 389; Mackenzie-Kennedy v Air Council (1927) 2 KB 517 at 534, cited by Starke J in Chaff and Hay at 388.

26. The approach taken to the identification of a necessary implication concerning an intention to incorporate in these cases should be applied in the present proceedings. The question is one of legislative intention of the relevant State Parliament, and cannot be determined by reference to a broad definition of "corporation" embracing many types of artificial legal entity. As the Incorporation Case demonstrates, the Commonwealth Parliament "has nothing to do" with "[t]he creation of corporations and their consequent investiture with powers and capacities" (Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 394 per Isaacs J, quoted with approval in the Incorporation Case at 500) for the purposes of s 51(xx). Rather, the Commonwealth Parliament "finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other": Huddart Parker at 394. As explained in the Incorporation Case (at 500-501), while the reasoning in Huddart Parker was rejected in Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 428, the proposition that the Commonwealth has no power under s 51(xx) to legislate for the creation of corporations was not doubted in Strickland. In legislating pursuant to s 51(xx), the Commonwealth's "power of regulation [over particular corporations] might fluctuate" (Incorporation Case at 503): the Commonwealth Parliament effectively takes domestic corporations as it finds them.

27. The discernment of the Queensland Parliament's intention relation to the constitution of the first defendant under the Queensland Rail Transit Authority Act 2013 (Qld) is not reducible to consideration of an ipse dixit (cf PS at [12], [32]). The ascertainment of legislative intention to create a corporation in accordance with the case law referred to above is more complex than that. But the significance of a statement indicating express legislative intention on the part of a State Parliament that a body is not a corporation, such as that found in s 6(2) of the Queensland Rail Transit Authority Act, cannot be discounted as a mere label or an attempt on the part of the legislature to "recite itself out of the reach of Commonwealth legislation" for the purposes of statutory construction: cf PS at [32], Commonwealth Submissions at [61]. It might be noted that a similar statement (that no institute shall be capable of becoming incorporated) in s 67 of the Libraries and Institutes Act 1939-1946 (SA) was given effect in Williams v Coulthard. For the reasons set out by the first defendant (FDS at [53]-54]), analogies to authorities addressing s 51(xix) and s 90 of the Constitution are inapposite.

Section 51(xx) and bodies politic

28. A further reason for rejecting the broad definitions of "corporation" for the purposes of s 51(xx) advocated by the plaintiff is that the plaintiff's definition (PS at [41]) (and potentially that of the Commonwealth (see Commonwealth Submissions at [5.1], [16])) would extend to bodies politic of a State, most obviously local governments: see eg the Local Government Act 1993 (NSW), s 220, providing that "a council is a body politic of the State with perpetual succession and the legal capacities and powers of an individual", and that "a council is not a body corporate (including a corporation)"; see also s 388. The qualification to the Commonwealth's favoured definition in relation to bodies politic reflected or recognised in the Constitution would seemingly cover the Commonwealth, States and Territories but not other bodies politic. There is no reason to think bodies politic of a State, allocated a share of State sovereignty and well known to the law, fall within the scope of Commonwealth legislative power under s 51(xx).

Part VI Estimate of time for oral argument

29. It is estimated that 10 minutes will be required for oral argument.

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