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 TRADE UNION OF EMPLOYEES QUEENSLAND
Second Plaintiff

AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION
Third Plaintiff

QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES
Fourth Plaintiff

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION
Fifth Plaintiff

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

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (Federal)
Seventh Plaintiff

AUSTRALIAN FEDERATED UNION OF LOCOMOTIVE EMPLOYEES, QUEENSLAND UNION OF EMPLOYEES (State)
Eighth Plaintiff

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, QUEENSLAND BRANCH
Ninth Plaintiff

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

and

QUEENSLAND RAIL
First Defendant

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION
Second Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the First Defendant's statement of the applicable legislative provisions.

Part V: Submissions

5. In summary, South Australia in relation to questions 1 and 2 of the special case, submits:

   i. this Court does not need to, nor should it, decide generally what is a "corporation" for the purposes of s51(xx) of the *Constitution* in order to resolve whether the entity established by s6 of the *Queensland Rail Transit Authority Act 2013 (Qld)* (the ***QRTA Act***) is a "trading corporation". In particular, it should not accept the submission advanced by the plaintiffs that a corporation for the purposes of s51(xx) is "*an entity established under law with its own name, and with separate legal personality and perpetual succession*",[1] or the Commonwealth that a corporation for the purposes of s51(xx) is any "*artificial juristic entity with a distinct continuing legal personality that is not a body politic reflected or recognised in the Constitution*".[2]

   ii. there are weaknesses in the approach of the plaintiffs and the Commonwealth in deriving their general definitions of "corporation", and unresolved complexities in their application, by reason that:

      a. what is a "corporation" when that word is used in the expression "trading corporation" is not answered by deriving a general definition from what was, and is, known as a corporation in different contexts and for a variety of other purposes.

      b. the starting point for determining what is connoted by the expression "trading corporation" must inhere in the *Constitution*, its text, its context and the purpose of the conferral of power on the Commonwealth. That will include significantly the establishment of a federation effected by the *Constitution* and its creation of the new

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1 *Plaintiffs' submissions*, [41].
2 *Commonwealth submissions*, [5.1].

and separate polities of the States and Territories. The Commonwealth's qualification to its general definition is correct but that qualification itself invites, and requires, further analysis as to precisely what is excluded.

c. there are additional qualifications to the plaintiffs', or the Commonwealth's, general definition, which do not arise on the facts of this case that would need to be considered before any general definition could be accepted.

iii. if a body is a corporation, the relevant question as to whether s51(xx) is engaged is whether the corporation has the character of being a "trading corporation". What that expression connotes must be determined in light of the historical context in which the power was conferred and the purpose of such a conferral. That is, what is connoted is significant to understanding and applying the "activities test" - an analysis of the extent of trading undertaken by an entity. In particular, what is connoted suggests substantial trading is required, more than 'much', or 'a lot', and that a comparison of the relative extent of trading and the overall activities of the corporation ought be undertaken such that the corporation can properly be ascribed the character of being a trading corporation.

iv. analysing relativity of trading and non-trading activities cannot be reduced to a mathematical comparison. Non-trading activities, such as governance, will often not be able to be quantified in monetary or financial terms. The specific origins and nature of the class of juristic entity under consideration may also inform the analysis because they may assist in understanding the activities undertaken, and their relative significance, and therefore the entity's character.

Question 1

An invitation to accept a general definition

6. As a step in resolving whether the entity created by s6 of the *QRTA Act* is a "trading corporation", the plaintiffs and the Commonwealth invite this Court to accept and apply a general definition of what is a "corporation" for the purposes of s51(xx).

7. The Commonwealth submits that a "corporation" for the purposes of s51(xx) is an "*artificial juristic entity with a distinct, continuing legal personality*[3] *that is not a body politic reflected or recognised in the Constitution*".[4] The qualification to the definition is inferred from the constitutional context. The Commonwealth, States and Territories are not corporations, but in light of being provided for

3 Which in turn may be evidenced by perpetual succession, the right to hold property and the right to sue and be sued: *Commonwealth submissions*, [65].

4 *Commonwealth submissions*, [5.1].

separately in the *Constitution* as repositories of sovereign authority, "*belong to a different category of artificial legal persons*".[5] The definition advanced is said to describe "*the fundamental quality of a corporation*" (which is too protean[6], diverse[7] and elastic[8] to permit of any more precise definition) and is derived from a consideration of the historical evolution of the corporation from Roman, canon and English law - the Australian framers not having a "particular conception" of what was a trading corporation.

8. The Plaintiffs submit that the question whether Queensland Rail is a "corporation" for the purposes of s51(xx) is not answered by s6(2) of the *QRTA Act*.[9] The task requires identification of the "*essential characteristics*" or "*connotation*" of a "corporation", and then an exercise of characterisation of Queensland Rail by reference to the terms and effect of the *QRTA Act*.[10] The Plaintiffs submit that the connotation can be reduced to a definition of a corporation, being "*an entity established under law with its own name, and with separate legal personality and perpetual succession*".[11] This is stated to be "*consistent*"[12] with history and context including: the legal usage of the word "company" and "corporation"[13]; the unsettled characteristics of a corporation at the time of federation, bearing in mind the contemporary decision in *Salomon v A Salomon & Co Ltd*,[14] and the observations of legal commentators;[15] the need for generality arising from the need for broad power to regulate artificial entities;[16] and, the variety of forms of foreign corporations and the need for internal consistency in s51(xx) in the meaning attached to "corporation".[17] Certain other traditional characteristics of corporations are identified (having a seal, the making of by-laws, the existence of members), but rejected as "*essential characteristics*" of a corporation within the meaning of s51(xx).[18] The existence of "*governmental characteristics*", such as Ministerial control and oversight,[19] are not determinative: they are exhibited by many corporations (such as Departments or Ministers which are incorporated as bodies corporate)[20] and were exhibited by the Hydro-

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5 *Commonwealth submissions*, [16].
6 *Commonwealth submissions*, [18].
7 *Commonwealth submissions*, [32].
8 *Commonwealth submissions*, [46].
9 It states, moreover, that "*the types of corporations [the Commonwealth] may regulate cannot be divorced from the task of identifying what "corporations" are*": *Plaintiffs' submissions*, [14].
10 *Plaintiffs' submissions*, [13].
11 *Plaintiffs' submissions*, [41].
12 *Plaintiffs' submissions*, [40].
13 *Plaintiffs' submissions*, [21]-[22].
14 *Salomon v A Salomon & Co Ltd* [1897] AC 22.
15 *Plaintiffs' submissions*, [23]-[24].
16 *Plaintiffs' submissions*, [25]-[27].
17 *Plaintiffs' submissions*, [28]-[38].
18 *Plaintiffs' submissions*, [47]-[49].
19 Raised in the *Amended Defence*, [67](a), (b), (c)(i)-(vii).
20 *Plaintiffs' submissions*, [54].

Electric Commission in *Commonwealth v Tasmania*[21] ***(Tasmanian Dam case)*** and the Board in *State Superannuation Board v Trade Practices Commission*[22] (***State Superannuation case***).

9. It is a feature of both the Commonwealth's and plaintiffs' arguments that this Court is invited to accept a single, all-embracing definition capable of application to all future cases. The broad effect of the definition advanced by the Commonwealth is that, in practical terms, the expression "corporation" whenever used in s51(xx) excludes only natural persons and bodies politic established by the *Constitution*, and that any other kind of artificial juristic or legal person is a "corporation". That is also the effect of the definition advanced by the plaintiffs, though in reaching that definition they accept that the States could create new creatures not known to the law.[23]

10. This Court should decline the invitation to state such a definition. Principally, it should not do so in circumstances when it is not required to do so for the purposes of the case it needs to decide.[24] It is sufficient to answer whether or not the entity created by s6 is a "trading corporation". That is a narrower task that does not require any of the all-embracing propositions to be accepted.

11. For the reasons that follow the general definitions and their qualifications conceal difficulties of taxonomy, interpretation and application, that will require careful working through in future cases where the issue arises for decision.

The approach to identifying what is a "corporation" that is a "trading corporation"

12. The correct approach to determining what is a "trading corporation" within the meaning of s51(xx) is explained by Gleeson CJ in *Singh v Commonwealth*:[25]

> The concepts which those terms signify, in the context of the Constitution, can only be identified by reference to legal usage and understanding. Thus, when a dispute arose as to whether an incorporated local government authority that sold electrical appliances was a "trading corporation" within the meaning of s 51(xx), the question was not resolved by consulting a dictionary, and looking up the meaning of the noun "corporation", and the verb "to trade". This Court held that, although the authority in question was a corporation, and although it traded, it was not a trading corporation. In reaching that conclusion, the Court looked to the history of the development of corporations law, and noted that, at and around the time of Federation, legal authorities treated trading corporations and municipal corporations as entities of a different kind. The relevance of contemporary legal usage was that it formed part of the context in which the expression "trading corporations" was adopted, and an understanding of the context was necessary to a conclusion about the constitutional meaning of the expression.[26] *(footnotes omitted)*

13. Importantly, it was the development of the corporations law in this country that informed the

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21 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Plaintiffs' submissions*, [57].

22 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Plaintiffs' submissions*, [58].

23 *Plaintiffs' submissions*, [32].

24 *Plaintiff M76/2013 v Minister for Immigration* (2013) 88 ALJR 324, [148] (Crennan, Bell and Gageler JJ) and the references cited there.

25 *Singh v Commonwealth* (2004) 222 CLR 322, see also Menzies J in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 552-4.

26 *Singh v Commonwealth* (2004) 222 CLR 322, [10]-[12] (Gleeson CJ).

contemporary meaning of the expression "trading corporations."

14. In determining what the expression "trading corporation" signifies, this Court must approach that task bearing in mind that:

    i. the court is engaged in a process of construing a *Constitution*, which is "*intended to apply to the varying conditions which the development of our community must involve*",[27] and so is to be construed "*with all the generality which the words used admit*".[28] The *Constitution* is a mechanism under which laws are to be made, not a mere Act which declares what the law is to be.[29]

    ii. the starting point must be the text of the *Constitution*. However, the process of assessing the scope of constitutional power does not proceed "*by merely analytical and a priori reasoning from the abstract meaning of the words*".[30]

    iii. it is necessary to read the constitutional language in its context, including "*the whole of the instrument, its nature and purpose, the time when it was written and came into legal effect, other facts and circumstances, including the state of the law, within the knowledge or contemplation of the framers and legislators who prepared the Constitution or secured its enactment, and developments, over time, in the national and international context in which the instrument is to be applied*".[31]

    iv. to "*identify the meaning conveyed, at the time of federation, by the words used in the Constitution is… an essential step in the task of construction*".[32]

    v. there is no "*single all-embracing theory of constitutional interpretation*", and that "*[d]ebates cast in terms like originalism or original intent (evidently intended to stand in opposition to "contemporary meaning") with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.*"[33]

15. However, accepting the principle of interpretation that a power should be read with all relevant generality, does not assist in defining the boundary of a relevant class. The expression "trading corporation" necessarily operates to both include and exclude, as does the part of that expression "corporation". The relevant task is to determine what both connote.

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27 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 368 (O'Connor J).

28 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225-226.

29 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469, 612 (Higgins J).

30 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [15] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 576 (Windeyer J).

31 *Singh v Commonwealth* (2004) 222 CLR 322, [10]-[12] (Gleeson CJ).

32 *Singh v Commonwealth* (2004) 222 CLR 322, [159] (Gummow, Hayne and Heydon JJ); *Cole v Whitfield* (1988) 165 CLR 360, 385.

33 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

16. Nor is much assistance derived from the undoubted observation that s51(xx) is a "*power with respect to persons*".[34] That the concern is to identify a particular class as opposed to "*a function of government, a field of activity or a class of relationships*" is to restate the issue at hand in identifying the boundaries of that class.[35]

The text and context of s51(xx)

17. The starting point as to what the term "corporation" connotes is the text itself:

> (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

18. The provision offers only two indications as to what amounts to a corporation. First, the expression "*formed*" implies an artificial creation.[36] Second, the reference to "*limits of the Commonwealth*" distinguishes the origin of foreign corporations.

19. It is significant to the understanding of what is a corporation that there are artificial entities established by the *Constitution* that are not corporate. Covering clause 6 deals with definitions of the entities created, providing that "'*The Commonwealth' shall mean the Commonwealth of Australia as established under this Act*" whilst the former colonies, now comprising "*parts of the Commonwealth*", were each to be "*called a State*". Barwick CJ in *New South Wales v Commonwealth*,[37] stated that upon the passage of the Constitution Act the "*colonies ceased to be such and became States forming part of the new Commonwealth. As States, they owe their existence to the Constitution which, by ss 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed*". The continued existence of these integers of the federation is a constitutional premise.[38]

20. This constitutional conception of the Commonwealth, and the States as its constituent parts, was explained by Dixon J in *Bank of NSW v The Commonwealth*[39] in the context of the High Court's original jurisdiction over disputes between the polities:

> The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government … and goes directly to the conceptions of ordinary life. 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

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34 *New South Wales v Commonwealth* (1990) 169 CLR 482, 497.
35 *New South Wales v Commonwealth* (1990) 169 CLR 482, 497.
36 There is a relationship between the word "formed" and corporations: see s4 *Companies Act 1862 (UK)*; s4 *Companies Act 1890 (Vic)*; s1 *Companies Act 1908 (UK)*; *Russian Commercial and Industrial Bank v Comptoir D'Escompte de Mulhouse* [1925] AC 112, 148-9 (Lord Wrenbury).
37 (1976) 135 CLR 337, 372 (Barwick CJ).
38 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).
39 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.

of enforcing the Constitution rests.[40]

21. Moreover, assuming it for present purposes to be correct,[41] the idea that the Crown may have been a corporation has no ready application in this context. The notion of the Crown having corporate capacity might be convenient or useful for some purposes, but it is an analogy with limits.[42] Where the question is the meaning of "corporation" in s51(xx), the constitutional framework demonstrates that the polities established under it are simply not within the relevant framework of analysis.

22. That said, though South Australia accepts in broad terms the qualification that polities are excluded from any generalised definition of "corporation", that qualification requires some explanation and clarification.

23. The first area for explanation is which bodies politic are within the qualification. The Commonwealth's submission is that the Northern Territory and the Australian Capital Territory, each having been constituted as a body politic by exercise of Commonwealth legislative power under s122 of the *Constitution*,[43] would "*appear*" to fall within the qualification.[44] If that is correct, and it is suggested that the vesting of authority to govern ought give rise to that result, the position of the non-self-governing Territories is not explained. Nor is it explained why an exercise of State legislative power to constitute a body politic and allocate to it a share of sovereignty would fall into a different class. The obvious example is the establishment by the States of municipalities or local government. The analogy is particularly significant because it has been said of the constitutional relationship between territories and the Commonwealth that:

> The territories bear much the same relation to the general government that counties do to the State, and the Federal Parliament may legislate for them as States do for their respective municipal subdivisions.[45]

24. The second area is what constitutes the body politic of a State. The States themselves having the characteristics of representative and responsible government,[46] will undertake activities in the name of Ministers. Ministers may be given separate legal personality by legislation.[47] Departments

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40 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 363; See also *Crouch v Commissioner for Railways (Queensland)* (1985) 159 CLR 22, 28-29 (Gibbs CJ).

41 Maitland criticised the treatment of the Crown as a corporation sole: F W Maitland, "*The Crown as Corporation*" (1901) 17 Law Quarterly Review 131.

42 McTiernan J regarded "*[t]he notion of corporate capacity [as] only to a degree applicable to the Crown*" in *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, 28.

43 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 7; *Northern Territory (Self-Government) Act 1978* (Cth), s 5.

44 *Commonwealth Submissions*, [16] fn 20.

45 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 972.

46 In the case of the Commonwealth embodied in ss62 and 64.

47 For example, in South Australia, some Ministers and other public officers, are made corporations sole by statute: s8 *Harbours and Navigation Act 1993* (SA) (the Minister); s6 *National Parks and Wildlife Act 1972* (SA) (the Minister); s11 *Mining Act 1971* (SA) (the Minister and Director of Mines); s18 *Crown Proceedings Act 1992* (SA) (the Crown Solicitor); s7 *Families and Community Services Act 1972* (SA) (the Minister).

of government may be given corporate characteristics.[48] The government may vest certain of its functions in a statutory corporation that is an instrumentality and entirely the subject of its direction and control.

25. The Commonwealth's submissions suggest that a body may be a corporation for the purpose of s51(xx), but the State for other purposes, such as for the purposes of s114 (State property).[49] That at least acknowledges there is a large question concealed in the qualification. There may or may not be a reason in each case to distinguish the corporation from the body politic. Such arrangements will require an analysis in each case as to whether the proposed qualification to the definition of what is a corporation ought extend to them notwithstanding they possess corporate characteristics. Indeed, that analysis may also be significant in understanding whether the relevant activity is "trading". Where the relevant activity is between parts of government, and as such amounts to an internal transfer, real questions arise as to whether the activity ought be regarded as trade even if it is recorded internally for accounting purposes.

Other qualifications to the general definition

26. Additionally, there is some reason to think that, aside from federal considerations and the need to explain the qualification of a body politic in more detail, there are other qualifications that caution against accepting the general definition. The first is that, as identified above, the identification of an entity as corporate, historically or now, for other purposes does not mean it is relevantly a corporation for the purposes of s51(xx). For that reason, some considered analysis would appear to be required before accepting that a "corporation sole" is a corporation for constitutional purposes.[50] The second, is that it does not appear that artificial legal entities with continuing existence can be equated with the notion of a corporation. Two relevant examples[51] appear to highlight the point: the historical position of trade unions and the statutory creation of the Chaff and Hay Acquisition Committee.

27. As to trade unions, in *Bonsor v Musicians' Union,*[52] a majority of the House of Lords held that a

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48 See, the example in *Chaff and Hill Acquisition Committee v J Hemphille& Sons Pty Ltd* (1947) 74 CLR 375, 390 (Starke J).

49 *Commonwealth's submissions,* fn 18.

50 A corporation sole is an office which has been vested by the Crown with separate legal personality from the natural person holding office for the time being, and with perpetual succession. The corporation sole is regarded as having *"two capacities, that of the natural person and that of the corporation": McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 534 (Dixon, Williams, Fullagar and Kitto JJ). Whilst the office is occupied, the natural person is clothed with the office's separate legal personality, powers and functions; those powers and functions may lie dormant whilst there is a vacancy in the office: *Crouch v Commissioner of Railways* (Qld) (1985) 159 CLR 22, 35-36 (Mason, Wilson, Brennan, Deane and Dawson JJ). It is not obvious that such a corporation falls within what is connoted by the word "corporation" when used in s51(xx).

51 For another example, see *The Queen v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 587 (Deane J).

52 *Bonsor v Musicians' Union* [1956] AC 104.

trade union registered under the *Trade Unions Act 1871 (UK)* was a legal entity, with a *'permanent identity'*,[53] which could sue and be sued, hold property, act through agents, and bear liability in respect of that property for the acts of its agents, but was not an incorporated body.[54] The majority, like the High Court in *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd*,[55] recognised the plenary power of Parliament to create entities which were unknown to the law, not being corporations, and to grant them capacities to own property and sue and be sued.[56] Lord Porter regarded the union as a *"thing created by statute, call it what you will, an entity, a body, a near-corporation, which by statute has in certain respects an existence apart from its members"* and was capable of being sued for breach of contract.[57] Lord Morton expressed himself to similar effect.[58] Lord Keith stated that *"in a sense, a registered trade union is a legal entity, but not that it is a legal entity distinguishable at any moment of time from the members of which it is at that time composed"*.[59] Lord Somervell, regarded the position of trade unions as a *"special one"*[60] and with Lord MacDermott held that it was neither a corporation nor a legal entity (*"the legislature ...was averse to the idea of going the whole length and making these unions new creatures"*)[61], but nonetheless could be sued in its name. It does not appear that the approach of the House of Lords commended itself to this Court when it considered the issue in *Williams v Hursey*.[62] However, the Australian trade union registration legislation appears to have been drafted in more explicit terms and was construed as creating a union as a body corporate upon registration.[63] The English decision, nevertheless, illustrates an instance of a separate legal entity with perpetual succession that is not a corporation.

28. The body considered by this Court in *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd*,[64] provides another example. That case provides no assistance in determining what is a "trading corporation" because it was considering the different question of whether the Committee could be sued in proceedings in New South Wales. It does, however, demonstrate that there can be artificial legal persons that are not corporations. The Committee, constituted of four members appointed by the Governor, was an instrumentality of the Crown and not incorporated. It nonetheless was given power to acquire or dispose of property, which it held in a collective name, and to be sued in its collective name. This Court's conclusion that it was not a

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53 *Bonsor v Musicians' Union* [1956] AC 104, 150 (Lord Keith).
54 *Bonsor v Musicians' Union* [1956] AC 104, 127 (Lord Morton).
55 *Chaff and Hill Acquisition Committee v J Hemphill & Sons Pty Ltd* (1947) 74 CLR 375.
56 In this regard, applying the earlier decision of *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426, 429 (Farwell J).
57 *Bonsor v Musicians' Union* [1956] AC 104, 131 (Lord Porter).
58 *Bonsor v Musicians' Union* [1956] AC 104, 127 (Lord Morton of Henryton).
59 *Bonsor v Musicians' Union* [1956] AC 104, 149 (Lord Morton of Henryton); see also on trade unions, *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, 191 (Farwell LJ).
60 *Bonsor v Musicians' Union* [1956] AC 104, 155 (Lord Somervell).
61 *Bonsor v Musicians' Union* [1956] AC 104, 144 (Lord MacDermott).
62 *Williams v Hursey* (1959) 103 CLR 30.
63 *Williams v Hursey* (1959) 103 CLR 30, 53 (Fullagar J).
64 *Chaff and Hill Acquisition Committee v J Hemphill & Sons Pty Ltd* (1947) 74 CLR 375.

corporation tends to suggest that the class of *persona juridica* is not limited to natural persons and corporations. That may be so because such a body is part of the body politic, or is a different type of legal person.[65] It tends to suggest that the definitions advanced by both the plaintiffs and the Commonwealth of what is a corporation are drawn too widely.

Question 2

29. The phrase "*trading or financial corporation*" is a composite expression that embraces both the nature of the entity and its character. So much is reinforced by the drafting history of s51(xx).[66] Much of the relevant historical context concerning the corporations power is explained in the *Work Choices case*.[67] What has been said there is not disputed, nor need be repeated. However, as the majority in that case pointed out, the Court was not there concerned to consider what are "*trading or financial corporations formed within the limits of the Commonwealth*".[68] It is significant therefore to set out those aspects of the Convention Debates relevant to that issue.

Trading or financial corporation in the Convention debates

30. When, in Sydney in 1891, the Convention considered a proposed sub-clause which would give the Commonwealth the power to make uniform laws with respect to:

> the status in the commonwealth of foreign corporations, and of corporations formed in any state or part of the commonwealth.[69]

it was suggested that the power should be extended to include "*the registration or incorporation of companies*".[70] Sir Samuel Griffith, in opposing the suggested amendment, explained:

> there are a great number of different corporations. For instance, there are municipal, trading, and charitable corporations, and these are all incorporated in different ways according to the law obtaining in the different states.[71]

When it was proposed to limit the power to make laws with respect to incorporation to "trading corporations", Sir Samuel Griffith responded that "*it is sometimes difficult to say what is a trading corporation*".[72] The amendment was not agreed to, and the proposed draft bill adopted by the 1891 convention was limited to granting power to make uniform laws with respect to the recognition

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65 *Chaff and Hill Acquisition Committee v J Hemphill & Sons Pty Ltd* (1947) 74 CLR 375, 390 (Starke J).

66 It is now accepted that, in construing s 51(xx), it is desirable to have regard its historical context, including by reference to extrinsic materials such as the Convention Debates and legal opinions roughly contemporary with federation. This historical context can shed light upon the contemporary meaning of the language used, the subject to which that language was directed, and the nature and objectives of the movement towards federation from which the *Constitution* emerged: *Cole v Whitfield* (1988) 165 CLR 360, 385.

67 *New South Wales v Commonwealth* (2006) 229 CLR 1, [96]-[121] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

68 *New South Wales v Commonwealth* (2006) 229 CLR 1, [55], [58], [86], [185] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

69 *Official Report of the National Australasian Convention Debates, Sydney*, 685.

70 *Official Report of the National Australasian Convention Debates, Sydney*, 686 (Mr Munro)

71 *Official Report of the National Australasian Convention Debates, Sydney*, 686 (Sir Samuel Griffith).

72 *Official Report of the National Australasian Convention Debates, Sydney*, 686 (Sir Samuel Griffith).

of corporations.

31. In 1897 in Adelaide, the corporations power, contained in cl 50(XXII) of the draft Bill, was one to make laws with respect to "*Foreign corporations, and trading corporations formed in any State or part of the Commonwealth*".[73] Significant to what is discussed below, Barton credited Isaacs as the originator of the wording "*foreign corporations, and trading corporations*".[74] The debate centred upon why the clause was limited to trading corporations, and it was proposed to expand the clause to include "*financial institutions which are not banking institutions*" (banking being separately provided for), for example building societies.[75] The question was raised why the language of the original Bill had been changed from "*corporations*" to "*trading corporations*". Barton indicated that the Constitutional Committee had made the change because the word "*corporation*" was apt to cover municipal corporations.[76] The short debate which followed proposed a number of possible amendments, including the use of the word "*company*" which it was said would be "*well enough understood*".[77] A proposal to insert the words "*or financial*" before "*trading*" was agreed to.[78]

32. The inclusion of the provision concerning trading and financial corporations has to be considered in the context of then contemporaneous reforms to the corporations law. Some of that context was identified in the *Work Choices case* as relevant to understanding the meaning of '*financial*' corporations.[79]

33. A reference to "trading corporations" would appear to have been included against a background of their contribution to the corporate misconduct experienced, particularly in Victoria, as a result of the "*sensational*" collapse between November 1891 and March 1892, in New South Wales and Victoria of companies involved in the exploitation of land, including developers, financiers and building societies.[80] That between 1889 and 1900 the number of companies listed on the Melbourne Stock Exchange fell from 231 to 130, indicates the extent of the corporate collapses during this period.[81]

34. In 1894, Isaacs was the Attorney-General in the newly-elected Victorian liberal government and sought to reform the colony's companies legislation in response to the widespread corporate

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73 *Official Report of the National Australasian Convention Debates, Adelaide*, 793.
74 *Official Report of the National Australasian Convention Debates, Adelaide*, 793 (Mr Barton).
75 *Official Report of the National Australasian Convention Debates, Adelaide*, 793 (Sir George Turner).
76 *Official Report of the National Australasian Convention Debates, Adelaide*, 793 (Mr Barton).
77 *Official Report of the National Australasian Convention Debates, Adelaide*, 793 (Mr Symon).
78 *Official Report of the National Australasian Convention Debates, Adelaide*, 794.
79 *New South Wales v Commonwealth* (2006) 229 CLR 1, [116] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
80 J Waugh, "*Company Law and the Crash of the 1890s in Victoria*" (1992) 15 UNSWLJ 356, 363; See also, M Cannon, "*The Land Boomers*", (MUP, 1966).
81 P Lipton, "*A History of Company Law in Colonial Australia: Economic Development and Legal Evolution*" (2007) 31 NSWLR 805, 824.

fraud leading up to the crash.[82] Isaacs' reform effort culminated in the *Companies Act 1896* (Vic), which imposed what were described as "*drastic*"[83] additional obligations on "*trading companies*" registered under Part I of the *Companies Act 1890* (Vic).[84]

35. The typical activity of the land companies was the purchase of large blocks of city fringe land with a view to subdivision and sale as residential housing. The provisions of the new Act can be seen to have been related to the activities of the land companies in the period leading up to the crash. Land companies were sometimes formed to acquire properties from their directors or promoters, who profited from large mark ups without disclosing their interest to investors or creditors.[85] Misstatements and misrepresentation by directors or promoters in their dealings with the public were common.[86] The new Act prohibited the making of misleading statements in prospectuses[87] and in company names,[88] and rendered voidable any contract with a company in which a promoter was interested if disclosure was not made.[89] In order to attract investors, companies inflated their issued capital by manipulation of book entries.[90] Examples were given in Parliament of large institutions which had lent more than their paid-up capital to their own directors[91] and who had borrowed heavily on the security of their own shares.[92] The new Act required preparation and distribution of independently audited balance sheets to creditors and shareholders,[93] and filing of biannual statements of advances made to directors.[94] While land prices rose, the land companies had declared dividends out of these unrealised gains; as land prices fell, the companies did not revalue the land and continued to pay dividends out of new deposits received from the public.[95] The new Act required that dividends be paid only out of capital.[96] Foreign companies, being those formed outside Victoria, were required to have an agent resident in Victoria who could be sued on the company's behalf.[97]

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82 P Lipton, "*A History of Company Law in Colonial Australia: Economic Development and Legal Evolution*" (2007) 31 NSWLR 805, 826.

83 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 June 1896, 123 (Mr Isaacs)

84 These requirements included all those recommended by the Davey Committee in its 1895 Report, *Report of the departmental committee appointed by the Board of Trade to inquire what amendments are necessary in the acts relating to joint stock companies incorporated with limited liability under the Companies Acts, 1862 to 1890*, Command Paper 7779 (1895). These recommendations had not yet been made law in England.

85 J Waugh, "*Company Law and the Crash of the 1890s in Victoria*" (1992) 15 UNSWLJ 356, 371.

86 Including directors posing as financial advisors, advising shareholders to subscribe for shares in their own companies: J Waugh, "*Company Law and the Crash of the 1890s in Victoria*" (1992) 15 UNSWLJ 356, 373-4.

87 *Companies Act 1896* (Vic) ss47, 112-113.

88 *Companies Act 1896* (Vic) ss50-1.

89 *Companies Act 1896* (Vic) s115.

90 J Waugh, "*Company Law and the Crash of the 1890s in Victoria*" (1992) 15 UNSWLJ 356, 374-5.

91 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 June 1895, 226 (Mr Isaacs).

92 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 July 1896, 276 (Mr Isaacs).

93 *Companies Act 1896* (Vic) ss27-29.

94 *Companies Act 1896* (Vic) s46.

95 J Waugh, "*Company Law and the Crash of the 1890s in Victoria*" (1992) 15 UNSWLJ 356, 376.

96 *Companies Act 1896* (Vic) s48.

97 *Companies Act 1896* (Vic) s70.

36. As Henry Foster, the Minister of Mines and Minister of Water Supply, noted, "*it was owing to the frauds perpetrated by trading and financial companies that the stringent provisions of this Bill had been rendered necessary*".[98] Controversially, the amendments did not apply to mining companies, which the Attorney-General explained had "*always been treated separately*" and to which the applicable considerations "*were altogether different from those pertaining to ordinary trading companies*".[99]

37. As is suggested by the preceding discussion, the expression "trading corporation" has its origin in the legal usage of that period which drew distinctions between types of companies. Waugh observes that in the decades prior to federation in Victoria the distinction between classes of corporation was derived from the Act under which the corporation was formed:

> In this period, companies incorporated under the *Companies Statute* 1864 and its successor, Part I of the *Companies Act* 1890 (Vic), were generally referred to as 'trading' companies, regardless of the nature of their business, to distinguish them from companies incorporated under the optional, alternative provisions for the incorporation of mining companies in the *Mining Companies Act* 1871 (Vic) and its successor, Part II of the *Companies Act* 1890 (Vic).[100]

38. The distinction between classes of companies is also found in the language of *Companies Act 1890 (Vic),* a consolidation of existing legislation,[101] which was divided into parts using the headings, "Trading companies", "Mining companies", "Trustee companies" and "Executor companies".[102] Those types are distinct from a further class, the "municipal corporation" constituted under separate legislation.[103] Adopting the distinctions drawn in the legislation, the Official Victorian Year-books of the 1890's drew a distinction between "*Trading Companies registered in the United Kingdom and in Victoria*", those kinds being "*exclusive of mining, life, and trustees and executors companies, as well as building societies*".[104]

39. Similar distinctions prevailed in New South Wales between an incorporated "municipality"[105], "trading companies"[106], "no liability mining companies"[107] and other types of companies,[108] and in South Australia between "trading companies",[109] "mining companies",[110] "incorporated

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98 Victoria, *Parliamentary Debates,* Legislative Assembly, 1 July 1896, 157 (Mr Foster).

99 Victoria, *Parliamentary Debates,* Legislative Assembly, 1 July 1896, 151 (Mr Isaacs). The *Companies Act 1910* (Vic) s 2(1), sch 4 eventually extended the provisions to mining companies under Part II of the 1890 Act.

100 J Waugh, *"Company Law and the Crash of the 1890's in Victoria"* (1992) 15 UNSWLJ 356, 358.

101 Mining companies had been previously separately provided for under the *Mining Companies Act 1855 (Vic).*

102 *Companies Act 1890 (Vic),* s1.

103 *An Act to incorporate the Inhabitants of the Town of Melbourne* (6 Vict., No. 7); *An Act to incorporate the Inhabitants of the Town of Geelong, and to extend and apply thereto the laws now in force for the regulation of the Corporation of Melbourne* (13 Vict., No. 40); *Municipal Corporations Act 1863 (Vic).*

104 *Victorian Year-Book 1896,* 413.

105 s5, *Municipalities Act 1897 (NSW)* (Act. No. 23 of 1897).

106 *Companies Act 1874 (NSW).*

107 *An Act to incorporate " The Bathurst Copper Mining' Company" and for other purposes, 1853 (NSW); An Act to incorporate "The Ophir Copper Mining Company" and for other purposes, 1853 (NSW); An Act to incorporate No-liability Mining Companies 1881 (NSW).*

108 *Perpetual Trustee Company (Limited) Act 1888 (NSW).*

109 *Companies Act 1864* (SA), at least until 1892: *Companies Act 1892* (SA).

institutions",[111] and "municipal corporations".[112]

40. Similarly in England, *Halsbury's Laws of England* published in 1909 divided "lay corporations" (those that did not have an ecclesiastic origin) into trading and non-trading corporations. Trading corporations comprised chartered companies, those incorporated under special Acts and companies incorporated under the *Companies (Consolidation) Act 1908 (UK)*.[113]

41. Aside from a distinction in taxonomy, identification of an entity as a "trading corporation" availed it of an exception to the rule concerning the requirement to use its common seal to contract. The availability of an exception to the usual rule for trading corporations was identified in 1838 as an instance of general qualifications that had applied since the "*earliest traceable periods*" to the rule requiring use of a seal.[114] As explained by Dixon J in *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation*,[115] that need arose as:

> a trading corporation from its very nature must contract through its servants and agents in the ordinary course of its business as other traders do and the common law always recognised that such a corporation might be bound by contracts not under seal made in the course of trade.[116]

42. The expression "trading corporation" in s51(xx) was intended to include a class of entity and exclude others. That result was reflected in early decisions on the corporations power. As noted by the Court in the *Work Choices case*,[117] in *Huddart, Parker & Co Pty Ltd v Moorehead*,[118] now Justice Isaacs (in dissent) said of the words "*trading or financial corporations*":

> The power over corporations is exerciseable wherever these specific objects are found, irrespective of whether they are engaged in foreign or Inter-State commerce, or commerce confined to a single State. Next, it is clear that the power is to operate only on corporations of a certain kind, namely, foreign, trading, and financial corporations. For instance, a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading...[119]

43. All of this suggests, that at least as at 1900 that a number of classes of corporate entities would not have been described as trading corporations. Whilst the Framers may not be said to have

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110 *Mining Companies Act 1881* (SA), s 4.

111 *An Act to provide for the incorporation of Institutions or Associations formed for the promotion of Religious, Charitable, Educational, Scientific, and other useful objects, 1858* (SA).

112 *Municipal Corporations Act 1861* (SA).

113 *Halsbury's Laws of England*, Volume 8, [688] (Butterworths, London, 1909).

114 *Church v Imperial Gas Company* 6 Ad. & E. 859, 861; (1838) 112 ER 324, 330 (Lord Denman CJ).

115 *Johnson's Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544.

116 *Johnson's Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544, 562.

117 *New South Wales v Commonwealth* (2006) 229 CLR 1, [86] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

118 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

119 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 393 (Isaacs J). This statement is not affected by any formal doctrine of reserved powers. Justice Isaacs had already in *Barger* expressed his opposition to the doctrine of reserved powers as a limitation on the construction of Commonwealth legislative power as "*contrary to reason*".

been of one mind as to what was or was not included in the expression "trading corporations", the expression reflects concern regarding those corporate bodies falling within the class "trading corporation".

What is connoted by the expression "trading corporation" and its relationship to the activities test

44. It is not suggested that the former distinctions between types of companies fix the meaning of the expression "trading corporation". As observed by the majority in the *Work Choices case* corporations law was still developing in the last decade of the nineteenth century.[120] All implications of corporate personality had not been worked through. With those developments there has been an abandonment of at least some of the classes of corporations which appear to inform the language used in s51(xx). Moreover, other legislative reforms which removed the limits on activities in which a corporation could engage, diminish the ability to meaningfully speak of a trading corporation as defined simply by its origin, or its stated corporate purpose.

45. However, though those developments relevantly change what might be denoted today as a "trading corporation" and necessarily affect how any test to determine what is a trading corporation must be framed, the connotation of what is a "trading corporation" remains informed by the context and purpose set out above. The protective purpose inherent in the need to provide for the conferral of power over trading or financial corporations diminishes or grows with the extent of the corporation's trading or financial activity. That protective purpose has no apparent relationship to corporations that are established to govern.

46. None of the parties seek to re-open any decision that establishes the activities test. Nor do these submissions. However, it is necessary to explain the relationship between what is submitted to be connoted and the application of the activities test such that the latter does not serve some different end.

47. The origins of the activities test are to be found in the judgment of Barwick CJ in *R v Trade Practices Tribunal; Ex parte St George County Council* (***St George***).[121] The Chief Justice said:

> ... The power quite obviously, in my opinion, is given to the Parliament to enable it by legislation to control amongst other things at least some of the activities of corporations which fall within its description. It seems to me that the activities of a corporation at the time a law of the Parliament is said to operate upon it will determine whether or not it satisfies the statutory and therefore the constitutional description. Thus, in my opinion, the identification of the corporation which falls within the statutory definition will be made principally upon a consideration of its current activities.[122]

48. The Chief Justice's starting point is a consideration of the scope of the power contained in

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120 *New South Wales v Commonwealth* (2006) 229 CLR 1, 97-8 [121]-[122] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

121 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

122 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ).

s51(xx).[123] It is having regard to the scope of the power – enabling the control of some activities; the corporate activities – that Barwick CJ settles upon his test.[124]

49. That test also reflected the purpose of the grant of the power contained in s51(xx), namely, the power to control those activities of foreign and local trading and financial corporations because of the influence which such activities could have on the Australian community and its affairs, so much so that that no special or technical meaning should be given to the description "trading corporation".[125]

50. Again, having regard to the purpose of the power and that it was not a power to legislate with respect to trading, the Chief Justice determined that to be a trading corporation it was not enough that a corporation trade[126], only a corporation whose "*predominant and characteristic activity is trading whether in goods or services*" was a trading corporation.[127]

> As I have indicated, the purpose of the grant of legislative power includes the control of the corporate activities of the corporation: it is not so concerned with the motives which prompt those activities, nor the ultimate ends which those activities hope to achieve. If, upon that consideration, the corporation can fairly be described by reason of those activities, their extent and relative significance in the affairs of the corporation as a "trading corporation" it will, in my opinion, be nothing to the point that it is also a government or State or municipal corporation. The effect of the trading activities of such a corporation upon and in the community will not be lessened or necessarily affected by the fact that it is a State or municipal instrumentality.[128]

51. Thus the test and the scope of the power share a symbiotic relationship and reflect the purpose of the grant of the power. As an exercise in connotation, the difference between the Chief Justice and Menzies J could be considered to lie in the significance attributed by the latter to classes of corporation known at Federation that traded, and potentially substantially,[129] but were not those considered to have the ability to influence the Australian community and its affairs in the way subject of the Framers' general concern.

52. In *The Queen v Federal Court of Australia; Ex Parte WA National Football League* (**Adamson's case**) Barwick CJ returned to his understanding of the purpose and scope of the power contained in s51(xx) which he now considered to extend beyond those corporations "*formed as trading corporations, that is to say, as corporations the sole or predominant purpose of whose incorporation was to*

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123 Here Barwick CJ's remarks reflect his approach in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 490-1; see also 508 (Menzies J), 525 (Gibbs J).

124 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 542, 543 (Barwick CJ).

125 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 541-2 (Barwick CJ); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 204-5 (Mason J), 217 (Brennan J).

126 See also, *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 546 (McTiernan J), 553, 554 (Menzies J), 572 (Stephen J).

127 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ).

128 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ).

129 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 552-3 (Menzies J).

trade...".[130] The Chief Justice considered a trading corporation within the meaning of s51(xx) one for which trading is a *substantial* corporate activity.[131] This was the surest guide as the nature of a company "*may not be discernible from a perusal of its memorandum*".[132] Further, such test was warranted having regard to "*the virtual elimination of ultra vires from the law*".[133] For Mason J, with whom Jacobs J agreed, a corporation was a trading corporation within the meaning of s51(xx) if its trading activities formed a "*sufficiently significant proportion of its overall activities as to merit its description as a trading corporation*".[134] That was a question of fact and degree.[135] For Murphy J, a corporation was a trading corporation as "*long as the trading is not insubstantial*".[136] Justice Gibbs was in the minority but indicated that if, contrary to his view, the activities of a corporation were determinative, then trading had to be the "*predominant and characteristic activity*".[137]

53. Justice Gibbs aside, the ascendancy of the activities test in *Adamson's case* was accompanied by a lowering of the proportion that trading represents to the overall activities of the corporation. A court was now to look beyond the corporation's predominant and characteristic activity.[138]

54. In *State Superannuation Board v Trade Practices Commission* (**State Superannuation case**) the majority appear to suggest a transition to a further lowering of the threshold: the proportion that a corporation's trading activities represented to the entirety of its activities was no longer the central focus. Now it was enough that a corporation carry on trading activities on "*a significant scale*". That is, trading on a significant scale, would see a corporation characterised as a trading corporation within the meaning of s51(xx) even if other more extensive non-trading activities warrant it also being characterised as a corporation of some other type.[139] After deciding the Board's trading activities were carried out on a "*very substantial scale*", the majority appears to have treated their relativity to other activities as secondary to their absolute extent.[140] For the minority, application of the activities test was not simply a matter of determining whether the quantity of trading undertaken was sufficient to characterise the corporation as a trading corporation – it

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130 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 207-8 (Barwick CJ).

131 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 208 (Barwick CJ). "Trade for constitutional purposes cannot be confined to dealing in goods or commodities. Its full parameters may be difficult. But the commercial nature of an activity is an element in deciding whether the action is in trade or trading": 209 (Barwick CJ). See also *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184-5 (Gibbs CJ), 203 (Mason J); *The Queen v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 235 (Mason J).

132 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 208 (Barwick CJ).

133 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 208 (Barwick CJ).

134 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 233 (Mason J).

135 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 234 (Mason J); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570, 588-9 (Gibbs CJ), 602 (Mason, Murphy, Brennan and Deane JJ), 611 (Wilson J).

136 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 239 (Murphy J).

137 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 215 (Gibbs J).

138 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ).

139 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ).

140 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 306 (Mason, Murphy and Deane JJ).

was "*not a question solely of substantiality in either a quantitative or a relative sense but whether the activity is the predominant or characteristic activity*".[141]

55. In the *Tasmanian Dam case* a majority held that the Hydro-Electric Commission was a trading corporation within the meaning of s51(xx). Justice Mason, continuing the transition suggested in the previous case, considered that such characterisation followed from the fact that the Commission sold electrical power in bulk and by retail *on a very large scale*.[142] Justice Murphy considered that it was enough that the Commission was a major trader.[143] For Brennan J the Commission's trading activities were a "*substantial part or its overall activities, if not the predominant part*".[144] Justice Deane, echoing Mason and Jacobs JJ in *Adamson's case*, held the trading activities of the Commission were a sufficiently significant proportion of the Commission's overall activities as to merit its description as a trading corporation.[145] It was not necessary for Wilson J or Dawson J to consider whether the Commission was a trading corporation. In dissent, the Chief Justice considered that although the Commission's trading activities were significant, they did not indicate its true character.[146]

56. The *Tasmanian Dam case* is the last case in this Court to consider the application of the activities test to a corporation engaged in trade. *Fencott v Muller*[147] concerned a corporation that had not traded. Significantly, the majority held that *Adamson's case* did not suggest that trading activities were the sole criterion to be considered in determining character.[148].

57. Accepting that "*trading corporation*" is not a term of art,[149] that the description "*trading corporation*" distinguishes a domestic corporation from other kinds of corporation,[150] that a corporation is not a trading corporation just because it trades,[151] and that the purposes for which a corporation is formed are never irrelevant,[152] the question becomes one of to what extent must a corporation

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141 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 296 (Gibbs CJ and Wilson J).
142 *Commonwealth v Tasmania* (1983) 158 CLR 1, 156 (Mason J).
143 *Commonwealth v Tasmania* (1983) 158 CLR 1, 170 (Murphy J).
144 *Commonwealth v Tasmania* (1983) 158 CLR 1, 240 (Brennan J).
145 *Commonwealth v Tasmania* (1983) 158 CLR 1, 293 (Deane J).
146 *Commonwealth v Tasmania* (1983) 158 CLR 1, 117 (Gibbs CJ).
147 *Fencott v Muller* (1983) 152 CLR 570.
148 *Fencott v Muller* (1983) 152 CLR 570, 601-2 (Mason, Murphy, Brennan and Deane JJ).
149 *R v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 233 (Mason J); *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 542 (Barwick CJ); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 305 (Mason, Murphy and Deane JJ); *New South Wales v The Commonwealth* (2006) 229 CLR 1, 108-9 [158] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
150 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 543 (Barwick CJ); *New South Wales v Commonwealth* (1990) 169 CLR 482, 497 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).
151 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, 572 (Stephen J); *The Queen v Federal Court of Australia; Ex Parte WA National Football League* (1979) 143 CLR 190, 234 (Mason J), 237 (Jacobs J).
152 *Fencott v Muller* (1983) 152 CLR 570, 602 (Mason, Murphy, Brennan and Deane JJ); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303 (Mason, Murphy and Deane JJ).

trade and the relativity of such trading to its other activities before it may properly be characterised as a trading corporation for the purposes of s51 (xx). The answer to that question, as demonstrated, is not settled. One reason for this may be because, with the exception of *Fencott v Muller*, the trading activities in *Adamson's case*, *State Superannuation case* and the *Tasmanian Dam case* were, however the threshold be stated, substantial overall.

58. The consequence of the gradual erosion of the extent of trading required before a corporation will be considered a trading corporation and of the relativity of such trading to other activities, has been the inclusion within the scope of the power of corporations that were not the subject of the Framer's concerns. True it is that no firm view of what the Framer's considered to be a trading corporation is discernible, but it is clear that the intention in conferring the power contained in s51(xx) was protection of the investor and the creditor, and such protection was not required in relation to the likes of municipal corporations, for example, as they were then known.[153]

59. That consideration of purpose and context is relevant to ensuring the activities test, and the application of it, does not ultimately serve some different end. The activities test, to be consistent with what is connoted, must retain a requirement of relativity between the extent of trading and other activities. Moreover, it must have as its threshold a standard that means its satisfaction establishes an entity's character as a trading corporation. To the extent that the approach in *E v Australian Red Cross Society*[154] suggests otherwise it should not be followed.

60. For that reason, it is not entirely apposite to speak of a "broad" interpretation of the class defined by "trading corporation". Returning to Barwick CJ in *St George*, the application of the test must be informed by the purpose of the grant of the power, not by simply resorting to a claim of breadth. It is also to be remembered that at the time of *St George*, no one view of the scope of the power conferred by s51(xx) had received the support of a majority of this Court. That did not occur until the decision in the *Work Choices case*.[155] There it was determined by the majority that the scope of the power was as explained by Mason CJ, Deane and Gaudron JJ in *Re Dingjan; Ex parte Wagner*.[156] Specifically, in the *Work Choices case* the majority said:

> This understanding of s51(xx) was subsequently amplified by Gaudron J in her reasons in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy* Union where her Honour said:
>
> > I have no doubt that the power conferred by s51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on

153 *Huddart Parker and Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 405-7 (Isaacs J).

154 *E v Australian Red Cross Society* (1991) 27 FCR 310, 343, 345 (Wilcox J). See also the decisions collected in N Gouliaditis, "*The meaning of 'trading or financial corporations': Future directions*" (2008) 19 PLR 110, 114-118.

155 *New South Wales v The Commonwealth* (2006) 229 CLR 1.

156 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

> it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.
>
> This understanding of the power should be adopted. ...[157]

61. Thus, the lowering of the threshold in terms of trading activity that has occurred since *St George* has been accompanied by an expansion of the scope of the power. [158]

62. None of the above represents an argument that *Adamson's case* should be re-opened. Rather, the contention is that the activities test should be re-stated as it was originally formulated; i.e. a corporation will be a trading corporation for the purposes of s51(xx) where its trading activities form a sufficiently substantial proportion of its overall activities as to justify its description as a trading corporation. As Barwick CJ made plain in *St George*, what is required is a judgment as to the nature of the corporation made after an overview of all of its current activities. An overview of all its activities will include considering the nature and origin of the corporation so as to understand its activities. Activities of corporations that cannot be measured in monetary or numerical terms, such as governing constituents, will need to be borne in mind in that calculus, so as to understand the character of the corporation. Evaluation of relativity in such cases may be difficult, but cannot be avoided.[159] Relativity cannot be abandoned because, as Gibbs CJ said in *Fencott v Muller*:

> ... It may indeed be wrong to insist on finding activities that are "primary" or "predominant", but it is equally wrong to be satisfied with activities that are "substantial", if the latter activities do not, in all the circumstances, show that the corporation has a character which the Constitution requires. It is true that the question will often be one of degree.[160]

Part VI: Estimate of time for oral argument

63. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

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157 *New South Wales v Commonwealth* (2006) 229 CLR 1, 114 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

158 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184-5 (Gibbs CJ)

159 *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 25 (Toohey J).

160 *Fencott v Muller* (1983) 152 CLR 570, 589 (Gibbs CJ).