

Criteria for identification of ‘corporations’ and ‘trading corporations’ under 51(xx) of the Constitution

Brent Michael reports on *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11.

The question presented for the High Court was whether the Queensland Rail Transit Authority (‘the authority’) was a ‘trading ... corporation formed within the limits of the Commonwealth’, within the meaning of s 51(xx) of the Constitution. At stake in the answer to that question was whether the authority was subject to federal or state industrial relations laws.

In finding that the authority was indeed a ‘trading corporation’, the court applied the ‘trading purpose’ and ‘trading activities’ tests found in previous cases, but did not find it necessary to state exhaustively the features of ‘trading corporations’. The court also considered the concept of a ‘corporation’ itself for the purposes of s 51(xx), finding that the term applies to any independent ‘right and duty bearing’ artificial entity, other than a body politic.

Background

The authority provided labour to operate railway services to Queensland Rail Limited, a corporation in which the authority held all of the shares. The constituting statute conferred on the authority ‘all the powers of an individual’,¹ and provided that the authority could create and be made subject to legal rights and duties, that it could sue and be sued in its name, and that it could own property.² However, the statute also provided that the authority ‘is not a body corporate’.³

The plaintiffs, composed of various employee organisations, brought a special case seeking affirmative answers on two primary questions: (1) whether or not the authority was a ‘corporation’; and (2) if so, whether or not it was a ‘trading or financial corporation’. The plaintiffs also sought a determination that the *Fair Work Act 2009* (Cth) applied to the authority and its employees by operation of s 109 of the Constitution, to the exclusion of certain Queensland industrial laws.

Was the authority a ‘corporation’?

The authority submitted that not all artificial entities with separate legal personality are ‘corporations’ within s 51(xx); and that the question turns on legislative intention. That intention was not present here, because the constituting statute provided that the authority was not a body corporate.

As a starting point, French CJ, Hayne, Kiefel, Bell, Keane, and Nettle JJ observed that in the years leading up to and after federation there had been much development in corporate regulation; and there was no reason to read s 51(xx) as

empowering the legislature to deal with classes of artificial legal entities only having the features fixed at 1900.

The plurality then rejected the notion that the definition of ‘corporation’ turned simply on legislative intention. Such a test would be a labelling exercise and provided ‘no satisfactory criterion for determining the content of federal legislative power’.⁴

In any event, the court found as a matter of construction that the constituting statute did not classify the authority as some type of artificial legal entity distinct from the artificial legal entities which are ‘corporations’ under s 51(xx). Rather, in providing that the authority was not a ‘body corporate’, the constituting statute was intended to affect the operation of various other Queensland statutes which use the language of ‘body corporate’.⁵

The court held that the determinative consideration is not legislative intention but rather an entity’s ‘independent existence as a legal person’ – that is, ‘recognition as a right and duty bearing entity’.⁶

Gageler J came to the same conclusion. Different varieties of corporations had emerged prior to federation, and the term ‘corporation’ in s 51(xx) could encompass such entities in 1900. The power should be given a broad interpretation, and should be construed to include ‘all entities, not being merely natural persons, invested by law with capacity for legal relations’.⁷

Was the authority a ‘trading corporation’?

The court held that applying either a test of trading purpose or actual trading activity, the authority was a ‘trading corporation’.

As for purpose, this could be seen in the authority’s functions, which included ‘managing railways’, ‘controlling rolling stock on railways’, ‘providing rail transport services, including passenger services’ and ‘providing services relating to rail transport services’.⁸ The constituting statute provided that the authority was to ‘carry out its functions as a commercial enterprise’, with dividends payable to the state, and that the authority was liable to the state for amounts which the authority would have been liable if it had been liable to pay federal tax.⁹

As for activities, the plurality held that the supply of labour, even at a price for which the authority made no profit, did not mean that the authority was not a ‘trading corporation’.

The plurality found that the combination of all of these features

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satisfied the definition in s 51(xx), but that it was unnecessary to determine which features were necessary or sufficient.

Gageler J reached the same conclusion. His Honour said that a corporation may satisfy the constitutional description of 'trading' either by its 'substantial trading purpose' or by its 'substantial trading activity'. His Honour rejected the submissions of Victoria, intervening, which advanced a test by reference to a corporation's 'true character' as revealed by its 'characteristic activity'. That alternative test was said to be counter to standard interpretive method that the subject matter of federal powers not be confined to a single or predominant characterisation.¹⁰

Having concluded that the authority was a 'trading corporation' for the purposes of s 51(xx), the court found that, generally, the *Fair Work Act 2009* (Cth) applied, to the exclusion of certain Queensland statutory provisions.

Conclusion

It is hardly surprising that the court did not leave the subject matter of a federal head of power to legislative intention.¹¹ The case nevertheless confirms the broad scope of the corporations power. It also illustrates the residual need where the text provides minimal assistance to fall back upon historical and prudential interpretive factors¹² which in most cases take second place to text, structure and context.

The continued recognition of the trading activity or purpose tests, or a combination of both, without specifying necessary conditions of such entities is also consistent with a modern trend to avoid the Aristotelian essentialism of defining the necessary elements of words, and instead to approach constitutional expressions along multifactorial, Wittgensteinian family-trait lines, whereby no single feature is determinative.

Endnotes

1. *Queensland Rail Transit Authority Act 2013* (Qld), s 7(1).
2. *Queensland Rail Transit Authority Act 2013* (Qld), ss 7, 7(4), and 7(1)(b).
3. *Queensland Rail Transit Authority Act 2013* (Qld), s 6(2). There was no issue as to whether the authority was the State of Queensland, because the statute provided that the authority did not represent the state: s 6(3).
4. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [23].
5. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [29].
6. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [36].
7. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [65].
8. *Queensland Rail Transit Authority Act 2013* (Qld), ss 9(1)(a)-(d).
9. *Queensland Rail Transit Authority Act 2013* (Qld), ss 10(1), 55, 56(1)(a), 62.
10. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 at [70]-71.
11. *Australian Communist Party v The Commonwealth* (1950) 83 CLR 1 at 259.
12. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1984, Oxford University Press).

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