Body Corporate or Body Politic – what does the High Court decision in QLD rail case mean for NSW Local Government?

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Body corporate or body politic?


HcT held that:
- QR is a trading corporation within the meaning of s. 51(xx) of the Constitution;
- QR and its employees governed by federal IR law and not Qld IR laws.
Body corporate or body politic?

- QR established by QRTA Act 2013

- Under s 6(2) QR explicitly deemed **not** to be a ‘body corporate’.

- QRTA Act provided QR with legal powers and rights of an individual.

- Similarity to s 220 and 338 of the *Local Government Act 1993* (NSW).
Body corporate or body politic?

• Background continued

− QR and its employees governed by federal IR law and not Qld IR laws.

− Application by ten unions alleging that QR and its employees were subject to federal industrial relations law primarily because QR is a ‘trading corporation’ within the meaning of s 51(xx) of the Constitution.
Body corporate or body politic?

- Submissions of AG of NSW

  - The HCt should not discount as a mere label the significance of express legislative intent on the part of a State Parliament that a body is not a corporation.

  - NSW submission also noted that a broad definition of ‘corporation’ would extend to bodies politic of the State and made specific reference to s 220 of the LG Act 1993.
Body corporate or body politic?

• Submissions of Commonwealth AG
  - H Ct must consider an entity’s substance over form
  
  - “To say that a body is not a constitutional corporation merely because a legislative provision deems it not to be a corporation, …. would be contrary to the purpose of s 51(xx). It would enable legislatures (whether State or federal) or individuals, by a simple drafting device, to immunise certain entities from the reach of federal laws regulating constitutional corporations” (¶ 60 of Cth).
Body corporate or body politic?

• Submissions of Commonwealth AG cont.
  - The corporate character of an entity is not and cannot be determined by a statutory descriptor or label.
  - Whether a local council “…is said to be a ‘body politic of the State’ but ‘not a body corporate’, the question of whether the council is a constitutional corporation must be answered by looking to whether – as a matter of substance, not form – it has the characteristics of a corporation for the purposes of s 51(xx)”. (¶64 of the Cth submissions)
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• Findings of the HCt

  - In finding that QR was a trading corporation the HCt applied the well-established ‘activities test’ and determined that QR’s trading activities formed a sufficiently significant proportion of QR’s overall activities.

  - “…no doubt that the description which that legislature chooses to give to the body it so creates cannot determined the character of that body for the purpose of s 51 (xx) of the Constitution”. (¶62 of the judgement)
Body corporate or body politic?

- Industrial implications for NSW Councils
  - The QR decision does not automatically invalidate s 220 of the LG Act.
  - Even if s 220 is successfully challenged councils will not be automatically covered by the *Fair Work Act 2009* (Cth).
  - The majority of FWA provisions apply to national system employers and employees.
  - Councils are not national system employers by operation of s 14(2) of the FWA.
Body corporate or body politic?

• Industrial implications for NSW Councils cont.

− A number of provisions of the FWA apply to constitutional corporations that are non-national system employers.

− In those instances the question that will need to be asked is whether the trading activities at the council in question forms a sufficiently significant proportion of the council’s overall activities.
Body corporate or body politic?

- Other implications for NSW Councils
  - Any federal law that relies upon the Cth’s corporations power that is inconsistent with a State law e.g.
    - Privacy;
    - Tax;
    - Cth funding.