

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?

- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 (8 April 2015)
(**‘Queensland Rail Case’**)
 - 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.
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Body corporate or body politic?

- Background
 - 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).
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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.
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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.
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Body corporate or body politic?

- Submissions of Commonwealth AG
 - HCt 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).
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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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Body corporate or body politic?

- 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 determine the character of that body for the purpose of s 51 (xx) of the Constitution”. (¶62 of the judgement)
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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.
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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.
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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.
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