DECISION

Fair Work Act 2009
s.365—General protections

Veronika Bonora
v
Council of The City of Ryde
(C2023/5640)

DEPUTY PRESIDENT EASTON SYDNEY, 12 FEBRUARY 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – whether the Respondent was a national system employer – whether the Respondent is a constitutionally-covered entity – the effect of State legislation attaching legal status to local councils – the Respondent is not a constitutional corporation – not a trading corporation, a financial corporation or a foreign corporation – not a national system employer – jurisdictional objection upheld – application dismissed.

[1] Ms Veronika Bonora was employed by the Council of The City of Ryde as a Senior Governance Officer from April 2023 until August 2023. Ms Bonora was dismissed during her six-month probation period. On 14 September 2023 Ms Bonora made an application to the Fair Work Commission under s.365 of the *Fair Work Act 2009* (Cth), alleging that her dismissal contravened the general protection provisions of the FW Act.

[2] The Council of The City of Ryde (**Ryde Council**) maintains that the Commission does not have jurisdiction to hear the application because Part 3-1 of the *Fair Work Act 2009* (Cth) (**the FW Act**) does not apply to the actions of Ryde Council.

[3] Both parties consented to the matter being determined on the papers.

The Legislation

[4] The General protection provisions are in Part 3-1 of the FW Act. Division 2 of Part 3-1 (ss.337-339) sets out the circumstances in which Part 3-1 applies. Sections 338 and 339 are in the following terms:

> **"338 Action to which this Part applies**
> (1) This Part applies to the following action:
>
> (a) action taken by a constitutionally-covered entity;
>
> (b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person;

(d) action taken in a Territory or a Commonwealth place;

(e) action taken by:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect an employee of the employer;

(f) action taken by an employee of:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect the employee's employer.

(2) Each of the following is a constitutionally-covered entity :

(a) a constitutional corporation;

(b) the Commonwealth;

(c) a Commonwealth authority;

(d) a body corporate incorporated in a Territory;

(e) an organisation.

(3) A trade and commerce employer is a national system employer within the meaning of paragraph 14(d).

(4) A Territory employer is a national system employer within the meaning of paragraph 14(f).

339 Additional effect of this Part

In addition to the effect provided by section 338, this Part also has the effect it would have if any one or more of the following applied:

(a) a reference to an employer in one or more provisions of this Part were a reference to a national system employer;

(b) a reference to an employee in one or more provisions of this Part were a reference to a national system employee;

(c) a reference to an industrial association in one or more provisions of this Part were a reference to an organisation, or another association of employees or employers, a purpose of which is the protection and promotion of the interests of national system employees or national system employers in matters concerning employment;

(d) a reference to an officer of an industrial association in one or more provisions of this Part were a reference to an officer of an organisation;

(e) a reference to a person, another person or a third person in one or more provisions of this Part were a reference to a constitutionally-covered entity;

(f) a reference to a workplace law in one or more provisions of this Part were a reference to a workplace law of the Commonwealth;

(g) a reference to a workplace instrument in one or more provisions of this Part were a reference to a workplace instrument made under, or recognised by, a law of the Commonwealth;

(h) a reference to an industrial body in one or more provisions of this Part were a reference to an industrial body performing functions or exercising powers under a law of the Commonwealth."

[5] Ryde Council is not:

(a) a "trade and commerce employer" as defined in s.338(3) and s.14(1)(d);
(b) the Commonwealth;
(c) a Commonwealth authority;
(d) a body incorporated in a Territory;
(e) an organisation or industrial association; or
(f) a finance corporation or a foreign corporation (to the extent that finance corporations and foreign corporations are corporations to which paragraph 51(xx) of the Constitution applies).

[6] In this matter I need only consider whether Ryde Council is:

(a) a constitutionally-covered entity by dint of it being a constitutional corporation; and/or
(b) a national system employer.

Is Ryde Council a National System Employer?

[7] Section 14 of the FW Act relevantly defines "national system employer" as follows:

> "(1) A national system employer is:
>
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
>
> (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
>
> (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
>
> (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
>
> (i) a flight crew officer; or
>
> (ii) a maritime employee; or
>
> (iii) a waterside worker; or
>
> (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
>
> (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.
>
> (2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
>
> (a) that employer:
>
> (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
>
> (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
>
> (iii) is a wholly-owned subsidiary (within the meaning of the Corporations Act 2001) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

> (b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
>
> (c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.
>
> …"

[8] Quite clearly Ryde Council is a "body established for a local government purpose by or under a law of a State" referred to in s.14(2)(a)(ii) and therefore not a National System Employer.

Is the Respondent a constitutional corporation?

[9] The more difficult question to resolve is whether Ryde Council is a constitutional corporation. Through its solicitors Ryde Council submitted that it is not a body corporate, not a corporation and not a constitutional corporation.

[10] A constitutional corporation is defined in s.12 of the FW Act as "a corporation to which paragraph 51(xx) of the Constitution applies."

[11] Ms Bonora represented herself and is not legally qualified. In her brief written submissions she referred to and relied on an article posted on a law firm's website: "Are you in or are you out? Is a local council a body politic or a corporation?" by Mr James Mattson.[1]

[12] Ms Bonora relies on Mr Mattson's article to advance the proposition that Ryde Council is a constitutional corporation despite the terms of the *Local Government Act 1993* (NSW) (**LG Act**).

[13] I will deal with the matters in issue by considering:

(a) Mr Mattson's article;
(b) the terms of the *Local Government Act 1993* (NSW);
(c) the High Court's decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11, (2015) 256 CLR 171 (**Queensland Rail**);
(d) Justice Spender's decision in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Counci*l [2008] FCA 1268, (2008) 171 FCR 102; (2008) 175 IR 383;
(e) decisions of other courts regarding s.220 of the LG Act and corporate status;
(f) decisions of the Commission; and
(g) principles regarding trading corporations.

Consideration: Mr Mattson's Article

[14] Mr Mattson is a partner specialising in employment law at Bartier Perry. Unlike the flotsam of online free "legal opinion", Mr Matson's article is helpful and legally sound. The article refers to and summarises the High Court's decision in *Queensland Rail*. In *Queensland Rail* the High Court found that a government owned body, established by statute that declared the authority not to be a body corporate, was nonetheless a constitutional corporation.

[15] Mr Mattson speculates on whether the application of the High Court's reasoning in *Queensland Rail* would result in local and county councils in NSW established under the LG Act being regarded as constitutional corporations under the FW Act. Mr Mattson said:

> "It is clear that the mere statement in ss220(2) and 388(2) of the Local Government Act that local councils are not body corporates, will not act as a shield to councils being constitutional corporations and therefore, governed by the FW Act.
>
> It appears that the High Court has adopted a broad interpretation, but it was not asked to consider or determine the status of a body politic, like local councils…
>
> So, perhaps there is still room for ss220(1) and 388(1) of the Local Government Act to keep local councils out of the Federal sphere.
>
> …
>
> In many respects, some local councils do engage in activities that might be considered to be trading in nature, such as leasing venues, managing facilities like art galleries and swimming centres, managing car parks etc. The High Court did not need to determine whether it is the constitution or purpose of the organisation, or its activities, or a combination of both, that are to be examined to determine if an organisation is a trading corporation. On any test, the Authority was a trading corporation.
>
> Significant and interesting times are ahead in working out if a council is in or out."

Consideration: *The Local Government Act 1993* (NSW)

[16] The LG Act allows the Governor of NSW to constitute "areas" and "cities" by proclamation (s.204). The LG Act constitutes a "council" for each area or city (s.219). Each council established under the LG Act has "the legal capacity and powers of an individual" (s.220) and the elected councillors are the "governing body" of the council (s.222). Each council must appoint a general manager (s.334), whose functions include appointing, directing and dismissing staff (s.335). The role of the governing body of each council includes "to direct and control the affairs of the council in accordance with [the LG Act]" in consultation with the general manager (s.223).

[17] The relevant provisions of the LG Act are:

> **"7 Purposes of Act**
> The purposes of this Act are as follows—
> (a) to provide the legal framework for the system of local government for New South Wales,
> (b) to set out the responsibilities and powers of councils, councillors and other persons and bodies that constitute the system of local government,
> (c) to provide for governing bodies of councils that are democratically elected,
> (d) to facilitate engagement with the local community by councils, councillors and other persons and bodies that constitute the system of local government,
> (e) to provide for a system of local government that is accountable to the community and that is sustainable, flexible and effective.

8 Object of principles
The object of the principles for councils set out in this Chapter is to provide guidance to enable councils to carry out their functions in a way that facilitates local communities that are strong, healthy and prosperous.

204 Constitution of areas
(1) The Governor may, by proclamation, constitute any part of New South Wales as an area.
(2) The area is to have the boundaries determined by the Governor by proclamation.
(3) An area must be a single area of contiguous land.

219 Constitution of councils
A council is constituted by this Act for each area.

220 Legal status of a council
(1) A council is a body politic of the State with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.
(2) A council is not a body corporate (including a corporation).
(3) A council does not have the status, privileges and immunities of the Crown (including the State and the Government of the State).
(4) A law of the State applies to and in respect of a council in the same way as it applies to and in respect of a body corporate (including a corporation).

222 Who comprise the governing body?
The elected representatives, called "councillors", comprise the governing body of the council."

[18] Section 220 of the LG Act was amended by the *Local Government Amendment (Legal Status) Act 2008* (NSW). This amending legislation included the following transition provision:

> "The following provisions apply to a council constituted as a body corporate immediately before the commencement of the 2008 Act:
> (a) the council ceases to be a body corporate on that commencement and becomes instead a body politic of the State as provided by section 220 or 388 (as substituted by the 2008 Act),
> (b) the council is taken for all purposes (including the rules of private international law) to be a continuation of, and the same legal entity as, the council as it existed before the commencement of the 2008 Act (except that the council is no longer a body corporate and is instead a body politic of the State)."

[19] The Second Reading speech for this amending legislation included the following:

> "The first of the reforms is designed to deal with the consequences of the WorkChoices regime, the adverse impact of which is still being felt by workers across New South Wales.

> Local councils and county councils are bodies corporate under the Local Government Act. This corporate status might, in some circumstances, still expose them to the Federal industrial relations system and its regulations.
>
> Quite simply, the New South Wales industrial relations system is fundamentally fairer than WorkChoices.
>
> …
>
> This bill will minimise the risk of New South Wales councils being caught up in the federal system by changing their corporate status.
>
> Instead of being a body corporate, a council will be constituted as a body politic of the State and will have the legal capacity and powers of an individual.
>
> This change in legal status is not intended to affect the day-to-day operations of a council. It will not expose councillors to greater risk of personal liability and will not affect the existing legal rights and obligations of councils or third parties who do business with them.
>
> Its only impact will be to remove the possibility that a council might be characterised as a constitutional corporation and therefore an employer for the purposes of the Commonwealth's Workplace Relations Act. It will ensure that a council cannot be subject to the Federal industrial relations legislation.
>
> New South Wales laws that apply to corporations, however, will continue to apply to councils as if they were bodies corporate. This means, for example, that section 50 of the Interpretation Act will continue to apply to a council. As a result, a council will continue to have a seal for the execution of documents and may sue and be sued in its council name. Councils will also continue to be subject to any statutory penalties or fees—such as filing fees—that may be imposed on bodies corporate, rather than being treated as natural persons."

Consideration: The Queensland Rail Case

[20] The terms of the LG Act need to be considered in light of the High Court's approach in the *Queensland Rail case.* The following excerpt from the separate judgment of Justice Gageler at [47]-[48] conveniently summarises the question before the High Court In *Queensland Rail*:

> "Commonwealth legislation often refers to entities on which it confers rights or imposes duties as "constitutional corporations" and defines that expression to mean "corporations" to which s 51(xx) of the Constitution applies. The statutory reference is to corporations with respect to which the Commonwealth Parliament is empowered by s 51(xx) to make laws: "foreign corporations" and "trading or financial corporations formed within the limits of the Commonwealth". Questions have often arisen as to whether particular entities constituted under State legislation, not disputed to be "corporations formed within the limits of the Commonwealth", answer the constitutional description of "trading or financial" corporations. The anterior question in this case is

whether a particular entity constituted under State legislation answers the constitutional description of a "corporation".

That anterior question arises because the *Queensland Rail Transit Authority Act 2013* (Q), despite establishing "Queensland Rail", conferring on it "all the powers of an individual" (specifically including to "enter into contracts", "acquire, hold, dispose of, and deal with property", "employ staff", "appoint agents and attorneys", and "engage consultants"), and providing that it "may sue and be sued in the name it is given", declares that it "is not a body corporate". If effective to prevent Queensland Rail answering the constitutional description of a corporation, that declaration would take Queensland Rail outside the operation of the *Fair Work Act 2009* (Cth), which governs employment by constitutional corporations to the exclusion of State and Territory industrial laws. Removal of Queensland Rail from the operation of the *Fair Work Act* was part of the legislative design of the Queensland Rail Transit Authority Act, as is made plain by transitional and other provisions which expressly contemplate that employment by Queensland Rail would be governed by the *Industrial Relations Act 1999* (Q).”

[Footnotes omitted]

[21] The competing submissions were summarised by the plurality at [11]-[12]:

“The chief point of difference between the plaintiffs and the Authority was whether the Authority is a "corporation" within the meaning of the second limb of s 51(xx). The plaintiffs submitted that "an entity established under law with its own name, and with separate legal personality and perpetual succession, is a corporation within the meaning of s 51(xx)". The Attorney-General of the Commonwealth, intervening, proffered a generally similar description of what is a corporation: "any juristic entity with distinct, continuing legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) that is not a body politic reflected or recognised in the Constitution".

By contrast, the Authority (with the support of the Attorneys-General for New South Wales and Victoria) submitted that not all artificial entities having separate legal personality are corporations. The Authority submitted that "the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express words or by necessary implication". Hence, so the Authority submitted, the express provision, by s 6(2) of the QRTA Act, that the Authority "is not a body corporate" is especially significant because it reveals the intention of the Parliament and requires the conclusion that the Authority is not a "corporation".

[22] The Rail Authority accepted it was an artificial legal entity formed within the limits of the Commonwealth (at [5]) but submitted that it was not a corporation and was not a trading corporation.

[23] The *Queensland Rail Transit Authority Act 2013* (Q) (**QRTA Act**) established the Rail Authority as a distinct legal entity. The Rail Authority essentially provided labour to Queensland Rail - the employment of staff was transferred by statute from Queensland Rail to the Rail Authority. The Rail Authority held 100% of the shares of Queensland Rail Ltd. There was no real suggestion in the case that the Rail Authority was a body politic reflected or recognised in the Constitution.

[24] The High Court considered the effect of s.6(2) of the QRTA Act and rejected the submission that the legislation could create an artificial legal entity that was distinct from 'corporations' or 'bodies corporate' (at [24]-[27]).

[25] In rejecting this argument the plurality qualified its analysis by including in parenthesis a reference to body politics (at [25]):

> "The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (**that is not a body politic**) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression."
>
> [Emphasis added].

[26] One recognised intention of the QRTA Act was to take the Rail Authority outside of the operation of federal industrial law generally and the FW Act specifically. As the plurality said "a state government cannot determine the limits of federal legislative power" (at [28], see also Gageler J at [62]).

[27] The plurality found that the Rail Authority had the full character of a corporation, despite the terms of s.6(2) of the QRTA Act (at [32]):

> "Like the Federation considered in *Williams v Hursey*, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation"."

[28] Justice Gageler came to the same conclusion (at [65]-[67]):

> "The term "corporations" is, and was in 1900, readily capable of encompassing all artificial legal persons; that is to say, all entities, not being merely natural persons, invested by law with capacity for legal relations. There is nothing in the context or in the rest of the Constitution to indicate that any narrower interpretation would best carry out the object and purpose of the conferral by s 51(xx) of a national legislative power

> with respect to both foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The constitutional context, both structural and historical, points in favour of the application of the broad orthodox historical meaning.
>
> The constitutional reference to foreign corporations encompasses all artificial entities invested with legal personality under other systems of law. The constitutional reference to corporations formed within the limits of the Commonwealth encompasses all artificial entities invested with legal personality under Australian law.
>
> Queensland Rail has legal personality because it is legislatively conferred with capacity to own property, to contract and to sue. It is unnecessary to consider whether any lesser subset of those attributes might suffice. The statutory declaration that Queensland Rail is not a body corporate does not deprive Queensland Rail of any of those attributes."

Consideration: Etheridge Council Case

[29] Seven years before the High Court decision in *Queensland Rail* Justice Spender in the Federal Court considered similar questions in relation to a local council in Queensland (see *Australian Workers' Union of Employees, Queensland v Etheridge Shire Counci*l [2008] FCA 1268, (2008) 171 FCR 102; (2008) 175 IR 383 (**Etheridge Council**)). In that matter a council lodged an employee collective agreement for approval not long after the introduction of the WorkChoices legislation. The Australian Workers' Union argued that the council was not entitled to lodge the agreement because it was not an "employer" under the provisions of the federal legislation because it was not a constitutional corporation.

[30] In *Etheridge Council* Spender J considered the High Court's analysis in *New South Wales v Commonwealth* [2006] HCA 52, (2006) 229 CLR 1 (**WorkChoices**) regarding constitutional corporations and observed at [20]-[22]:

> "In essence, the High Court, by a majority, concluded that the Work Choices Act was valid in its application to constitutional corporations. The central question in these two proceedings is whether the Etheridge Shire Council is such a corporation.
>
> If it is, the acceptance by the majority in the *Work Choices Case* of the ambit of the power of the Commonwealth under s 51(xx) as described by Gaudron J in *Pacific Coal,* would mean that the Commonwealth has power to regulate the activities, functions, relationships and the business of the Etheridge Shire Council; the creation of rights and privileges belonging to the Etheridge Shire Council; the imposition of obligations on it; and, in respect of those matters, the regulation of the conduct of those through whom it acts, its employees, and also the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.
>
> In my opinion, it is inconceivable that the framers of the Constitution and the parliament which enacted it intended that the Commonwealth should have the powers described in para [21] above in respect of a local government, which is a body politic of a State government, having legislative and executive functions."

[31] Under the *Local Government Act 1993* (QLD) the council was a 'local government', a body corporate with perpetual succession and could sue and be sued in its name (see *Etheridge Council* at [34]).

[32] His Honour considered the proposition that the council was a 'municipal corporation' rather than a trading corporation (see [47]-[77] and [141]-[145]) before applying the activities test from *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6; (1979) 143 CLR 190 and concluding at [155] that the council was not a trading corporation.

[33] The following excerpt from the majority decision in *WorkChoices* at [194]-[195] assists in understanding the references to bodies politic:

> "What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution. The *Engineers' Case* did not establish that no implications are to be drawn from the Constitution. So much is evident from *Melbourne Corporation* and from *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the Boilermakers' Case"). Nor did the *Engineers' Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation*:
>
> > "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."
>
> **And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions.** But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.
>
> In the present matters, the appeals made to notions of federal balance, no matter whether the appeal was explicit or only implicit, were propositions about a "balance" of legislative power between the Commonwealth and the States. Two points must be made about those propositions. First, as Dixon J said in *Melbourne Corporation*:
>
> > "The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth."
>
> Secondly, again as Dixon J pointed out in *Melbourne Corporation*, the framers "appear ... to have conceived the States as bodies politic ***whose existence and nature are independent of the powers allocated to them***" (emphasis added). Thus when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified? It cannot be identified from any of the considerations

mentioned thus far in these reasons, and no other basis for its identification was advanced in argument."

[Footnotes omitted, emphasis added]

Decisions on the LG Act and corporate status

[34] Some decisions of superior courts have accepted without further examination that NSW councils constituted under the LG Act are, by force of s.220, bodies politic of the State of NSW (see *Queanbeyan City Council v ACTEW Corporation* Ltd [2011] HCA 40 at [2], (2011) 244 CLR 530, *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* [2009] HCA 12 at [1], (2009) 237 CLR 603, *Rumble v Liverpool Plains Shire Council* [2015] NSWCA 125 at [129]-[133], *Adrenaline Pty Ltd v Bathurst Regional Council* [2015] NSWCA 123 at [55], *Sutherland Shire Council v Folkes* [2015] FCA 1288 at [3]).

[35] In three matters the Federal Court has considered in brief terms the corporate legal status of local councils in light of s.220 of the LG Act:

(a) in *Rumble v Liverpool Plains Shire Council* [2020] FCA 1043 at [17]-[22] Justice Abraham found by reference to s.220 that Liverpool Plains Shire Council did not have obligations under the *Corporations Act 2001* (Cth) because it was not a corporation;

(b) in *Lady Crown and on Behalf of Ngati Rangihou Corrangie Hapu Dba Office of the Crown v Parramatta City Council, in the matter of Parramatta City Council* [2019] FCA 1668 Justice Gleeson dismissed an application under the *Corporations Act 2001* to wind up Parramatta City Council because, amongst other reasons, the plaintiffs had no reasonable prospects of demonstrating that the Court has power to order that the council be wound up "in the face of the legal framework established by the LGA and without any evidence that the Council is a company within the meaning of the Corporations Act (particularly that it is one of the types of companies that can be registered under the Corporations Act)" (at [18]-[19]); and

(c) in *Carroll v Clarence Valley Shire Council* [2012] FCA 1143 at [8] Justice Emmett observed that s.220 cannot be decisive in relation to the operation of the Corporations Act 2001, noting "Either the Council is a corporation within the meaning of the Corporations Act or it is not. A statement in a State Act cannot change the effect of a Commonwealth Act. If, on proper analysis, the Council is a corporation, within the meaning of that term as defined in the Corporations Act, the fact that the Local Government Act says that it is not a body corporate would not be decisive, and it may be that it would be inconsistent with the Corporations Act and, therefore, void under s 109 of the Constitution."

Other FWC Decisions

[36] In *Millen v Brisbane City Council* [2016] FWC 5897 Deputy President Lawrence found that the council was not a national system employer because of the exclusion in 14(2)(b) and seems to have applied *Etheridge Council* to find that the council was a 'body politic of a State government, is not capable of being a constitutional corporation and therefore not a constitutionally covered entity under the Act" (at [15] and [21]). The Deputy President did not expand on his reasons for finding that the council was a body politic except to note the submission of the council.

[37] Section 220 of the LG Act does not appear to have been considered in any decision of the FWC. Other FWC decisions involving local councils in other states are helpful on the question of whether particular councils are trading corporations:

(a) in *Application by Bastakos* [2018] FWC 7650 Commissioner McKinnon considered whether the City of Port Phillip Council was a trading corporation for the purposes of the Commission's stop-bullying jurisdiction. The Commissioner accepted at [5] that the respondent council was a body corporate (per s.3 of the *Local Government Act 1989* (Vic) which seems to have since been replaced by s.14 of the *Local Government Act 2020* (Vic), that it was a corporation (at [9]) and that it was a trading corporation (at [32]), predominantly because the value of its trading activities was not minimal, trivial or insignificant (at [31]);

(b) in *Applications by Cooper and Bagster* [2017] FWC 5974 Deputy President Anderson was called upon to consider whether the City of Burnside is a constitutionally-covered business. Section 35 of the *Local Government Act 1999* (SA) says "[a] council is a body corporate with perpetual succession and a common seal." The Deputy President found that the trading activities of the council were peripheral and that it was not a constitutional corporation (at [88]-[89]); and

(c) in *Boyd and Theedom v Shire of Yalgoo* [2016] FWC 2190 Deputy President Kovacic found that the council was not a trading corporation. In that matter the council's income from trading activities represented only 3.8% of its overall revenue.

Trading Corporations

[38] In *Roads and Maritime Services v Leeman* [2018] FWCFB 5772 at [13]-[19] the Full Bench provided a comprehensive analysis of the characterisatics of trading corporations. For present purposes I do not need to reproduce or summarise the Full Bench's analysis beyond including the following summary of the relevant principles drawn from the Western Australian Court of Appeal decision in *Aboriginal Legal Service (WA) Inc v Lawrence (No 2)* [2008] WASCA 254; 252 ALR 136 and endorsed by the Full Bench:

> "(1) A corporation may be a trading corporation even though trading is not its predominant activity ...
>
> (2) However, trading must be a substantial and not merely a peripheral activity ...
>
> (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services...
>
> (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant...
>
> (5) The ends which a corporation seeks to serve by trading are irrelevant to its description ... Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade'...
>
> (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree ...

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade ...

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading ..."

Ryde Council's Evidence

[39] Ryde Council's evidence comprised essentially of its 2021/22 Annual Report. Ms Bonora led no evidence to contradict the report or to contradict the assertions drawn from the report.

[40] Ryde Council listed its key activities as follows:

(1) Catchment program - managing water quality, natural waterways and stormwater;
(2) Centres and Neighbourhood program - developing, delivering, maintaining and managing public domain infrastructure, facilities and place management;
(3) Community and Cultural program - managing community services, community development, community buildings and events and driving cultural development;
(4) Customer and Community Relations program - engaging in community and media relations, branding and marketing and managing customer services;
(5) Economic Development program - Business sector and economic development;
(6) Environmental program - Monitoring and managing environmental performance and developing environmental policy;
(7) Foreshore program - managing all aspects of council's foreshore;
(8) Governance and Civic program - Supporting City of Ryde mayor and councillors; through council process and civic events; and providing guidance on governance to support other areas of council;
(9) Internal Corporate Services program - Developing and managing Ryde Council's information, records and corporate knowledge; implementing information technology, communications, business, financial and HR infrastructure and services. Managing its fleet and plant; planning and developing assets; all project management and administrative support.
(10) Land Use Planning program - Planning, delivering and managing council's land and urban design and enhancing and informing on council's heritage;
(11) Library program - Delivering library services;
(12) Open Space, Sport & Recreation program - Developing, delivering, maintaining and managing all council's sports, recreation, outdoor, open spaces and natural areas infrastructure, services and facilities.
(13) Organisational Development program - Addressing workforce planning, driving culture and performance, assessing process efficiency and overseeing all corporate communications;
(14) Paths and Cycleways program - Developing, managing and maintaining council's footpaths and cycleways.
(15) Property Portfolio program - Developing, managing and maintaining Ryde Council's portfolio of corporate, commercial and civic properties;

(16) Regulatory program - Delivering all council's regulatory assessments and activities, including building regulations, environmental regulations, road, parking and footpath enforcement and animal management;
(17) Risk Management program - Managing all legal services, procurement and internal auditing, assessing and managing business continuity, risk and disaster management; and
(18) Roads program - Managing and maintaining council's roads, bridges and retaining walls.

[41] Ryde Council's receipts in FY22 were $168M. Of this:
(a) 61% ($102 million) was from the collection of rates and annual charges;
(b) 16% ($26 million) was from grants and contributions provided for capital and operating purposes provided by Federal and State government;
(c) 8% ($13 million) was user charges and fees from programs that otherwise run at a loss;
(d) 2% ($3 million) came from interest and investment revenue; and
(e) 13% ($22 million) recorded as "other revenue and income".

[42] The "other revenue and income" includes receipts from parking fines, materials recycling, other rebates, sale of abandoned vehicles and the like.

[43] Two particular revenue items are of note: Ryde Council received $8,445,000 from its Open Space, Sport and Recreation Program, being almost 5% of total receipts. However Ryde Council incurred expenses of $20,333,000 to generate the revenue – almost 2.5 times as much. Many government community activities fall within this accounting cost centre such as free 'come and try exercise' classes and so on. Whilst the Open Space, Sport and Recreation Program includes operating an Aquatic Centre, I am inclined to conclude that these activities were not trading activities but were carried out for the benefit of the public.

[44] Similarly Ryde Council spent $6,378,000 on library services and received $463,000 in revenue. This council activity is clearly carried out for the benefit of the public rather than by way of trading activities.

[45] All of the key activities ran at a financial loss to Ryde Council in 2022, with the exception of a program for managing the Ryde foreshore, its Waste and Recycling program and a Land Use Planning program that involves improving the state planning framework, the development of statutory land use plans and development control plans.

Consideration

[46] The terms of s.220 of the LG Act are superficially straightforward - the council is not a body corporate but is instead a body politic. The intention of the NSW Parliament in amending s.220 to its current formulation is obvious – to reduce the risk that federal industrial relations legislation might apply to local councils by declaring them to have a legal status outside of the realm of the corporations power.

[47] However, the intention of the state parliament "provides no satisfactory criterion for determining the content of federal legislative power" (per *Queensland Railways case* at [23]) and legislation cannot finally determine whether NSW councils are constitutional corporations (per *Queensland Railways case* at [28] and [62]).

[48] Ryde Council is a separate legal entity to the individuals who make decisions on its behalf. It is an artificial legal entity, constituted by legislation, that can bear rights and duties. As the High Court found in *Queensland Rail*, there is no other class of right and duty bearing bodies created by statute beyond "corporations" or "bodies corporate" to which entities such as councils could belong, *other than bodies politic*.

[49] Justice Spender in the *Etheridge Council case* opined that it was not the intention of the Constitution to regulate local government bodies that are, he said, a body politic of a State government (at [23]). Spender J relied on the distinction between municipal corporations and trading corporations – largely equating municipal corporations with bodies politic.

[50] In *Queensland Rail* the parties asked the Court to determine whether the Authority is a "corporation" within the meaning of s 51(xx) and, if so, whether it is a "trading corporation" (at [10]). The plurality was troubled by the agreed two step approach of the parties. Ultimately they said at [45] that it was "better to provide no answer" to the first question. The plurality essentially questioned whether it was "useful to direct separate attention to [the question of] what is a 'corporation'" (at [9]).

[51] Recognising that the terms of s.220 of the LG Act are not definitive, that Ryde Council is a separate legal entity that bears rights and duties, and also that Ryde Council undertakes both community services and other activities that could be described as trading activities, the most useful starting point to resolve this matter is to begin with the conclusion that the nature and the extent or volume of Ryde Council's trading activities does not justify a description as a trading corporation.

[52] In absolute terms the receipt of $8,445,000 from the Open Space, Sport and Recreation Program is not insubstantial. In relative terms these receipts are almost 5% of total receipts. However one cannot only look at the revenue side of the equation. The same program cost Ryde Council more than $20M to operate and therefore was provided to the community at a net annual cost to Ryde Council of $12M. This cost can be equated to other annual net costs borne by Ryde Council such as the catchment program ($5M), governance and civil program ($4.3M), paths and cycleways program ($4M), customer and community relations program ($2.5M), and the centres and neighbourhoods program ($2.5M).

[53] The other potentially significant activity that might be said to be a trading activity is library services. By the same analysis, even though council received a significant sum as revenue for library services ($463,000), the library services program was a service provided to the community at a net annual cost to the council of almost $6M.

[54] In the broad the other activities of Ryde Council can be squarely categorised as activities it is required to do as a local government. The Open Space, Sport and Recreation Program and the Library Program fit comfortably within Ryde Council's remit to provide community services– in this context they are not 'business activities' that support a finding that Ryde Council is a trading corporation.

[55] In the circumstances it is not necessary to make a finding about whether Ryde Council is a corporation. It is sufficient to record, as the above authorities make clear, that the NSW Parliament's declaration in s.220 of the LG Act does not, without more, remove the legal possibility that Ryde Council is a constitutional corporation.

[56] Ms Bonora's claim under s.365 cannot continue. Ryde Council is not a constitutional corporation because it is not a trading corporation, a financial corporation or a foreign corporation. Nor is Ryde Council a national system employer or any other kind of body whose actions are covered by the general protection provisions in Part 3-1 of the FW Act.

[57] I will separately make an order dismissing Ms Bonora's application (PR771259).

DEPUTY PRESIDENT

Appearances:

Determined on the papers.

Printed by authority of the Commonwealth Government Printer

<PR771258>

[1] https://www.bartier.com.au/insights/articles/are-you-in-or-are-you-out-is-a-local-council-a-body-politic-or-a-corporation.