

'TRADING OR FINANCIAL CORPORATIONS' UNDER SECTION 51(xx) OF THE CONSTITUTION: A MULTIFACTORIAL APPROACH

CHRISTOPHER TRAN*

The Commonwealth has legislative power with respect to 'trading or financial corporations' under s 51(xx) of the Constitution. An important question is thus how to identify a trading or financial corporation. For around 30 years, the accepted doctrine has been that a court looks at a corporation's activities. This article examines the justifications for and application of this activities test in the High Court and in recent lower court decisions. It argues that the activities test should be replaced by a multifactorial approach. Such an approach is more transparent and informative, and also better reflects what the courts actually do when deciding cases in this area.

I INTRODUCTION

Under s 51(xx), the Commonwealth has legislative power with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' ('the corporations power'). In a series of cases in the 1970s and 1980s, a majority of the High Court established that a trading or financial corporation is one that engages in a certain level of trading or financial activities (the so-called 'activities test'). However, the majority judgments never coalesced around the same version of the test, nor did they rule out the relevance of factors other than the corporations' activities. Moreover, the activities test was only ever adopted by slim majorities, and then always over strong dissents that adopted a more holistic approach to this issue. Other approaches discernible in the case law are the 'purpose test' (a trading or financial corporation is one that is 'formed for the purpose' of trading or finance) and a 'mixed test' (both the activities of the corporation and its purpose are relevant in determining whether a corporation is a 'trading or financial' corporation).

A number of commentators and judges have noted that in the wake of *New South Wales v Commonwealth* ('*Work Choices*'),¹ 'there is some doubt as to whether the activities test for characterising a corporation will necessarily prevail, despite the stream of authority supporting it'.² The judgments in *Work Choices*

* BA, LLB (Hons) (Melb). My thanks to Vee Vien Tan and anonymous referees for their comments. The case law cited (and in particular the postscript) is current as at August 2011.

1 (2006) 229 CLR 1.

2 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 116. See also Nick Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2008) 19 *Public Law Review* 110; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters Australia, 3rd ed, 2010) 96.

stressed that the meaning of 'trading or financial corporations' in s 51(xx) of the *Constitution* was not in issue and awaited a future case.³ Moreover, a number of statements made during argument could be interpreted as hinting at some form of sea change.⁴ This issue is particularly important because of the Court's decision in *Work Choices*, which adopted an expansive interpretation of the scope of the corporations power. Thus rationalisation and clarification of the approach to determining what is a 'trading or financial corporation' is needed. On the assumption that the High Court was inclined to adopt a new test, Gouliaditis recently offered four suggestions as to what that new test might be.⁵ This article takes a different approach. It argues that the 'activities test' *should* be recast and the concept of 'tests' in this field discarded, and a multifactorial approach adopted in their place. Such an approach better reflects actual judicial practice and promotes clearer reasoning.

Part II of this article scrutinises the development of and justifications for the activities test in the High Court case law. Part III examines recent lower court cases purporting to apply that test. The survey reveals that despite adopting the 'activities test', factors other than a corporation's activities have been taken into account, often in an inconsistent and confusing manner. Part IV proposes a multifactorial approach and highlights a non-exhaustive list of factors that should be relevant to the characterisation of corporations. It then illustrates how this approach might be applied in particular factual scenarios.

II ACTIVITIES TEST: HIGH COURT CASES

A St George

In *R v Trade Practices Tribunal; Ex parte St George County Council* ('*St George*'),⁶ the High Court divided on the meaning of 'trading corporation'. Menzies J and Gibbs J in the majority adopted a purpose test, concluding that St George County Council was not formed for the purpose of trading and thus was not a 'trading corporation' within s 51(xx). The third majority judge, McTiernan J, took a different approach by concluding that the Council was not a corporation within the meaning of the relevant legislation. Barwick CJ and Stephens J in dissent each adopted a form of activities test. Due to this 2:2 split on the constitutional issue, *St George* is not strong support for the purpose test.⁷ However, neither Barwick CJ's nor Stephen J's judgments provide convincing justifications for adopting an activities test.

3 (2006) 229 CLR 1, 74 [55], 75 [58], 108–9 [158], 117 [185] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also Callinan J: at 373 [892].

4 See, eg, Transcript of Proceedings, *New South Wales v Commonwealth* [2006] HCATrans 215 (4 May 2006) 1359–62, 1369–90 (Hayne J).

5 See Gouliaditis, above n 2.

6 (1974) 130 CLR 533.

7 Zines, above n 2, 113; G J Lindell, 'The Corporations and Races Powers' (1984) 14 *Federal Law Review* 219, 238. See also Colin Howard, *Australian Federal Constitutional Law* (Law Book, 3rd ed, 1985) 463.

Barwick CJ formulated the activities test as follows: ‘the description “trading corporation”, in my opinion, refers not to the purpose of incorporation but to the activities of the corporation at the relevant time’.⁸ However, his Honour recognised that ‘a corporation which to any extent engages in trade’ is not necessarily a ‘trading corporation’⁹ because ‘s 51(xx) is not a power to legislate with respect to trading’.¹⁰ He therefore limited the description to those corporations ‘whose predominant and characteristic activity is trading, whether in goods or services’.¹¹ If such a level of trading activity existed, ‘the motives which prompt those activities’ and ‘the ultimate ends which those activities hope to achieve’ are not relevant.¹² Also, if it is a ‘trading corporation’ on the basis of ‘those activities, their extent and relative significance’, it is ‘nothing to the point that it is also a government or State or municipal corporation’.¹³

Barwick CJ’s adoption of the activities test appears to rest on three justifications, none of which is satisfactory in the light of subsequent developments. First, he perceived several problems with the purpose test.¹⁴ He noted that memoranda of association typically express a broad range of objects. Although he conceded that these objects could be clarified by other materials, he considered it ‘most unsatisfactory to have to follow such a course in order to identify the subject matter of constitutional power’.¹⁵ Barwick CJ also noted that ‘[i]n days of “diversification” in corporate industry’, it is possible that a company formed for a particular purpose will change course to undertake activities that were formerly only incidental to that purpose.¹⁶ This reasoning is unconvincing. The characterisation of a corporation has proven to be incredibly fact-specific; it is thoroughly typical for the courts to go to annual reports, for example, to determine the activities of the corporation in question, and such reports would equally illuminate the corporation’s actual purposes. Moreover, a majority of the Court in *Fencott v Muller* (*Fencott*)¹⁷ appeared to depart from this distrust of the company constitution by relying on it expressly to characterise corporations with no or few activities.¹⁸ In addition, Barwick CJ’s observation about diversification does not explain why a corporation’s purpose should thus become *irrelevant*, particularly given that a corporation’s activities can change just as frequently as its objects.

Secondly, Barwick CJ’s adoption of the activities test appears to have been influenced by his view of the scope of the corporations power. As Colin Howard

8 *St George* (1974) 130 CLR 533, 539.

9 *Ibid* 543.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

14 Howard, above n 7, 461.

15 *St George* (1974) 130 CLR 533, 542.

16 *Ibid*.

17 (1983) 152 CLR 570.

18 *Ibid* 602. The majority (Mason, Murphy, Brennan and Deane JJ) also said that ‘its constitution will never be completely irrelevant’: at 602. This could be reconciled with Barwick CJ’s judgment in *St George* (1974) 130 CLR 533, 542, as his Honour stated that the relevant trading activities must not be ultra vires the company constitution.

has observed, the activities test 'follows naturally'¹⁹ from Barwick CJ's view in *Strickland v Rocla Concrete Pipes Ltd* ('*Rocla*') that s 51(xx) extends (at least) to the control of the trading and financial activities of trading and financial corporations.²⁰ Indeed, in *St George*, Barwick CJ stated that '[t]he framers of the *Constitution* appear to have concluded that the power to control those activities should be included in' s 51 and '[t]hus, the question in this case should be approached bearing in mind the purpose of the grant of the power'.²¹ He later repeated:

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 constitutional description.²²

A majority of the Court in *Work Choices* adopted an interpretation of s 51(xx) that goes far beyond Barwick CJ's view of the scope of the corporations power in *Rocla* and *St George*. To the extent that this view influenced Barwick CJ's preference for the activities test, it is appropriate to question whether that test should continue to be applied.²³

Finally, Barwick CJ's third reason for adopting the activities test was that there was no 'generally accepted definition of a trading corporation' at Federation, although he recognised that 'corporations were classified for various purposes' at that time.²⁴ In his view 'no assistance in the solution of the present problem is to be derived from the undoubted statement that, as at 1900, there were trading and non-trading corporations'.²⁵ He then continued: 'It was assumed, I think, that such a corporation could be identified by its activities. If its nature was being sought, it was to be found in what it did'.²⁶ There are a number of problems with this reasoning. First, Barwick CJ's dismissal of the historical classification of corporations is contrary to the modern approach to constitutional interpretation, which does consider historical circumstances.²⁷ Secondly, Barwick CJ's observation — that in 1900 a corporation was identified by its activities — appears to be unfounded. Indeed, his Honour cited nothing in support of this proposition. By contrast, contemporary sources suggest that purpose was the touchstone for characterising corporations. For example, Harrison Moore stated that s 51(xx)

19 Howard, above n 7, 461.

20 (1971) 124 CLR 468, 490. See also Zines, above n 2, 120. Interestingly, in *Rocla* (1971) 124 CLR 468, 489, Barwick CJ also stated that laws regulating the trading activities of constitutional corporations 'dealt with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade'.

21 *St George* (1974) 130 CLR 533, 541–2.

22 *Ibid* 542–3.

23 See Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 *Melbourne University Law Review* 519, 539.

24 *St George* (1974) 130 CLR 533, 541.

25 *Ibid*.

26 *Ibid*.

27 See *Cole v Whitfield* (1988) 165 CLR 360.

applies to ‘corporations formed within Australia for the purpose of carrying on business in any part thereof or elsewhere’,²⁸ and Quick and Garran observed that a trading corporation is one ‘formed for the purpose of trading’.²⁹

Before leaving Barwick CJ’s judgment, it should be noted that he did not wholly rule out considerations other than a corporation’s activities. He ‘point[ed] out at the outset’ that his decision was directed to St George County Council and not to all councils, and that ‘considerations which, in my opinion, are definitive in this case may not be so in the case of other county councils with different powers and activities’.³⁰ Moreover, in one formulation of the test, Barwick CJ stated that ‘the identification of the corporation which falls within the statutory definition will be made *principally* upon a consideration of its current activities’,³¹ which suggests that other considerations may be relevant to the analysis.

The other judge to adopt an activities test was Stephen J. In his view, the characterisation of a corporation depended on ‘the activities which a corporation is intended to undertake or to those which it in fact does undertake’.³² Like the Chief Justice, Stephen J accepted that ‘every corporation which happens to trade is not a trading corporation’.³³ A corporation would not be a ‘trading corporation’ if it engaged in trading activities ‘ancillary to some other principal activity’.³⁴ His justification for adopting the activities test was fundamentally linguistic. He explained that ‘the use of the participle “trading” necessarily involves reference to function, either to the activities which a corporation is intended to undertake or to those which it in fact does undertake’.³⁵ This reasoning drew on the *Shorter Oxford English Dictionary* definition of ‘trading’: ‘the “carrying on of trade; buying and selling; commerce; trade, traffic”’.³⁶ That definition does refer to activities, but not necessarily to the exclusion of the purpose of the corporation’s incorporation.

Leaving aside the persuasiveness of this linguistic reasoning, Stephen J’s judgment does not provide solid support for the activities test because he appears to leave open the relevance of purpose. The authors of *Hanks’ Constitutional Law* note that Stephen J ‘gave rather less emphasis to that factor [activities] than did Barwick CJ’.³⁷ They base this view on Stephen J’s statement that a corporation will be a ‘trading corporation’ ‘when [it] is especially created to perform that

28 Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, first published 1910, 1997 ed) 471.

29 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 606.

30 *St George* (1974) 130 CLR 533, 538.

31 *Ibid* 543 (emphasis added).

32 *Ibid* 568–9.

33 *Ibid* 572.

34 *Ibid*.

35 *Ibid* 568.

36 *Ibid* 570.

37 Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 353.

[trading] function and none other',³⁸ which reveals some blurring of the activity and purpose tests. Howard similarly concludes that Stephen J 'left somewhat more open [than Barwick CJ] the relevance of the purpose for which it was created to the identification of what he preferred to call its function rather than its activities'.³⁹ Howard's point is that purpose is inherent in Stephen J's reference to the corporation's 'intended' activities. There are other passages in the judgment that leave open the relevance of other factors besides a corporation's activities. Stephen J stated that if the supply of electricity to consumers was 'undertaken as one of the many activities of an ordinary municipal council', that council will not be 'other than a municipal corporation'.⁴⁰ He also stated that where a municipal corporation is vested only with the power of 'supplying electrical energy to private consumers', without 'the regulatory governmental powers of local government', there is 'no ground for denying to that corporation the description of "trading corporation"'.⁴¹ This potential blurring of the activity test and purpose test manifests more clearly in Stephen J's dissenting judgment in *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League (Inc) ('Adamson')*,⁴² where he employs a mixed test.⁴³

B Adamson

In *Adamson*, a majority of the Court applied the activities test to find that two football leagues and a football club were trading corporations. The majority judgments do not, however, provide answers to the difficulties identified above.

Barwick CJ again adopted the activities test: a trading corporation was one that engaged in 'substantial corporate activity' of a trading nature⁴⁴ that was not 'a merely peripheral activity' of the corporation.⁴⁵ Yet again, his justification for doing so was the potentially misleading character of memoranda of association.⁴⁶ Howard has, however, noted two ways in which Barwick CJ 'refined ... somewhat' his position from *St George*.⁴⁷ The first was his 'greater stress' on investigating whether the activities were within the corporation's powers.⁴⁸ The second, and presently more significant, refinement was his statement that where there is 'substantial and not a merely peripheral' trading activity, then 'the conclusion that the corporation is a trading corporation is *open*'.⁴⁹ As Howard rightly

38 *St George* (1974) 130 CLR 533, 568.

39 Howard, above n 7, 462.

40 *St George* (1974) 130 CLR 533, 570–1.

41 *Ibid* 573.

42 (1979) 143 CLR 190.

43 See Howard, above n 7, 467.

44 *Adamson* (1979) 143 CLR 190, 208.

45 *Ibid*.

46 *Ibid*. See also Howard, above n 7, 466. Barwick CJ again repeated that terms should be interpreted broadly, but it is not clear whether this directly affected his reasoning.

47 Howard, above n 7, 466.

48 *Ibid*. See *Adamson* (1979) 143 CLR 190, 208.

49 *Adamson* (1979) 143 CLR 190, 208 (emphasis added).

observed, that this conclusion is ‘merely open may be read also as a step towards accommodation’ of the purpose test, ‘particularly as Barwick CJ proceeds immediately to the suggestion that [*St George*] should be confined to its own facts because the majority opinion was based on the local government and public service aspects of the matter’.⁵⁰ Barwick CJ referred to these points as ‘special considerations upon which the majority founded their views [in *St George*]’.⁵¹ Accordingly, Barwick CJ’s reasoning appears to have shifted to allow more explicitly for other considerations to trump the corporation’s current activities.

Mason J, with whom Jacobs J agreed, delivered the other key judgment. In Mason J’s view, a corporation will be a ‘trading corporation’ when its ‘trading activities form a sufficiently significant proportion of its overall activities’.⁵² Trading will not be sufficiently significant if it is ‘so slight and so incidental to some other principal activity’, which is ‘very much a question of fact and degree’.⁵³ Mason J did not provide much justification for adopting this test. His Honour distinguished *St George* as ‘a county council created under the *Local Government Act, 1919* (NSW), as amended, for local government purposes’.⁵⁴ He then stated that he ‘prefer[red]’ the minority view in *St George*, in particular Barwick CJ’s judgment.⁵⁵ He continued that ‘trading corporation’ is not ‘a term of art’, and he repeated Barwick CJ’s observation that at Federation there was no ‘generally accepted definition’ of the description.⁵⁶ Thus far then, Mason J adopts the same line of reasoning as Barwick CJ in *St George*. His contribution to that reasoning is to invoke the connotation/denotation distinction to justify any expansion in the class of trading corporations since Federation as a result of applying the activities test as simply a change in the denotation, and not the connotation, of the constitutional text. So much may be accepted but it is an observation that applies equally to any test for ‘trading or financial corporations’. It is a distinction that does not positively establish that the activities test should be adopted. It only explains why the activities test should not be ruled out.

The final member of the majority was Murphy J, who accepted *both* the purpose test and the activities test as sufficient to characterise a corporation as a trading or financial one.⁵⁷ In applying the activities test, he stated that ‘[a]s long as the trading is not insubstantial’, it is a trading corporation.⁵⁸ Despite accepting both tests, Murphy J would have overruled *St George* rather than merely distinguishing it.

50 Howard, above n 7, 467.

51 *Adamson* (1979) 143 CLR 190, 209.

52 *Ibid* 233.

53 *Ibid*.

54 *Ibid*

55 *Ibid*.

56 *Ibid*. As Jeremy Kirk has observed, Mason J provided little evidence for this historical claim: Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 333–4.

57 *Ibid* 239.

58 *Ibid*.

C State Superannuation Board

In *State Superannuation Board v Trade Practices Commission* ('*State Superannuation Board*'),⁵⁹ a 3:2 majority of the Court applied the activities test to determine that the Board was a 'financial corporation'. The joint judgment of Mason, Murphy and Deane JJ held that the Board had 'very substantial' financial activities, forming 'a significant part of its overall activities'.⁶⁰ Although the Board was primarily engaged in providing superannuation benefits, 'a corporation whose trading [or financial] activities take place so that it may carry on its primary or dominant undertaking ... may nevertheless be a trading [or financial] corporation'.⁶¹

The joint judgment justified adopting the activities test on two grounds: first, they held that the same approach for characterising a 'trading corporation' should also apply to characterising a 'financial corporation', because the 'two adjectives form part of the general category "and trading or financial corporations ..."'.⁶² This much may be accepted. Their second justification was that the words 'financial corporation' 'are not a term of art' and simply 'describe a corporation which engages in financial activities or perhaps is intended so to do'.⁶³ The reasoning underlying this conclusion traces back to Barwick CJ in *St George*, and it suffers from the same problems accordingly.

In terms of doctrinal development, the joint judgment made three important observations. First, they downplayed the different formulations of the activities test in *Adamson* as 'one[s] of emphasis only'.⁶⁴ Secondly, they foreshadowed that where a corporation 'has not begun, or has barely begun, to carry on business', it might be necessary to consider the purpose for incorporating.⁶⁵ Finally, they interpreted *Adamson* as rejecting the argument that purpose 'is the sole or principal criterion' for a constitutional corporation.⁶⁶ Notably, both the second and third observations leave open the possibility that purpose might be a relevant factor to characterisation.

D Fencott

Fencott involved a shelf company that had not engaged in any trading or financial activities.⁶⁷ The joint judgment of Mason, Murphy, Brennan and Deane JJ held that 'it is in a case such as the present where a corporation has not begun, or has barely begun, to carry on business that its constitution, including its objects,

59 (1982) 150 CLR 282.

60 Ibid 306.

61 Ibid 304.

62 Ibid 303.

63 Ibid 305.

64 Ibid 304.

65 Ibid.

66 Ibid.

67 (1983) 152 CLR 570.

assumes particular significance as a guide' to characterisation.⁶⁸ Indeed, their Honours observed that in this case, 'there is no better guide to its character than its constitution'.⁶⁹ The constitution 'reveal[ed] that the objects for which it was established include engaging in financial activities and carrying on a large variety of businesses' and they therefore concluded that it was a trading or financial corporation.⁷⁰

The reasoning of the joint judgment was based on a number of factors. First, in their view, the majority in *Adamson* 'did not suggest that trading activities are the sole criterion of character. Absent those activities, the character of a corporation must be found in other indicia'.⁷¹ Secondly, the company constitution 'will never be completely irrelevant' and it took on particular significance here.⁷² This case represents the high point of the Court's turn away from activities towards other factors.⁷³

E Tasmanian Dam

The majority in *Commonwealth v Tasmania* ('*Tasmanian Dam*')⁷⁴ gave little attention to the rationale for the activities test and thus did not particularly progress the jurisprudence beyond the previous case law.⁷⁵ Mason J concluded that the Commission was a trading corporation as it sold electricity 'on a very large scale'.⁷⁶ The Commission's governmental functions could not change the character of these activities.⁷⁷ His Honour stressed that *St George* 'is no longer to be regarded as correct' and that a majority in *Adamson* 'considered it to have been wrongly decided'.⁷⁸ Although Mason J cited *State Superannuation Board* in support of that proposition, it was not explicit in that case whether *St George* had been overturned. Indeed, in *Adamson* itself, only Murphy J explicitly overruled *St George*.

The other majority judgments limited themselves to applying the activities test to the Commission. Murphy J again adopted both the purpose and the activities tests as individually sufficient. His Honour found that the Commission's constitution and its activities as a 'major trader' justified its characterisation as a trading

68 Ibid 602.

69 Ibid.

70 Ibid.

71 Ibid.

72 Ibid.

73 According to Lindell, '[t]he combined effect of these decisions [up to and including *Fencott*] is that the Court has to a substantial extent adopted both the *activities* and the *purposive* tests': Lindell, above n 7, 239 (emphasis in original).

74 (1983) 158 CLR 1.

75 In Winterton's view, there was 'no change' from *State Superannuation Board* (1982) 150 CLR 282: George Winterton, 'Comment on Section 51(xx)' (1984) 14 *Federal Law Review* 256, 259.

76 *Tasmanian Dam* (1983) 158 CLR 1, 156.

77 Ibid 155–6.

78 Ibid 155.

corporation.⁷⁹ According to Brennan J, the Commission's trading activities were 'a substantial part of its overall activities, if not the predominant part'.⁸⁰ Deane J found that the Commission was a trading corporation because, 'in the context of its overall activities', it engaged in trade 'on a very large scale'.⁸¹

F Concluding Observations on the High Court Case Law

In *John v Federal Commissioner of Taxation*, Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ set out four factors to consider before departing from previous decisions:

The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration ...⁸²

Although *John v Federal Commissioner of Taxation* did not involve constitutional litigation — where different issues may arise⁸³ — the factors noted in that case provide a useful framework with which to assess the above stream of authority. Using these factors as a guide, the High Court should reconsider the 'activities test'.

First, the activities test was not 'carefully worked out' over several cases. The starting point is Barwick CJ's judgment in *St George*, which was then affirmed by three judges in *Adamson* and applied in the majority judgments in *State Superannuation Board* and *Tasmanian Dam*. As analysed above, however, Barwick CJ's reasoning is problematic. Significantly, his judgment rests on shaky historical foundations. This might be explicable in part because the case predated *Cole v Whitfield*⁸⁴ and the High Court's resulting willingness to consult the *Convention Debates* openly. But as Justice Heydon has noted extra-judicially, '*Cole v Whitfield* overruled about 140 High Court and Privy Council cases — in effect, though not by name'.⁸⁵

Secondly, there has always been a difference in the reasoning of those judges adopting the activities test. In *St George*, Barwick CJ and Stephen J adopted the activities test for very different reasons, and Stephen J was distinctly different in the room he left for purpose considerations to be taken into account. In

79 Ibid 179.

80 Ibid 240.

81 Ibid 293.

82 (1989) 166 CLR 417, 438–9, citing *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56–8 (Gibbs CJ).

83 See generally *Wurridjal v Commonwealth* (2009) 237 CLR 309, 350–3 [65]–[71] (French CJ).

84 (1988) 165 CLR 360.

85 J D Heydon, 'One Small Point about Originalism' (2009) 28 *University of Queensland Law Journal* 7, 7.

Adamson, Murphy J explicitly endorsed both the activities test and the purpose test, Barwick CJ stated that having sufficient trading activities merely left the finding of a trading corporation ‘open’, and all the majority judgments differed on the extent of trading activities needed to identify a ‘trading corporation’. The case law thus allows for other factors to be taken into account to varying degrees (culminating in *Fencott*) and requires different levels of trading activity to characterise a corporation as a ‘trading’ corporation. There have also been differences of opinion as to the status of *St George*. In *Work Choices*, for example, the joint judgment considered *St George* to have been ‘distinguished’,⁸⁶ but there are suggestions in the cases that *St George* was overruled by a majority of the Court in *Adamson*.

Thirdly, the ‘activities test’ as currently articulated has led to considerable inconvenience. It has proven difficult to apply consistently and coherently in the lower courts.⁸⁷ Indeed, rather than navigate the morass of nuanced High Court judgments establishing this ‘activities test’, it is now common for the lower courts to rely on summaries of the principles compiled by other lower courts.⁸⁸

Finally, the Commonwealth Parliament has not enacted significant legislative schemes in reliance on the ‘activities test’. Rather, the standard statutory formula is to define the scope of legislation in terms of constitutional corporations within the meaning of s 51(xx).⁸⁹

III LOWER COURT CASES APPLYING THE ACTIVITIES TEST

On many occasions lower courts have had to grapple with the question of whether a particular corporation is a ‘trading or financial corporation’. This section examines five recent cases and distils from the larger body of case law the courts’ approach to applying the activities test. Although it is difficult to generalise any one approach — as the five example cases demonstrate — this survey reveals some of the many nuances that belie the apparent simplicity of the activities test.

A Etheridge Shire Council

The issue in *Australian Workers’ Union of Employees, Queensland v Etheridge Shire Council* (‘*Etheridge Shire Council*’)⁹⁰ was whether Etheridge Shire Council was a trading corporation. Spender J accepted that he had to apply the activities

86 (2006) 229 CLR 1, 108 [158] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

87 This is considered in more detail below.

88 See especially *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 20–1; *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* (2008) 252 ALR 136 (‘*Aboriginal Legal Service*’); *Garvey v Institute of General Practice Education Incorporated* (2007) 165 IR 62, 71–3 (Wright, Walton and Boland JJ).

89 See, eg, *Competition and Consumer Act 2010* (Cth) s 152AC.

90 (2008) 171 FCR 102.

test,⁹¹ but he nonetheless drew heavily on the judgments in *St George*.⁹² Evidence established that the Council undertook a number of activities, including the operation of a visitors' information centre, the completion of road works for the Department of Works, the sale of water and the leasing of property.⁹³ Spender J concluded that these activities 'entirely lack the essential quality of trade'.⁹⁴ This was for a number of reasons. First, '[a]lmost all of them run at a loss'.⁹⁵ Secondly, '[t]hey are all directed ... to public benefit objectives'.⁹⁶ Thirdly, the State government gave the Council road works to complete on a 'sole invitee' basis 'to maintain a viable local workforce and to maintain the social infrastructure in those remote areas'.⁹⁷ Spender J also emphasised 'the legislative and executive activity of the shire council' under local government legislation.⁹⁸ In comparison to such activity, the scale of the trading activity was said to be 'so inconsequential and incidental to the primary activity and function of the council'.⁹⁹

The more controversial aspect of Spender J's decision is that he took into account notions of federal balance. He stated:

In my opinion, it is inconceivable that the framers of the *Constitution* and the parliament which enacted it intended that the Commonwealth should have [legislative power] in respect of a local government, which is a body politic of a State government, having legislative and executive functions.¹⁰⁰

He continued that the federal framework 'emphatically denies that possibility'¹⁰¹ and later repeated:

If, contrary to my view, the Etheridge Shire Council was a trading corporation, the Commonwealth government would have the powers [established in *Work Choices*]. Such powers would annihilate any concept in the *Constitution* of a federal balance, and in a very significant way, permit the Commonwealth to nullify the right of the State to govern in its local government areas.¹⁰²

Subsequent cases have endorsed Spender J's reasoning, although sometimes with caution.¹⁰³ It was also endorsed by Ryan and Marshall JJ in *Etheridge Shire*

91 Ibid 131 [155].

92 See, eg, ibid 112 [49], 131 [154].

93 Ibid 125–8.

94 Ibid 130 [151].

95 Ibid.

96 Ibid.

97 Ibid 130 [152].

98 Ibid 130 [151].

99 Ibid.

100 Ibid 108 [22].

101 Ibid 108 [23].

102 Ibid 130–1 [153].

103 *Award Modernisation* [2009] AIRCFB 865 (25 September 2009) [145]–[147], [265] (Giudice J, Watson VP, Watson, Harrison and Acton SDPP, Smith C); *Shire of Ravensthorpe v Galea* [2009] WAIRC 01149 (2 November 2009) [203] (Smith SC).

Council,¹⁰⁴ an appeal against costs orders arising from the principal judgment. On their Honours' interpretation of Spender J's judgment, the Council's legislative and executive functions far outweighed any trading functions and, moreover, the activities were not of a 'trading' nature because they were 'more properly to be seen as extensions of the governmental powers or functions of the Council'.¹⁰⁵ The difficulty with both Spender J's reasoning, and Ryan and Marshall JJ's interpretation of it, is that they appear to assume a concept of 'federal balance' without working through in detail how characterising Etheridge Shire Council as a trading corporation would affect the State in a constitutionally impermissible manner.¹⁰⁶ Such an imprecise approach is contrary to the majority judgment's criticism of 'federal balance' arguments in *Work Choices*.

B Aboriginal Legal Service

In *Aboriginal Legal Service v Lawrence [No 2]*,¹⁰⁷ a majority of the Western Australian Court of Appeal held that the Aboriginal Legal Service ('ALS') was not a trading corporation. In the leading judgment, Steytler P found that the provision of legal services to Indigenous people did not have a 'trading' character. This was for a combination of eight reasons.¹⁰⁸ First, the ALS provided 'public welfare services' and 'exist[ed] for no other purpose'. This was not, however, determinative. Secondly, it did not engage in any other activity of any significance. Thirdly, all of its income and property had to be used to promote its objects and could not be distributed to its members. Fourthly, it did not earn or intend to earn profits. Fifthly, it was a public benevolent institution. Sixthly, it did not compete for clients. Seventhly, looking at its funding arrangements, it had successfully tendered for the funding contract with the government, but the tender was not based on price. Eighthly, its services were largely rendered gratuitously to clients. Accordingly, although '[o]rdinarily, the provision of large scale legal and allied services, for reward' would have a trading character, it was not so here. It lacked a 'commercial aspect'.¹⁰⁹ His Honour concluded that if, contrary to his primary conclusion, the services did have a 'trading' nature, they were clearly substantial because they were all that the ALS did. Pullin J agreed generally with Steytler P, but he expanded on the proper approach to the interpretation of the term 'trading corporation'. In his view, it is 'a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the

104 (2009) 178 FCR 252.

105 Ibid 255 [7].

106 As explained below, a judge adopting this line of reasoning should explain how characterising a corporation as a trading corporation impairs the constitutional integrity of the states in the manner discussed in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*') and *Austin v Commonwealth* (2003) 215 CLR 185.

107 (2008) 252 ALR 136.

108 See *ibid* 337–8 [70]–[72].

109 *Ibid* 338 [74].

conclusion that the particular corporation is a trading corporation'.¹¹⁰ A relevant factor will be whether it 'produce[s] a profit or [is] intended to produce a profit'.¹¹¹

Le Miere J dissented. In his view, the provision of legal services is a trading activity and the ALS was paid for its services by the Commonwealth under contract.¹¹² The fact that the ALS was not-for-profit does not alter its trading nature.¹¹³ This reasoning is persuasive. It is not uncommon for A to pay B to provide benefits to C. Such an arrangement does not mean that B's activity is not 'trading' in nature. It is counterintuitive to conclude, as the majority did, that the provision of legal services by the ALS was not a *trading* activity when it was paid by the Commonwealth for those services. Conceptually, it would be more persuasive to say that the ALS was engaged in trading when it provided those services, but that for some other reason the ALS was not a *trading corporation*.

C Shire of Ravensthorpe

Although *Shire of Ravensthorpe v Galea*¹¹⁴ was only a decision of the Western Australian Industrial Relations Commission, the judgments contain extensive consideration of the activities test and thus merit attention. The majority held that the Shire of Ravensthorpe was not a trading corporation. Ritter AP emphasised 'the status and role of the Shire as a local government body'.¹¹⁵ Provisions of local government legislation and the *Constitution of Western Australia* demonstrated that 'the Shire, as a local government, is no ordinary corporation. ... [It] is part of an arm of government which must act for the benefit of its community'.¹¹⁶ Rather than 'apply the activities test more stringently', as suggested by Gouliaditis,¹¹⁷ Ritter AP thought that the proper approach was to take into account all of the corporation's activities to come to a 'qualitative assessment': '[f]or a local government, a consideration of its activities must have full regard to its statutory function'.¹¹⁸ He concluded that any trading activities undertaken by the Shire were 'generally incidental to the activities of the Shire as a whole — functioning as a local government body for the "good government of persons in its district"'.¹¹⁹ In reaching this conclusion in the context of the 'substantiality' enquiry, he placed great emphasis on the notion of 'functions': '[t]he function of the Shire, what it does, is set out in [local government legislation] and other legislation ... Its function is to govern a local district. This, in my opinion, stamps the character of the Shire'.¹²⁰ He argued that 'the analysis which I have undertaken about the

110 Ibid 339 [82].

111 Ibid.

112 Ibid 348 [136].

113 Ibid 346–7 [125].

114 [2009] WAIRC 01149 (2 November 2009) ('*Shire of Ravensthorpe*').

115 Ibid [35].

116 Ibid [68].

117 Gouliaditis, above n 2, 126.

118 *Shire of Ravensthorpe* [2009] WAIRC 01149 (2 November 2009) [98].

119 Ibid [149].

120 Ibid [151].

Shire does not resort to the “purpose” test; rather, “[t]he focus has been upon function and not purpose”.¹²¹ In his view, a function ‘is the kind of action or activity which is proper to a person, body, or institution’ whereas a purpose ‘is the object for which something is done’.¹²² This ‘function’ terminology unnecessarily complicates matters as it is not clear exactly what the ‘function’ concept adds to the concept of ‘activities’. In *St George*, both Stephen J and Gibbs J used the term ‘functions’ to mean ‘activities’.¹²³

Beech CC delivered the other majority judgment. In his view, characterisation of the Shire ‘require[d] a consideration of all of the circumstances of the Shire of Ravensthorpe’, including ‘its structure and purpose’ under legislation, ‘its activities and where relevant, its funding arrangements’.¹²⁴ He stated that activities conducted in the public interest are not ‘necessarily’ non-trading in nature, although they could be in the specific circumstances of a case.¹²⁵ He found that such circumstances existed here; specifically, the Shire was ‘carrying out a function of government in the interests of the community’.¹²⁶

Smith SC took a different approach. He adopted the three stage test suggested in *Hughes v Western Australian Cricket Association (Inc)*.¹²⁷ The first step is to identify all of the corporation’s activities. The second step is to determine which of those activities has a trading character. According to Smith SC, ‘[l]egislative and executive functions of government which are purely governmental and are not activities that any private citizen or trader might do’ are not trading activities; similarly, the ‘provision of services where the right to be paid a fee for carrying out the service is created by legislation’ is not a trading activity.¹²⁸ The third step is to determine the substantiality of the trading activities. According to Smith SC, this involves considering the ‘monetary value of trading activities as one factor’.¹²⁹ However, ‘it is necessary to look at other factors’ to make ‘a qualitative or relative assessment’.¹³⁰ Other factors include: the ‘number of persons employed’ by the corporation ‘and the nature of work and their activities’, the activities of the corporation, the ‘number of persons whose work requires them to be engaged in work on trading activities and the extent of the work on or in relation to trading activities in proportion to their work on non-trading activities’, whether ‘income is generated from work of persons or bodies contracted to work’ for the corporation, whether the work is ‘supervised or controlled to any degree by the’ corporation, and the ‘frequency and regularity of each category of trading and non-trading

121 Ibid.

122 Ibid.

123 Howard, above n 7, 462–3.

124 *Shire of Ravensthorpe* [2009] WAIRC 01149 (2 November 2009) [167].

125 Ibid [183]–[184] (emphasis in original).

126 Ibid [184], quoting *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579, 584 (Davies J).

127 (1986) 19 FCR 10, 22–3.

128 *Shire of Ravensthorpe* [2009] WAIRC 01149 (2 November 2009) [227].

129 Ibid [229].

130 Ibid.

activity'.¹³¹ Smith SC ultimately held that he had insufficient information about the Shire to reach a final conclusion.¹³²

D Bankstown

In *Bankstown Handicapped Children's Centre Association Inc v Hillman* (*Bankstown*),¹³³ the Full Court of the Federal Court had to determine whether the Bankstown Handicapped Children's Centre Association ('Association') was a 'trading corporation'. The Association provided 'welfare and support services for people with disabilities, children and young people' and provided 'support for their families and carers'.¹³⁴ In particular, it provided accommodation, support services and a preschool.¹³⁵ The Association received funds from the New South Wales Department of Ageing, Disability and Home Care, from the Department of Community Services ('DOCS'), and from fees paid by parents.¹³⁶ The Association provided services to the government Departments on a fee-for-service basis, and those fees generated over \$3.3 million, or 35 per cent, of the Association's revenue in the relevant financial year.

The Court unanimously held that the Association was a 'trading corporation'. According to their Honours, there was 'little doubt' that the provision of those services was a 'trading' activity, and that those activities were a 'substantial part of its activities'.¹³⁷ The Court noted that the activities involved 'the provision of public welfare services',¹³⁸ and that the fees were levied on a cost recovery basis.¹³⁹ However, this did not 'detract from the essentially commercial nature' of the activities.¹⁴⁰ A number of factors were said to establish the commerciality of the activities undertaken: the Association provided DOCS with services and received remuneration for doing so;¹⁴¹ the contract with DOCS was negotiated between the parties 'having regard to the price at which others provide similar services';¹⁴² the Association 'employed personnel and acquired rental property' in order to provide the services;¹⁴³ and 'its continued existence depended on its success in placing itself in a position in which it would continue to be remunerated by continuing to provide those services'.¹⁴⁴

131 Ibid [230].

132 Ibid [245].

133 (2010) 182 FCR 483.

134 Ibid 485 [3].

135 Ibid 486 [3].

136 Ibid 486 [5]–[7].

137 Ibid 511 [51], [53].

138 Ibid 512 [55].

139 Ibid 511 [51].

140 Ibid 512 [55].

141 Ibid 511 [54].

142 Ibid.

143 Ibid 512 [54].

144 Ibid.

The Court in this case applied the ‘activities test’ in a strict manner. It gave little attention to notions of the public interest; indeed the Court stated that it was ‘distracting’ to note that the Association operated in the ‘welfare sector’.¹⁴⁵ By contrast, in very similar circumstances, the Australian Industrial Relations Commission has held that the Autism Association of WA Inc is not a trading corporation by virtue of its charitable nature and purpose.¹⁴⁶ The Full Court’s judgment in *Bankstown* illustrates the arid nature of a strict application of the ‘activities test’. Reduced to its essentials, the Court’s reasoning proceeded in two steps. First, the provision of accommodation and like services for remuneration is a trading activity, even if profit is not made and the services are provided for a public welfare purpose; and second, those services were substantial in pure number terms. Such an approach is relatively straightforward to apply, but it gives little consideration to the totality of factors in play.

E Auswest

In *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability and Environment* (*Auswest*),¹⁴⁷ Croft J had to determine whether the Victorian State Department of Sustainability and Environment (‘Department’) was a ‘trading corporation’. The Department was responsible for the licensing of the timber industry and the administration of a number of statutes. The Department had \$227 million of operating revenue from user charges and fees and other revenue, a net cash flow from investments of \$23 million, and assets worth approximately \$652 million.

Croft J concluded that the Department was ‘primarily a governmental and regulatory agency’ and not a trading corporation.¹⁴⁸ He considered that the Commercial Forestry Branch’s licensing activities had to be assessed in the ‘broader context’ of the Department’s ‘regulatory and policy-making activities’ in administering a number of state statutes.¹⁴⁹ Looking at the activities as a whole he stated:

any ‘trading’ activities do not ‘form a sufficiently significant proportion of its overall activities to merit its description as a trading corporation’. Alternatively, an evaluation of the extent of any ‘trading activities’ against the totality of the [Department’s] activities demonstrates that the former are not so significant to give the [Department] ‘the character of a trading corporation’.¹⁵⁰

145 Ibid 512 [55].

146 See *Langoulant v Autism Association of WA Inc* [2009] AIRC 900 (22 October 2009) [22] (McCarthy DP).

147 (2010) 241 FLR 360.

148 Ibid 436 [161].

149 Ibid 441 [167].

150 Ibid 443 [171].

In support of this conclusion, Croft J noted that an activity does not obtain a 'trading' nature simply because it is conducted in a 'businesslike' manner.¹⁵¹ Croft J endorsed Buddin J's comments in *Knevitt v Commonwealth* that '[i]n today's world it would not be acceptable for any public instrumentality to conduct its activities in a fashion that was other than "business-like"'.¹⁵² As for the Department's substantial revenue from licensing, Croft J downplayed this evidence by referring to provisions of the *Forests Act 1958* (Vic) that empowered the Department to grant licences at a charge.

The reasoning employed by Croft J is very problematic. First, his Honour quoted *Quickenden v O'Connor* where Black CJ and French J stated '[i]t is doubtful, however, that [trading] extends to the provision of services [there, educational services] under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory'.¹⁵³ Unlike the *Higher Education Funding Act 1988* (Cth) considered in *Quickenden v O'Connor*, however, the *Forests Act 1958* (Vic) does not compel licences to be granted or fees charged; it only confers on the Department the power to grant licences and charge fees. Secondly, Croft J appears to assume that all governmental activity cannot be trading in nature; hence he observed that a 'businesslike' activity is not necessarily a 'trading' activity otherwise all governmental activity would be 'trading' in nature. The assumption must be correct, but the reasoning should be more explicit as to why that is so. Finally, it is difficult to reconcile *Auswest* with other cases. Looking purely at the numbers, the Department's revenue was clearly substantial, and other bodies have been held to be trading corporations where they have had similar regulatory responsibilities.

F Summary of Lower Court Application of the Activities Test

Although the case law is unsettled and at times inconsistent, it appears that the application of the 'activities test' can be broken down into the three steps applied by Smith SC in *Shire of Ravensthorpe*. The first step is to identify all of the activities of the corporation. The second step is to determine whether the activities have a 'trading' nature. The third step is to assess the substantiality of the trading activity. At both the second and the third steps, the courts have taken into account more than just the mere 'activities' of the corporation. At the second step, it is possible to take into account several factors. In *Shire of Ravensthorpe*, Ritter AP focused on the notion of commerciality, amongst other considerations. In *Etheridge Shire Council*, Spender J took into account the governmental nature of the activities. In *Carter v Carenne Support Ltd*, one consideration was the

151 Ibid 436–7 [161], 441–2 [168].

152 Ibid 442 [168], quoting *Knevitt v Commonwealth* [2009] NSWSC 1341 (4 December 2009) [56] (Buddin J).

153 *Auswest* (2010) 241 FLR 360, 442 [169], quoting *Quickenden v O'Connor* (2001) 109 FCR 243, 261 [51] (Black CJ and French J).

fact that Carenne did not compete with any other transport providers.¹⁵⁴ Other factors appear to include whether or not the activity is conducted in a businesslike fashion, whether the activity was intended to and/or does result in profit, and the inherent nature of the activity itself. At the third step, whether trading activities are ‘substantial’ has been weighed against non-commercial activities in the light of the overall purposes of the corporation and its general functions.

In one sense, then, it is correct to say that the lower courts have applied the ‘activities test’. The courts do look to the corporation’s activities. However, the activities test has proven to have a myriad of nuances. Whether such flexibility is entirely consistent with what the High Court envisaged in the original stream of authority is contestable and depends on how strictly limited to activities the ‘activities test’ was ever intended to be. Yet it is unsurprising that the courts have looked at much more than simply the corporation’s activities. It is not clear how it is possible to determine whether trading activities are ‘significant’, ‘substantial’ or ‘predominant’, for example, without consideration of the overall context of the corporation.

IV A MULTIFACTORIAL APPROACH

The time has come to reconsider the approach to identifying ‘trading or financial corporations’ within the meaning of s 51(xx) of the *Constitution*. If the activities test means that only the corporation’s activities are taken into account, that is too narrow an approach and should not be accepted. A determination of substantiality based simply on numerical values is arbitrary, and leads to unhelpful questions of whether, for example, 20 per cent as opposed to 25 per cent trading revenue is sufficiently significant to warrant characterising a corporation as a ‘trading corporation’. Moreover, an approach centred solely on activities rests on unsound foundations, as explained above in Part II. If the ‘activities test’ does not mean that only the activities are taken into account — and this seems to be the case, both in the High Court case law and especially in the lower courts — then the label is misleading and should be abandoned. Language that is more informative of what judges actually look for in cases would be easier to understand and avoid circuitous reasoning. Any new approach must be grounded in sound principles of constitutional interpretation.¹⁵⁵ The constitutional text and structure must be central, although their meaning must be informed by their historical context (as regulated by the principles in *Cole v Whitfield*)¹⁵⁶ and subsequent case law.

154 [2009] NSWIRComm 173 (20 October 2009) [62] (Haylen J). See also *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 191, 218 [160] (Weinberg J).

155 Whether a corporation is a ‘trading or financial corporation’ will of course depend on constitutional facts, but it is necessary first to identify the meaning of ‘trading or financial corporation’, which is a question of interpretation.

156 (1988) 165 CLR 360.

A Relevant Factors

Turning first to the constitutional text, s 51(xx) is limited to 'trading' or 'financial' corporations. *The Macquarie Dictionary* defines 'trade' as the 'buying and selling, or exchanging, of commodities' or 'a purchase, sale, or exchange'.¹⁵⁷ 'Financial' is defined as 'of or relating to monetary receipts and expenditures; having to do with money matters'.¹⁵⁸ These definitions are directed towards concrete acts, and so the ordinary meaning of the constitutional text suggests that a corporation's activities are relevant to whether it is a trading or financial corporation. However, not every corporation that engages in a trading or financial activity is thus a constitutional corporation because the text would otherwise simply refer to 'trading' or 'finance'. Something more is needed. The ordinary meaning of the constitutional text provides no further guidance on this matter.

The main structural consideration is that the *Constitution* contemplates the continued existence of the states. The consequence of concluding that a corporation is a trading or financial corporation is that Commonwealth legislation under s 51(xx) can apply to it. This concern has influenced a number of lower court decisions.¹⁵⁹ The current starting point for using federalism to guide constitutional interpretation is the comments of the majority in *Work Choices*. Their Honours stated that arguments about 'federal balance' must give that term 'content'.¹⁶⁰ The only currently accepted doctrine in Australian constitutional law that could give this term content is the *Melbourne Corporation* principle¹⁶¹ — a Commonwealth law cannot 'destroy or curtail the continued existence of the States or their capacity to function as governments'.¹⁶² It might be possible, as Spender J did in *Etheridge Shire Council*, to reason that characterising an entity as a trading or financial corporation impairs the capacity of a particular state to function, and thus to conclude that the corporation should not be so characterised. However, this would be a peculiar use of the *Melbourne Corporation* principle. That principle has been applied to invalidate a law otherwise within power under s 51, rather than affecting the interpretation of a legislative head of power itself.¹⁶³ Such a use of the principle would instead resemble the reserved powers doctrine discarded in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.¹⁶⁴ Moreover, it is not unusual for an entity to have to comply with interlocking Commonwealth and state legislation and to keep itself up to date as to what legislation applies to it. Therefore, the *Melbourne Corporation* principle should not ordinarily affect the characterisation of a corporation. The proper use of that principle is after a

157 Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 1339.

158 *Ibid* 457.

159 See, eg, *Etheridge Shire Council* (2008) 171 FCR 102.

160 *Work Choices* (2006) 229 CLR 1, 120–1 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

161 See *Melbourne Corporation* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185.

162 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J).

163 By analogy, it would be absurd to find that the *Melbourne Corporation* principle could operate to conclude that a particular building was not a 'lighthouse' under s 51(vii) to avoid the application of Commonwealth laws to that building.

164 (1920) 28 CLR 129.

corporation is found to be a constitutional corporation, to determine whether Commonwealth legislation in its application to that corporation is valid. One would suppose that it is the application of a statute to a corporation that will affect a state's autonomy and not a corporation's mere status as a trading or financial corporation alone.¹⁶⁵ Federalism considerations should only influence the characterisation of corporations to the extent that such considerations influenced the framers of the *Constitution*, a general factor considered next.

In *Cole v Whitfield*, the Court sanctioned reference to the Convention Debates 'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation'.¹⁶⁶ Accepting the relevance of historical context to constitutional interpretation, at a minimum, the historical sources noted above (the writings of Harrison Moore and Quick and Garran)¹⁶⁷ suggest that a corporation's purpose is relevant to its characterisation as a trading or financial corporation. Purpose should be identified from legislation (for statutory corporations) and from the corporation's constitution,¹⁶⁸ annual reports and other objective evidence. Whether more can be derived from historical sources requires further investigation.

Section 51(xx) was not discussed in great detail during the Convention Debates. Delegates turned their attention to what kinds of corporation should fall within s 51(xx), primarily on 17 April 1897. Josiah Symon asked why 'trading' corporations were referred to rather than just 'corporations' as in the original draft.¹⁶⁹ Sir Edmund Barton explained that the word 'corporations' would include municipal corporations, the implication being that municipal corporations should not be within the head of power.¹⁷⁰ Sir Joseph Abbott then shortly afterwards proposed an amendment to insert the word 'financial' to include financial institutions that are not banks or trading corporations, which was accepted 'with next to no debate'.¹⁷¹ Overall, the Convention Debates are not very informative, but they do make clear that the words 'trading or financial' were intended to *include*

165 Situations might exist where such a characterisation, even without actual Commonwealth regulation, would impermissibly impair a state's capacity to function. The Crown is a corporation sole. Accordingly, it might be argued that an *unincorporated* state department is a 'trading or financial corporation': see *Workcover Authority of New South Wales (Inspector Keelty) v Crown in Right of the State of New South Wales (Police Service of New South Wales)* (2000) 50 NSWLR 333; *M v Home Office* [1994] 1 AC 377; *Town Investments Ltd v Department of the Environment* [1978] AC 359. But see *Stephen David Mann v Government Employees Superannuation Board* [2008] AIRC 893 (18 November 2008). Commissioner Williams held, without citing authority, that 'the respondent is a Crown agency and so is not a constitutional corporation': at [88]. Although the result is probably correct, the analysis to reach that conclusion needs to be made explicit. Possibly, the underlying reasoning is that *Melbourne Corporation* prevents such a characterisation of an unincorporated emanation of the Crown.

166 (1988) 165 CLR 360, 385.

167 Moore, above n 28, 471; Quick and Garran, above n 29, 606.

168 The corporate constitution should always be considered, but it may be of less help today than in the past due to changes in corporations law: see especially *Corporations Act 2001* (Cth) ss 124–5.

169 *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 793 (Josiah Symon).

170 *Ibid* 793–4 (Sir Edmund Barton).

171 *Work Choices* (2006) 229 CLR 1, 96 [116] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 793–4.

certain corporations and to *exclude* others.¹⁷² It is well-known that labelling both includes and excludes, but this insight has not been given full force in this area of the law. The Convention Debates¹⁷³ and leading contemporaneous textbooks indicate that the meaning and subject matter of the words 'trading or financial' exclude municipal and charitable corporations, amongst others, because those were not classified as trading corporations at the time.¹⁷⁴ Of course, the definition of 'trading or financial corporations' was not settled at Federation, and the framers' intentions do not strictly bind the Court today. However, this historical context can contribute to determining the extent of any expansion or contraction in the denotation of the constitutional text. As Barwick CJ noted in *Adamson*, '[t]he full connotation of the description "trading corporation" cannot be displaced by the denotation it may have had at any past time',¹⁷⁵ and, equally, any present time. It is not necessary to use these indications of past intentions to establish a strict 'carve-out'¹⁷⁶ of certain types of corporations, as Isaacs J seemed to suggest in *Huddart, Parker & Co Pty Ltd v Moorehead* ('*Huddart Parker*') when he excluded 'all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes'.¹⁷⁷ A more nuanced approach would see these original intentions used as just one factor to be taken into account.

Finally, subsequent case law indicates other useful factors to take into account. For example, it has been common for courts to consider the corporation's funding arrangements — is it government funded or does the corporation charge fees for services? The case law indicates that government funded activities do not contribute to the characterisation of a corporation as a 'trading or financial corporation'.¹⁷⁸ If fees are charged, even if it is the government paying, then this tends to indicate that it is a trading corporation,¹⁷⁹ unless there is a statutory obligation to levy that fee.¹⁸⁰ Courts have also frequently turned their attention to

172 See *New South Wales v Commonwealth* [2006] HCATrans 215 (4 May 2006) (Gummow J).

173 See *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 686 (Sir Samuel Griffith); *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 793–4 (Sir Edmund Barton).

174 See, eg, Seward Brice, *A Treatise on the Doctrine of Ultra Vires: Being an Investigation of the Principles Which Limit the Capabilities, Powers, and Liabilities of Corporations and More Especially of Joint Stock Companies* (Stevens and Haynes, 1874) 14–16; James Grant, *A Practical Treatise on the Law of Corporations in General, as well Aggregate as Sole* (Butterworths, 1850). See also *New South Wales v Commonwealth* (1990) 169 CLR 482, 511–12 (Deane J), discussing Sir Nathaniel Lindley, *A Treatise on the Law of Companies: Considered as a Branch of the Law of Partnership* (Sweet and Maxwell, 5th ed, 1889) 10.

175 *Adamson* (1979) 143 CLR 190, 208.

176 See Gouliaditis, above n 2, 128–9.

177 (1909) 8 CLR 330, 393.

178 See, eg, *E v Australian Red Cross Society* (1991) 27 FCR 310, 343 (Wilcox J). See also Gouliaditis, above n 2, 127.

179 See, eg, *Bankstown* (2010) 182 FCR 483; *Hughes v Al-Hidayah Islamic Education Administration Incorporated* [2009] WAIRC 967 (6 October 2009) [14] (Commissioner S Wood). See also *Queensland Independent Education Union of Employees (for Warren Butler) and the Presbyterian and Methodist Schools Association* (Unreported, Queensland Industrial Relations Commission, Commissioner Asbury, 24 December 2007).

180 *Quickenden v O'Connor* (2001) 109 FCR 243, 261 [51] (Black CJ and French J).

the internal structure of the corporation — is it registered as a public benevolent institution; how many employees does it have; and what type of corporation is it (for example, is it a company limited by guarantee)?¹⁸¹

How the different factors should be weighed against each other is ultimately a question of judgment, but such ‘judgmental evaluation’ is not antithetical to notions of judicial power.¹⁸² Unsatisfactory though this conclusion might be, the weight to be accorded to each factor depends on the circumstances of the case. The cogency of the available evidence about the framers’ intentions regarding the relevant class of corporation, the specificity of the particular corporation’s objects and the extent of its activities will be important considerations.

Summarising the above, the preferable approach to s 51(xx) is to adopt a multifactorial approach. The courts should take into account every relevant factor in a holistic and transparent assessment of whether or not the corporation is properly characterised as a ‘trading or financial corporation’. Adoption of such an approach has a number of advantages. First, it is more consistent with how the courts approach other cases. Decision-making typically involves taking into account all relevant factors and then weighing them up. Secondly, a multifactorial approach has already been implicitly adopted by the courts under the rubric of the ‘activities test’ and should be openly acknowledged. Doing so will expose the quest for an all-embracing ‘test’ as unhelpful and ensure that no relevant consideration is a priori excluded. Thirdly, as a matter of transparency, a multifactorial assessment is more revealing of the actual process of decision-making than the inapt label ‘activities test’.¹⁸³

At least two criticisms can be made of this multifactorial assessment. First, the multifactorial approach borders on trite because it essentially means that the courts should consider everything. But that is the way it should be. If the activities test really does operate to exclude all considerations except for the corporation’s activities, then it should be rejected. If it does not operate in that fashion, then the test should be recast so as not to mislead. Secondly, and more tellingly, a multifactorial approach provides little certainty for corporations, some of which will only discover whether they are covered by Commonwealth legislation when the court’s decision is handed down. This is particularly troubling given the Commonwealth’s far-reaching capacity to legislate with respect to corporations following *Work Choices*. It must be conceded that a multifactorial approach provides little in the way of certainty, at least until further guidelines are developed incrementally as cases arise and are determined. Yet it should not be assumed that the activities test, which is ‘very much a question of fact and degree’,¹⁸⁴ provides

181 See, eg, *Carter v Carenne Support Ltd* [2009] NSWIRComm 173 (20 October 2009) [64]–[65] (Haylen J).

182 *Thomas v Mowbray* (2007) 233 CLR 307, 331 [20] (Gleeson CJ).

183 Thus, an explicit multifactorial approach, explaining the different factors that are being considered and the reasons for doing so, is to be preferred to the terminology of a ‘mixed’ or ‘true character’ test. Such terminology runs the risk of disguising rather than exposing the reasoning that takes place to reach a conclusion. However, a multifactorial approach does, in substance, have much in common with such tests.

184 *Adamson* (1979) 143 CLR 190, 234 (Mason J).

corporations with much more certainty. A focus on activities does not always lead to stable results. As noted by Connor C, 'as community based organisations temporarily acquire or lose trading or financial activities from time to time, they move in and out of Work Choices; not a particularly manageable situation I would think'.¹⁸⁵ The nub of the point is that a multifactorial approach provides as much or as little certainty as the activities test in terms of predicting results, but it promotes greater clarity of reasoning in explaining results.

B Example Applications

This section will briefly illustrate how a multifactorial approach can be applied to certain classes of corporations. The analysis is necessarily general, given the intensely fact-specific nature of the suggested approach.

1 Local Governments and Incorporated State Departments

Whether municipal corporations like Etheridge Shire Council fall within s 51(xx) has proven to be controversial. A multifactorial approach would probably confirm that in many cases, these municipal corporations are not trading or financial corporations. On the one hand, local governments engage in a wide variety of activities, some of which will bear a trading character. This therefore suggests characterisation as a 'trading corporation'. On the other hand, they are usually established for a public rather than for a profit-making purpose. Moreover, there is evidence that at Federation municipal corporations were intended to be excluded from the scope of s 51(xx). Barton made an explicit statement to this effect during the Convention Debates,¹⁸⁶ and contemporary text writers treated municipal corporations separately from trading corporations.¹⁸⁷ *St George* can also be interpreted as confined to its facts, specifically, that it involved a municipal corporation.¹⁸⁸ Another factor is that municipal corporations are probably organised in a business-like fashion, consistently with modern notions of proper administration. This consideration pulls in both directions because business-like organisation is indicative of a 'trading corporation', but there exists a 'public' (the requirements of good public administration) and not a commercial rationale for it in this instance. Another ambivalent factor is the fact that municipal corporations have a role in state government, except to the extent that this observation informs the argument that municipal corporations were intended by the framers to be excluded from s 51(xx). It is not clear that merely characterising a municipal corporation as a trading or financial corporation will thereby prevent the states

185 *Harmer v Shoalhaven Community Housing Scheme Ltd* [2006] NSWIRComm 1165 (14 November 2006) [12] (Connor C).

186 *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 793–4 (Sir Edmund Barton).

187 See, eg, Grant, above n 174, 341–514; Brice, above n 174, 15; C T Carr, *The General Principles of the Law of Corporations: Being the Yorke Prize Essay for the Year 1902* (Cambridge University Press, 1905) 45–6.

188 See also *Huddart Parker* (1909) 8 CLR 330, 393 (Isaacs J).

from functioning in the *Melbourne Corporation* sense, and so federalism has no direct role in the analysis.

This cursory analysis suggests that the ultimate conclusions in *St George*, *Etheridge Shire Council* and *Shire of Ravensthorpe* are correct. The advantage of adopting an openly multifactorial approach is that it takes into account everything that is relevant without relying on vague notions of ‘federal balance’ or fine distinctions between ‘activities’ and ‘functions’.

2 Non-Profit Organisations

In *Aboriginal Legal Service*, the majority of the Western Australian Court of Appeal held, applying the activities test, that the ALS was not a trading corporation. It is convenient to use the facts of that case to illustrate the multifactorial approach in action. On the one hand, the ALS engaged in the provision of legal services that were paid for through government funding arrangements. This is a trading activity notwithstanding that the recipients of the legal advice did not necessarily pay for the service. On the other hand, the ALS existed for the purpose of providing public welfare services and not to make a profit. Additionally, particular features of its internal administration suggest that it was not a trading corporation. For example, it could not distribute any income to its members and it was a public benevolent institution. The historical background to s 51(xx) is unhelpful. Although 19th century text writers generally dealt with charitable corporations separately from trading corporations,¹⁸⁹ there was no specific treatment of a corporation in the position of the ALS. Federalism issues are also not relevant, because the ALS is not so significant to the operation of the states that the *Melbourne Corporation* principle could be engaged. The arguments are finely balanced; unlike municipal corporations, characterisation of the ALS depends primarily on its activities, purposes and structure without any guidance from history. The conclusion seems open that the ALS is a trading corporation.

The above analysis illustrates an important advantage of adopting an explicitly multifactorial approach. In *Aboriginal Legal Service*, the majority considered most of the above factors, but they did so to determine whether the provision of legal services had a ‘trading’ nature. The judgment therefore gave the term ‘trading’ too much work to do. A multifactorial approach allows courts to avoid overloading that term by adopting a simple definition of trading (namely, the exchange of goods or services for reward) and by redirecting other factors to the subsequent question of whether the corporation is a ‘trading or financial corporation’.

189 See, eg, Brice, above n 174, 14, 48; *Halsbury's Laws of England* (Butterworths, 1909) vol 8, [688].

3 Universities

Most Australian universities are statutory corporations.¹⁹⁰ Whether they are 'trading or financial' corporations, and thus, for example, subject to scrutiny by the Commonwealth Tertiary Education Quality and Standards Agency, is a matter of controversy.¹⁹¹ In *Quickenden v O'Connor*, the Full Court of the Federal Court held, applying the activities test, that the University of Western Australia is a constitutional corporation.¹⁹² It had trading activities that generated \$54.2 million in revenue (18 per cent of its total annual operating revenue) and financial activities that generated \$38 million (approximately 5 per cent of its total assets). Applying a multifactorial approach, activities of these kinds and magnitude would suggest that a university is a trading or financial corporation, but they would not be determinative of the matter. Other factors would need to be taken into account. First, a university also engages in educational and non-trading activities. Secondly, a university is a 'public institution, [incorporated] to promote the public purpose of higher education'.¹⁹³ As the Full Federal Court has noted in a different context:

there is nothing in the evidence to suggest that those commercial activities have displaced, either totally or if in part to what extent, [the University of Western Australia's] traditional public function as an institution of higher education in favour of the pursuit of commercial purposes ...¹⁹⁴

Thirdly, leading texts around the time of Federation distinguished universities from trading or financial corporations,¹⁹⁵ as do some High Court obiter dicta.¹⁹⁶ Fourthly, there are no structural considerations to weigh into the mix. Although education is typically perceived to be a policy area for the states,¹⁹⁷ characterising a university as a trading or financial corporation does not impermissibly infringe on the states' capacity to function. Finally, any particular features of the internal management and structure of the university must also be considered; for example, the fact that it receives funding from both government and also private sources.

190 *University of Western Australia v Gray* (2009) 179 FCR 346, 365 [96] (Lindgren, Finn and Bennett JJ).

191 See Bernard Lane, 'TEQSA Statute Vulnerable to High Court Challenge', *The Australian* (online), 13 April 2011 <<http://www.theaustralian.com.au/higher-education/teqsa-statute-vulnerable-to-high-court-challenge/story-e6frgcyj-1226038125780>>.

192 (2001) 109 FCR 243.

193 *Harding v UNSW* [2002] NSWSC 113 (1 March 2002) [16] (Wood CJ at CL). See also *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, 134–5; *University of Western Australia Act 1911* (WA) preamble.

194 *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [184] (Lindgren, Finn and Bennett JJ).

195 See Grant, above n 174, 515–28; Herbert M Adler, *A Summary of the Law Relating to Corporations: Being an Analysis of the Powers and Limitations of All Corporate Bodies, Commercial, Municipal and Otherwise* (William Clowes and Sons Ltd, 1903) 21, 23–4, 26; Brice, above n 174, 14–16; Carr, above n 187, 45–6; Lindley, above n 174, 10. See also Satis Chandra Bagchi, *Principles of the Law of Corporations with Special Reference to British India* (Cambay & Co, 1928) 534–69; Paul L Davies, *Gower's Principles of Modern Company Law* (Sweet and Maxwell, 6th ed, 1997) 6–7.

196 See *Huddart Parker* (1909) 8 CLR 330, 393 (Isaacs J); *St George* (1974) 130 CLR 533, 553 (Menzies J), 562 (Gibbs J); *Adamson* (1979) 143 CLR 190, 234 (Mason J).

197 See *R v Barger & McKay* (1908) 6 CLR 41, 115, 123 (Higgins J); *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182, 195 (Griffith CJ).

A multifactorial approach brings the analysis this far. Whether the trading activities outweigh the non-trading purpose of the university and whether the indications about framers' intentions is strong enough to conclude that part of the essential meaning of 'trading or financial corporation' is 'not university' is a matter of judgment upon which there can be reasonable disagreement. The historical record is not quite as suggestive as it is for municipal corporations, which were specifically mentioned during the Convention Debates. The benefit of the multifactorial approach is that it exposes to scrutiny and promotes clarity in the reasons for reaching a decision, even if the final decision involves a level of judgment between reasonable alternatives.

V CONCLUSION

This article has called for a reconsideration and clarification of the approach to the identification of 'trading or financial corporation' within the meaning of s 51(xx) of the *Constitution*. A multifactorial assessment should be adopted and the quest for all-embracing tests abandoned. Such a multifactorial approach resonates with other areas of the High Court's recent jurisprudence. In *Clarke v Federal Commissioner of Taxation*, French CJ adopted a 'multifactorial assessment' to guide the application of the *Melbourne Corporation* principle.¹⁹⁸ In *K-Generation Pty Ltd v Liquor Licensing Court*, the Court implicitly adopted a multifactorial assessment to determine whether the Liquor Licensing Court was a 'court of a State' for the purposes of s 77(iii) of the *Constitution*.¹⁹⁹ In *Wong v Commonwealth*, French CJ and Gummow J endorsed the 'proposition that diverse and complex questions of construction of the *Constitution* are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine'.²⁰⁰ Finally, in *Dickson v The Queen*, the Court preferred to address the s 109 issue by focusing on the substance of the question (legislative intention) rather than using the 'covering the field' and 'indirect inconsistency' labels.²⁰¹

This article has suggested that the courts should take into account the following factors:

- The purpose of the corporation, as revealed in its constitution and other objective sources (for example, annual reports).
- The nature and extent of its current and intended activities.

198 (2009) 240 CLR 272, 299 [34].

199 (2009) 237 CLR 501.

200 (2009) 236 CLR 573, 582 [20], citing *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [40]–[44] (Gummow J). See also Chief Justice Robert French, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the 2010 Constitutional Law Conference Dinner, Sydney, 19 February 2010) 6–8.

201 (2010) 84 ALJR 635, 642 [31] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

- The *Melbourne Corporation* principle, if the bare characterisation of a corporation as a 'trading or financial' corporation impermissibly impairs state capacities (this is unlikely to occur in most if not all cases).
- The framers' intentions, in particular what was thought to be included and excluded by the constitutional language used.
- Circumstances surrounding the funding and organisation of the corporation.

These factors have already, for the most part, been taken into account by courts applying the activities test. Adopting an openly multifactorial approach would therefore be a clearer and more revealing approach than the currently prevailing 'activities test'. This suggestion more clearly describes the process of decision-making actually engaged in by the courts, and it invites a more comprehensive appreciation of whether a corporation is or is not within the scope of s 51(xx). Tests are unhelpful in their simplicity and are ultimately misleading. The key consequence of this suggestion is not that cases will be easier to decide, but that hopefully the reasoning employed in cases will be easier to understand and accept.

VI POSTSCRIPT: *WILLIAMS v COMMONWEALTH*

The meaning of 'trading or financial corporations' is currently being considered by the High Court in *Williams v Commonwealth* No S307 of 2010 ('*Williams*').²⁰² Judgment was reserved on 11 August 2011. The principal issue in *Williams* is whether a funding agreement between the Commonwealth and the Scripture Union Queensland ('SUQ') is invalid because it is beyond the executive power of the Commonwealth in s 61 of the *Constitution*. One argument for validity is that s 61 includes the power to enter into contracts with trading corporations within the meaning of s 51(xx). Thus, one issue before the Court is whether SUQ is a trading corporation.

The written submissions of the parties and interveners have taken a variety of approaches to this question. The plaintiff did not initially directly challenge the 'activities test', although he expressed some preference for the view that 'a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on'.²⁰³ The plaintiff instead submitted that the facts agreed to in the special case did not establish a sufficient level of trading activities to conclude that SUQ is a trading corporation.²⁰⁴ The Commonwealth made two submissions on this point. First, it contended that the current test is whether trading forms a sufficiently significant proportion of the corporation's overall activities, and applying that test, SUQ is a trading

202 Unfortunately, *Williams* came on too late to be incorporated or considered in the body of this article.

203 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, No S307 of 2010, 29 July 2011, 9 [35], quoting *Fencott* (1983) 152 CLR 570, 588.

204 Ronald Williams, 'Plaintiff's Further Amended Submissions', Submission in *Williams v Commonwealth*, No S307 of 2010, 29 July 2011, 9 [35]–[37].

corporation.²⁰⁵ Secondly, the Commonwealth contended that if the activities test were to be discarded, the Court should instead look at the ‘capacities’ of the corporation. This is because, according to the Commonwealth, the Convention Debates reveal that the purpose of s 51(xx) was to regulate corporations that could cause harm to the public, such corporations being those with the capacity to engage in trading or financial activities. SUQ was said to have such a capacity and is thus a trading corporation.²⁰⁶ The Commonwealth’s ‘capacities test’ was criticised in other written submissions.²⁰⁷ Finally, SUQ submitted that it was a trading corporation, applying the activities test.²⁰⁸

Of the interveners, South Australia did not directly challenge the authority of the ‘activities test’ but instead made nuanced submissions on how the activities test should be applied.²⁰⁹ Victoria also did not directly challenge the ‘activities test’. Victoria’s submissions instead advocated a ‘refinement’ to the test to seek out the ‘true character’ of the corporation in question, which will depend on the corporation’s ‘predominant or characteristic’ activity.²¹⁰ SUQ was said not to meet this threshold of trading activity.²¹¹ Western Australia, with New South Wales and Tasmania (and ultimately the plaintiff)²¹² in support,²¹³ made very detailed submissions criticising the activities test and advocating consideration of both a corporation’s activities and its objects, with the result that SUQ is not a trading

205 See Commonwealth of Australia, Minister for School Education, Early Childhood and Youth, Minister for Finance and Deregulation, ‘Amended Submissions of First, Second and Third Defendants’, Submission in *Williams v Commonwealth*, No S307 of 2010, 29 July 2011, 9–10 [27]–[30].

206 *Ibid* 10–13 [31]–[36].

207 See Ronald Williams, ‘Plaintiff’s Submissions in Reply’, Submission in *Williams v Commonwealth*, No S307 of 2010, 18 July 2011, 3 [12]; Attorney-General (Vic), ‘Submissions of the Attorney-General for Victoria (Intervening)’, Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 9 [23]–[24].

208 Scripture Union Queensland, ‘Fourth Defendant’s Submissions’, Submission in *Williams v Commonwealth*, No S307 of 2010, 26 July 2011, 10–11 [46]–[54].

209 See Attorney-General (SA), ‘Written Submissions of the Attorney-General for the State of South Australia (Intervening)’, Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 9–12 [26]–[38].

210 See Attorney-General (Vic), ‘Submissions of the Attorney-General for Victoria (Intervening)’, Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 6–9 [16]–[22]. For criticism, see Commonwealth of Australia, Minister for School Education, Early Childhood and Youth, Minister for Finance and Deregulation, ‘Submissions of First, Second and Third Defendants in Reply to the Submissions of the Intervenors’, Submission in *Williams v Commonwealth*, No S307 of 2010, 27 July 2011, 3–4 [7].

211 Attorney-General (Vic), ‘Submissions of the Attorney-General for Victoria (Intervening)’, Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 9–10 [25].

212 See Ronald Williams, ‘Plaintiff’s Submissions in Reply’, Submission in *Williams v Commonwealth*, No S307 of 2010, 18 July 2011, 3–4 [12].

213 See Attorney-General (NSW), ‘Amended Submissions of the Attorney-General for New South Wales, Intervening’, Submission in *Williams v Commonwealth*, No S307 of 2010, 29 July 2011, 12–13 [5.26]–[5.31]; Attorney-General (Tas), ‘Written Submissions of the Attorney-General of Tasmania (Intervening)’, Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 2 [7].

corporation.²¹⁴ Finally, Queensland submitted that the case could be disposed of without considering s 51(xx).²¹⁵

The meaning of 'trading corporation' was not given extensive consideration during the three days of oral argument.²¹⁶ Given the useful and extensive written submissions, it is to be hoped that the High Court's decision in *Williams* will settle the issue in a manner that promotes clarity and transparency in reasoning, even if it is impossible to achieve absolute predictability regarding what is a heavily fact-specific question.

214 See Attorney-General (WA), 'Amended Written Submissions of the Attorney-General for Western Australia (Intervening)', Submission in *Williams v Commonwealth*, No S307 of 2010, 29 July 2011, 12–15 [4]–[45].

215 Attorney-General (Qld), 'Written Submissions of the Attorney-General for Queensland (Intervening)', Submission in *Williams v Commonwealth*, No S307 of 2010, 20 July 2011, 9 [40].

216 See especially Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) 3230–460.