



# DECISION

*Fair Work Act 2009*  
s.789FC - Application for an order to stop bullying

**Kim Cowie**  
(AB2016/394)

COMMISSIONER HAMPTON

ADELAIDE, 21 NOVEMBER 2016

*Application for an order to stop bullying – whether workplace conducted by a constitutionally covered business – incorporated sporting association – whether trading corporation – whether affiliation fees and other activities and income should be treated as trading activities – most activities not in the nature of trading services – whether other income producing activities trading in nature and significant – limited trading activities found – trading activities not significant and not sufficient to impact upon the characterisation of the association – not a trading corporation – not a constitutionally-covered workplace – whether alternative jurisdictional basis – referral of powers by Victoria – not relevant to anti-bullying jurisdiction – no jurisdiction to deal with application – application dismissed – s.789FD – Fair Work Act 2009.*

## 1. The background to this matter

[1] Ms Kim Cowie has made an application under s.789FC of the *Fair Work Act 2009* (FW Act) seeking a stop bullying order. Ms Cowie is a volunteer in her capacity as an umpire (Race Boat Official) with Rowing Victoria Inc. Rowing Victoria is an incorporated association established to be the peak body of rowing in Victoria.

[2] Ms Cowie has sought that orders be made in relation to the alleged conduct of both the Chairperson and Chief Executive Officer of Rowing Victoria. There are a number of grounds relied upon by Ms Cowie, however, many of these arise from how the officers handled a dispute involving herself and the coach of a team participating in a rowing regatta where Ms Cowie was officiating. That dispute, and some related matters, led to a “hearing” being conducted by a review Tribunal established under the rules governing rowing in Australia (the Rowing Tribunal).

[3] In response to the application, Rowing Victoria has raised issues concerning the Commission’s jurisdiction to deal with the application – given the nature of the association, in addition to its denial of the allegations. Constructively, all parties have at various times participated in comprehensive conciliation processes convened by the Commission on a without prejudice basis. At other times, the parties have sought, by agreement, that this application be held in abeyance pending developments associated with the Rowing Tribunal hearing and other internal complaint processes.

[4] This was appropriate given the focus of this application and the desire by all parties to facilitate Ms Cowie's active return to a sport in which she has been a committed participant and volunteer official over many years.

[5] Ultimately, due in large measure to Ms Cowie's concerns about the conduct and outcome of the Rowing Tribunal process, and the alleged conduct of Rowing Victoria and its officials in that particular context, this matter has not been resolved. Ms Cowie now seeks to press this application and it has become necessary to deal with the jurisdictional objection raised by Rowing Victoria.

[6] No party sought that a hearing be conducted in relation to the jurisdictional issue and I have dealt with that matter based upon the comprehensive sworn evidence and submissions filed by the parties.

## 2. The jurisdictional issue

[7] The anti-bullying provisions are contained in Part 6-4B of the FW Act. Section 789FC provides as follows:

### “789FC Application for an FWC order to stop bullying

- (1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.
- (2) For the purposes of this Part, *worker* has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

- (3) The application must be accompanied by any fee prescribed by the regulations.
- (4) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under this section; and
  - (b) a method for indexing the fee; and
  - (c) the circumstances in which all or part of the fee may be waived or refunded.”

[8] The term “worker” is defined in s.789FC of the FW Act and this indicates that “worker” has the same meaning as in the *Work Health and Safety Act 2011 (WHS Act)*, but does not include a member of the Defence Force. In general terms, the *WHS Act* states that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following:

- an employee;

- a contractor or subcontractor;
- an employee of a contractor or subcontractor;
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking;
- an outworker;
- an apprentice or trainee;
- a student gaining work experience; or
- a volunteer—except a person volunteering with a wholly 'volunteer association' with no employees.<sup>1</sup>

[9] There is no contest that Ms Cowie was a worker at the relevant times.

[10] Section 789FD of the FW Act defines bullying conduct as follows:

**“789FD When is a worker *bullied at work*?**

- (1) A worker is *bullied at work* if:
  - (a) while the worker is at work in a constitutionally-covered business:
    - (i) an individual; or
    - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.
- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
  - (a) the person is:
    - (i) a constitutional corporation; or
    - (ii) the Commonwealth; or
    - (iii) a Commonwealth authority; or
    - (iv) a body corporate incorporated in a Territory; or
  - (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;then the business or undertaking is a *constitutionally-covered business*.”

[11] Rowing Victoria contends that it is not a constitutionally-covered business within the meaning of the FW Act. It further contends that unless the “workplace” concerned is conducted by a constitutionally-covered business, there can be no basis for this application to be made.

[12] Ms Cowie contends that Rowing Victoria is a trading corporation due to the nature of its activities and is accordingly, a constitutionally-covered business. In the alternative,

Ms Cowie contends that the Commission has the power to deal with this application as a result of Victoria's referral of industrial matters to the Commonwealth and the national system nature of the FW Act.

### **3. The Evidence and submissions before the Commission**

#### **3.1 Rowing Victoria Inc.**

[13] Rowing Victoria contends that the Commission does not have the jurisdiction to determine this matter as it:

- “(a) does not engage in trading activities such as to render it a constitutional corporation as defined in s.51(xx) of the Constitution; and
- (b) is not a constitutionally covered business for the purposes of s.789FD(3) in Part 6-4B of the FW Act.”<sup>2</sup>

[14] In support of that position, Rowing Victoria submits that it is not a trading corporation because its revenue cannot be appropriately described as deriving from trading activities. In particular:

- The revenue total of \$381,855 derived from “Regatta Income” and “Rowing Victoria managed events” is not commercial in character and therefore should not be considered income derived from trading activities. Alternatively, if the Commission is of the view that these do form trading activities, it contends that Rowing Victoria acts an intermediary that collects and holds the majority of its regatta income (\$144,445) for the “convenience of its affiliates” and this should not be considered “substantial” as it is then passed onto the relevant affiliate and, in any event, Rowing Victoria could arrange for it to be paid directly to the affiliate;
- The revenue of \$250,674 generated from “affiliation fees” enables Rowing Victoria to provide services to its members for their sole benefit rather than for it to generate a profit and therefore does not equate to an activity of a commercial nature and should not be classified as trading activities; and
- The same can also be said of the income it derives from government grants, dividends and interest from its investments, fundraising, sponsorship and team fees, fines and amounts payable by membership towards insurance premiums.

[15] Rowing Victoria contends that the only revenue that could be considered to be generated by trading activities is that received from the coaching courses it offers and by sales from its online shop. This revenue represents approximately 5% of Rowing Victoria's total revenue, which it submits is “so insignificant as to be peripheral”, and the fact that it may have engaged in “some trading activity” does not automatically render it a trading corporation. Rowing Victoria further contends that from the beginning of the 2016/17 financial year, fees paid for the coaching courses will be paid directly to Rowing Australia.

[16] In terms of the approach to be adopted to this aspect, Rowing Victoria relies upon various authorities<sup>3</sup> to the effect that the extent of trading activities might be assessed either by reference to their substantial dollar value or to their relative value to the organisation. In that regard, it noted that in one case concerning sporting clubs, bar trading ranging between

19% and 63% of revenue did not lead the Federal Court to conclude that they were trading corporations.<sup>4</sup>

[17] Rowing Victoria also relies upon the fact that it is a not for profit association, is a sporting association exempt from paying income tax, and exists for the purposes of promoting, encouraging, managing and controlling the sport of rowing in Victoria.

[18] Rowing Victoria further contends that the referral of industrial matters by the State of Victoria is not relevant to the present matter.

[19] Rowing Victoria relies upon two affidavits of Mr Nick Gall, its Chief Executive Officer.

### **3.2 Ms Cowie**

[20] Ms Cowie contends that:

- The concept of trading activities must be given its full context and be generously, rather than strictly, construed;
- The amount of activities conducted by Rowing Victoria that should be considered to be trading activities exceeds the level found by the courts in other matters to be sufficient to impact upon the characterisation of the relevant body;
- Many of the activities of Rowing Victoria are business activities carried on with a view to earning revenue and these are trading activities;
- It does not matter that the objects of the association are not directed to making a profit or that not all events and activities generate a profit or surplus; and
- Sporting bodies can be, and are, trading corporations.

[21] In relation to the activities of Rowing Victoria, Ms Cowie contends that:

- Affiliation fees, regatta income, Rowing Victoria managed events, Government funding, income from shop sales, training and other services, interest and dividends should all be included as arising from trading activities;
- Affiliation fees received by Rowing Victoria are simple general revenue and are indistinguishable from other funds which are used to advance the objects of the organisation;
- Seat fees (paid to participate in a regatta) are set on a commercial basis and the full (gross) amount of money received, rather than the net amount after expenses or contributions remitted to others, should be included for present purposes;
- Rowing Victoria conducts regattas and establishes the annual program of regattas following the expressions of interest from affiliated clubs;
- Some regattas are conducted by Rowing Victoria at venues where admission fees (entry, program and/or parking) are charged;
- Events are run with the purpose of generating funds to further Rowing Victoria's objects;
- Services are provided by Rowing Victoria and these are not provided gratuitously, rather fees are charged;

- Government funding should be classed as trading activities if it involves an obligation to provide public services; and
- Even if net amounts of income (after expenses) is considered, the amount of relevant trading activities is substantial and such that Rowing Victoria could not easily forgo this income.

[22] Ms Cowie further contends, in effect, that as a result of the referral of industrial matters by the State of Victoria, the broader definition of national system parties in s.14, as extended by ss.30C, 30D and 30E of the FW Act, applies to include all non-constitutionally-covered employers in that State.

[23] Ms Cowie also provided an affidavit going to her understanding of the operations and activities of Rowing Victoria. This evidence also included reference to Annual Reports and other publicly available information.

#### **4. Does the Commission have the jurisdiction to deal with this application?**

##### **4.1 What is a constitutionally-covered business for present purposes?**

[24] For reasons that will become clear, it is appropriate to initially deal with the contention as to whether Rowing Victoria is a constitutionally-covered business.

[25] The initial focus of the statutory definition of workplace bullying is the workplace where the applicant is at work when the alleged unreasonable conduct takes place. That is, the conduct must take place whilst the applicant worker is at work in a constitutionally-covered business. Section 789FD(3) of the FW Act requires the Commission to consider the nature, or in some cases – the location, of the legal person conducting the business or undertaking (PCBU).

[26] In this case, the workplace involves the activities of Rowing Victoria. There is no suggestion of any other (corporate) entity employing in, or more importantly conducting the “business” of, Rowing Victoria.

[27] The workplace in this matter is not located in a Territory<sup>5</sup> and there is no suggestion that it is conducted by the Commonwealth or a Commonwealth authority. Assuming for present purposes that the workplace is a PCBU within the meaning of the WHS Act, in order to be a constitutionally-covered business and fall within the scope of s.789FD, it must be conducted by a constitutional corporation.

[28] The term “constitutional corporation” is defined in s.12 of the FW Act in the following terms:

“*constitutional corporation* means a corporation to which paragraph 51(xx) of the Constitution applies.”

[29] The Constitution, in effect, defines “constitutional corporations” as follows:

“Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”<sup>6</sup>

[30] The suggestion is that Rowing Victoria is a trading corporation, and of the alternatives, this is the only potentially relevant concept. It is an association incorporated under the *Associations Incorporation Reform Act 2012* (Vic) and accordingly has a corporate status.

[31] The approach of the Courts and Tribunals to the meaning of a trading corporation has been conveniently summarised by Steytler P in *Aboriginal Legal Service (WA) Inc v Lawrence (No 2)*.<sup>7</sup> (*Lawrence*). Having reviewed the developments in the approach of the High Court to arrive at what might be described as the activities test, His Honour found as follows:

“68 The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:

- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
- (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* [1986] FCA 357; (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
- (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: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* [1982] HCA 23; (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* [1985] FCA 134; (1985) 7 FCR 325, 330; *Quickenden* [101].
- (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
- (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). 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’: *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).

- (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: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
- (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: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
- (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26]." (footnotes and full references omitted)

[32] This summary was adopted by the Full Court of the Federal Court in *Bankstown Handicapped Children's Centre v Hillman*<sup>8</sup> (*Bankstown*).

[33] In an earlier case of *E v Australian Red Cross Society*<sup>9</sup>, Wilcox J considered whether the Australian Red Cross Society and the Royal Prince Alfred Hospital were trading corporations. The Society supplied blood and blood products, generally free of charge to the community, but received substantial government funding. The Court, in considering the more than \$44m received in respect of its blood transfusion services, said:

"These were, of course, substantial sums. They were earned only because the respondents are prepared to carry on blood transfusion services at a scale, in terms of labour and resources, greater than that of many organisations which are undoubtedly 'trading corporations'. But I do not think that it is appropriate to describe the gratuitous provision of a public welfare service, substantially at government expense, as the conduct of a 'trade'. It is pertinent to recall the words of Stephen J in *St George County Council*: 'It is the acts of buying and selling that are at the very heart of trade', and also to remember the distinction he made in respect of the distribution of electricity free of charge. In relation to the supply of blood, it seems to me that the first and second respondents do not engage in trading activities. They engage in a major public welfare activity pursuant to agreements with the Commonwealth and the various State governments under which they will be reimbursed most of their costs."<sup>10</sup>

[34] I note that when considering the position of the Royal Prince Alfred Hospital, Wilcox J found that the scale of the hospital's trading activities were "substantial enough" to require that the hospital should be regarded as a trading corporation.<sup>11</sup> The details of this aspect are explained in more detail in a decision outlined below.

[35] In *Bankstown*, the Full Court was dealing with an incorporated association that received most of its funding from government. The Court posed the question in the following manner:



“51 Many activities and services which have historically been provided mainly or exclusively by government are now carried on by companies which undertake those activities or provide those services with the objective of making a profit. Examples are legion and included prison services, electricity generation and distribution, potable water collection or production and distribution and the construction and maintenance of roadways. There can be little doubt that, at least in the ordinary course, companies which undertake those activities or provide those services can be characterised as trading corporations. Does the fact that a corporation likewise provides such services but on effectively a cost recovery basis only, render it inappropriate to characterise that corporation as a trading corporation?”

**[36]** The Full Court focused in particular on the funding and services provided in relation to the ‘Out-of-Home Care’ (OOHC) programs under which the Centre was paid for services provided to the relevant government agency (DOCS) on a fee for service basis. It concluded:

“54 If those substantial activities can be characterised as trading, then the Association can likewise be characterised as a trading corporation. So much is apparent from the authorities including, in this Court, the judgment of the Full Court in *Quickenden* (at [51]). The Association undoubtedly provided services to the State and was remunerated for doing so. It is, in our opinion, a proper characterisation of the Association's activities to describe them as selling those services to the State and, correspondingly, the State purchasing them. Indeed that was the language used in the header agreement which governed the contractual arrangements between the Association and DOCS. The provision of a given service under the header agreement resulted in an invoice from the Association to DOCS which it then paid. The prices at which the services were provided were negotiated between the parties having regard to the price at which others provide similar services. The Association employed personnel and acquired rental property to equip it for the task of providing those services. At least in its then manifestation (entailing its size, activities, property and personnel), 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.

55 All these matters appear to us to point to a relationship between the Association and DOCS as having been a commercial one involving trade in services. It is, of course, true that it is possible to characterise, as the Industrial Court did, the Association's activities as the provision of public welfare services. However the fact that the acquisition of these services by DOCS was for this purpose does not appear to us to detract from the essentially commercial nature of the relationship. It is properly so described. There may be many incorporated charitable bodies in Australia which are nevertheless trading corporations for the purposes of paragraph 51(xx) of the Constitution. As we have noted above, the terms of the header agreements were negotiated, as were the terms of the renewal header agreement. Ultimately by that process, further negotiation as to price was not then undertaken. Thereafter, DOCS did not have to use the services of the Association at all, and the Association for its part did not have to accept any offer or request by DOCS to provide such services. On the evidence, DOCS selected those entities which it wished to provide services, once the header agreements were negotiated, on the basis of the quality of the service to be provided, but the Association (or others) did not have to agree to provide them. It is distracting to note that the services which the Association and others contracted with

DOCS to provide were in the "welfare sector" of the economy, to use an expression used by the Solicitor-General."

[37] In terms of the assessment of trading activities as substantial and not merely peripheral, the approaches do vary to a degree.

[38] In *Bankstown*, the Full Court observed that "there is no bright line that determines what proportion of trading activities is "substantial"". <sup>12</sup> In the more recent decision of the Federal Court in *United Firefighters Union of Australia v Country Fire Authority*, <sup>13</sup> (*UFU v CFA*) the Full Court adopted the approach to the characterisation of trading activities as summarised in *Lawrence* and considered the revenue producing activities in order to assess the cumulative impact of those activities upon that assessment. In terms of the cumulative assessment, Murphy J at first instance in that matter <sup>14</sup> observed:

"[92] The term "substantial" is imprecise but it at least encompasses trading amounts that are "not so small as to be trivial": *Quickenden* at [51]. In that case the majority treated substantial and nontrivial as synonymous. In the present case the CFA contends that their trading activities are peripheral, insignificant or otherwise incidental. These terms are drawn from the various cases: see for "peripheral" *Adamson* at 208 per Barwick CJ; *State Superannuation Board* at 304 per Mason, Murphy and Deane JJ; for "incidental" *Adamson* at 234 per Mason J; for "significant" see *Adamson* at 233 per Mason J; *E v Australian Red Cross Society and Ors* [1991] FCA 20; (1991) 27 FCR 310 ("E v Red Cross") at 345 per Wilcox J; *Quickenden* at [47] per Black CJ and French J.

[93] The ordinary meaning of these words is straightforward. The Shorter Oxford Dictionary defines them to include the following:

- (a) "peripheral" means marginal, superficial, of minor importance, not essential or relevant to but subordinate to;
- (b) "insignificant" means lacking significance, meaningless, devoid of weight or force, ineffective, ineffectual, of no importance, trivial, trifling, or contemptible; and
- (c) "incidental" means occurring as something casual or of secondary importance; not directly relevant to; following up on as a subordinate circumstance."

[39] Having found that six of the County Fire Authority's (CFA's) non-fire fighting activities were trading activities, Murphy J found:

"96 The scope of these activities is broad. While they are secondary to the CFA's primary purpose I would not describe any of them as insignificant, incidental, trivial or unimportant. For example, the road accident rescue service is a specialised emergency service that the CFA has agreed to provide in country areas, which has required special training of CFA employees beyond the usual fire training, and which the CFA recognises as an important part of the range of services it provides. The CFA has no statutory obligation to provide this service and it does so at a cost to road users and the State through the Traffic Accident Commission. I would not describe the provision of this service as incidental to the CFA's activities nor as a fortuitous or casual

occurrence of subordinate importance. Nor should its provision, viewed in the context of all of its services, be described as trifling, ineffective, superficial or marginal.

97 For essentially the same reasons the provision of fire equipment maintenance services, consultancy on matters related to fire safety, the provision of advice related to the storage of dangerous goods and the sale of goods related to fire safety should not be seen as insignificant, incidental, trivial or unimportant activities considered against the range of services the CFA provides. I infer from the evidence that these activities are seen as important by the CFA, although they are not its central or predominant focus.

98 Nor do I consider that the revenue from these trading activities is incidental in the sense of arising fortuitously or as a result of some other activity. The income is earned deliberately by the CFA from these six specific sources and on the basis that the CFA have special expertise or products of value which they provide in exchange. Taken together the income from these activities is substantial.

99 While the quantum of income from the CFA's trading activities relative to its non trading activities is small, I am disinclined to treat almost \$13 million of revenue as minimal, trivial or insignificant. It should be seen for what it is, a significant volume of trading revenue albeit dwarfed by the money received from non-trading sources. The CFA put on no cogent evidence that \$12.93 million was insignificant to its operations, and no evidence was given that it could be easily foregone by the organisation. Put another way, it is likely that the CFA would be impaired in its capacity to provide services in road accident rescue, fire equipment maintenance, fire safety consultancy or sale of fire safety related goods, which it regards as important in the range of services offered, if it was not able to charge fees for doing so.

100 Although the \$12.93 million of trading income is plainly a substantial amount in absolute terms, it is only a small percentage relative to the CFA's total income. Even so, I do not consider it is trivial or minimal in relative terms.

101 In *E v Red Cross* the Australian Red Cross Society was one of the respondents. Wilcox J held that its supply of blood and blood products was the gratuitous provision of a public welfare service, substantially at government expense, and was not a trading activity. The Red Cross received a total of \$44.9 million from the government in respect of its non-trading blood supply services, and about \$2 million from trading activities. Another respondent, a major hospital, made approximately \$18 million from trading activities and, in the words of Wilcox J, that sum was dwarfed by a State government subsidy of \$112 million. His Honour concluded that the disparity between the money earned through trading and the money received by way of government subsidy was unimportant explaining at 345:

Trading activities yielding some \$18 million per year can only be described as substantial. It seems to me that the scale of the hospital's trading activities in 1984-1985 was such that it should be regarded as then being a trading corporation.

See also *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346 ("UFU v MFB") at 354 to 356 per Marshall J.

102 The CFA contends that both *E v Red Cross* and *UFU v MFB* were wrongly decided in that they incorrectly applied an absolute test. While I consider that the CFA's trading revenue is plainly significant if considered in absolute terms, I do not approach the issue that way. Considering its trading revenue relative to its non-trading activities, the question is not without difficulty and is one of fact and degree. In my opinion the CFA undertakes sufficient trading for it to be seen as "not insubstantial", not trivial, insignificant, marginal, minor or incidental, and I find that it is a trading corporation."

[40] By contrast, in the earlier approach adopted in *Hughes*, Toohey J observed that "A trading activity may represent a significant part of a club's income but be relatively insignificant in an overall consideration of the club's activities".<sup>15</sup>

[41] Further, the provision of services, largely or wholly, free of charge, and whether they are provided for altruistic purposes not shared by commercial enterprises, are also relevant, but not determinative, considerations.<sup>16</sup> Sporting bodies may be trading corporations, depending upon their activities and circumstances.<sup>17</sup>

#### 4.2 The general nature and activities of Rowing Victoria Inc.

[42] It is appropriate to set the context for the determination of this issue. I will deal with the detail and characterisation of the various activities in due course. Based upon the evidence before the Commission, I find that the general nature of Rowing Victoria and its activities are as follows:

- Rowing Victoria is the peak body for the management of the sport of rowing in Victoria. Its present activities remain consistent with its stated objects; namely:

##### "4. Objects

The objects of RV are to promote, encourage, manage and control the sport of rowing in Victoria, and without limiting the generality of the foregoing:

- (a) Encourage participation in rowing at all levels;
- (b) Promote the interests of member clubs and schools;
- (c) Encourage and promote high standards of rowing;
- (d) Establish rules for the conduct of rowing within Victoria;
- (d) Arrange and promote Victorian, interstate, national and international rowing regattas;
- (e) Manage selection of crews to represent Victoria in interstate and national regattas;
- (f) Assist in settling disputes between or among members, between members and RV and between registered members in so far as they utilise the RV member protection policy contained in the rules;
- (g) Impose penalties for any infringement of provisions of this constitution or of policies or procedures determined by RV for the conduct of rowing."<sup>18</sup>

- Rowing Victoria became an incorporated entity in 1987. It is a membership association and its affairs are managed by a Board comprising six Directors who must be a registered member of a club or school which is a member of Rowing Victoria.<sup>19</sup> The Board has the power<sup>20</sup> to appoint a CEO and other members of staff, and it has done so.
- In the 2015/16 financial year, Rowing Victoria generated a total of \$900,813 in revenue from its operating activities. Having regard to its Statement of Profit and Loss, Rowing Victoria recorded a loss of \$31,374 last financial year.
- Rowing Victoria has approximately 92 affiliated clubs, schools and associations and 7,000 members across junior, school, senior, masters and recreational rowers.
- Two of the primary functions of Rowing Victoria are the organisation and management of regattas, which are generally hosted by its affiliates, and the staging of its own managed competitions. For these events, Rowing Victoria's responsibilities include preparing a regatta or competition program, organising lane draws, formulating a schedule for progression into the finals, promoting the relevant event on its website and arranging the necessary authorisation with regulatory bodies such as Parks Victoria and/or Maritime Victoria, which are responsible for approving river or lake closures.
- Although it is a peak body for rowing, affiliated clubs are able to, and do, organise rowing regattas without Rowing Victoria's involvement or consent.
- Rowing Victoria's other functions include club development and education and it routinely provides advice and other forms of non-financial assistance to affiliate clubs regarding their administrative structure and engagement of volunteers.
- Rowing Victoria also offers a range of services to clubs and individual members associated with the sport of rowing, as a benefit of affiliation or membership and is provided at no additional cost. These services include:
  - (a) the National Officiating Accreditation Scheme (NOAR) for Boat Race Officials, which is a program designed by Rowing Australia and delivered by Rowing Victoria;
  - (b) a rostering system for host affiliates to use at regattas;
  - (c) a communications panel to engage with the public on behalf of the Rowing Victoria membership in relation to the sport of rowing; and
  - (d) the coordination of various charitable activities, including in support of Connor's Run, the Flying Doctor's Rowathon Australia and the My Row community initiative to raise money for the cancer centre at the Royal Children's Hospital.
- In the 2015/16 financial year, Rowing Victoria received \$250,674, or approximately 28% of its total annual revenue from operating activities, from affiliation fees paid by clubs and individual members.
- The annual membership cost for a senior athlete is \$75 per year; the cost for a junior or school aged member is \$21 per year, and the cost for a recreational member is \$18 per year. Depending on the number of members at a club, club affiliation fees range from \$375 for a club with less than 26 members, up to \$1700 for a club with more than 101 members.

- Rowing Victoria stages approximately 47 regattas and managed events annually. A single regatta or Rowing Victoria event may contain anywhere between 20 and 800 crews, or 100 and 2500 individual competitors.
- Rowing Victoria generated \$219,835 in regatta income for the 2015/16 financial year. This income is earned in part from individual entrant "seat fees" ranging from an average fee of \$17.60 (according to Ms Cowie) and a median value of approximately \$12.50 (according to RV) which is paid to Rowing Victoria to participate in a race. The full income is derived as follows:
  - Regatta applications fees administration - \$6,363.70;
  - Regatta Entry fees (2016 Masters Championships) - \$23,818.17;
  - Regatta Oar levies and insurance - \$125,248.49;
  - Rescue and Safety levy - \$63,314.06; and
  - RP7 (software) Fees - \$1,090.91.
- Of the regatta income, Rowing Victoria withholds approximately \$3 of the seat fee to cover a portion of the expenses it incurs in staging the event. It then remits the balance to the host club, school or association. Of the \$219,835 in revenue generated in regatta income, Rowing Victoria remitted a total of \$144,445 to its affiliates. Expenses related to Rowing Victoria's regattas are recorded in the financial statements for 2015/16 as totalling approximately \$144,000.
- Rowing Victoria also generated \$161,220 in revenue from its own managed events where the seat fee is paid directly to Rowing Victoria. These events include the larger State Championships, State Masters and the Head of School Girls regattas. The majority of Rowing Victoria events return less than \$1,500 profit (excess left over after expenses) or are not profitable at all.
- The larger championship events, of which there are five or six annually, tend to generate a larger excess for Rowing Victoria. The highest return Rowing Victoria receives for any single event in the rowing calendar is usually the State Championships, which last season generated approximately \$27,000. The surplus from events becomes part of its revenue and is used in the furtherance of Rowing Victoria's objectives, and includes cross-subsidising other services to some degree.
- The great majority of the athletes that participate in Rowing Victoria competitions and regattas do not receive any form of payment for doing so. The principal activity of the athletes that compete in Rowing Victoria events involves participation in the sport of rowing for recreation rather than financial reward.
- Of the approximate total of 47 regattas and competitions staged annually by Rowing Victoria, spectators are only charged an admission fee at the State Championships when that event is held at Nagambie, which is every second year. At the most recent State Championships event that took place at that venue, the admission fee was \$10. Car parking fees may also be involved in some cases. Spectators are able to attend most other regattas and competitions managed by Rowing Victoria, without charge.
- Rowing Victoria also received \$43,818 in government grants for the last financial year, and a further \$3,200 from fundraising activities which was used to partially subsidise the cost of some Rowing Victoria members participating in rowing events overseas.

- In the 2015/16 financial year, Rowing Victoria generated \$41,228 in revenue from coaching courses. The course content is designed by Rowing Australia and delivered by Rowing Victoria, which offers both level one and level two coaching courses at a cost of approximately \$200 per person, per course. Approximately \$60 of that amount is remitted to Rowing Australia. The balance is put toward the expense of providing the service, including venue hire and payments made to external consultants to run the course.
- Approximately 70% of the overall revenue of \$41,228 was derived from coaches attaining level one accreditation. From the 2016/17 financial year onwards, the level one course will be delivered entirely online at a cost of \$180. That amount will be payable directly to Rowing Australia such that Rowing Victoria's "coaching courses" revenue stream will be reduced in the future.
- Rowing Victoria also earns income from investments. In the 2016/17 financial year, it incurred losses of \$41,750 from the sale of shares, but earned \$51,461 in dividends and interest.
- In the 2015/16 financial year, Rowing Victoria also earned \$112,460 that is itemised in its accounts as "other income". This is derived from a range of sources. This included (in approximate figures) the following:
  - (a) sponsorships in the amounts of \$35,000, \$5,000 and \$1,000 respectively, which assist Rowing Victoria with temporary infrastructure and offsetting of the direct cost associated with using their venues and services;
  - (b) a \$10,000 Women Leaders in Sport grant from the Commonwealth government to enable a board member and a staff member to undergo leadership training;
  - (c) \$10,000 from the Victorian State government to develop a volunteering plan;
  - (d) \$10,000 from the Victorian State government to partially subsidise coaching courses in regional areas;
  - (e) \$11,572 from the broader membership to pay insurance premiums;
  - (f) \$27,000 in fines levied on affiliates and individual members; and
  - (g) \$3,000 to \$5,000 in sales from the Rowing Victoria online shop, including the sale of standard boat lights.

### **4.3 Is Rowing Victoria Inc. a trading corporation?**

[43] For reasons outlined earlier, the resolution of this question essentially involves the characterisation of the various activities of Rowing Victoria and an overall assessment as to whether the cumulative effect of those activities that are trading in nature is sufficient to mean that it is a trading corporation. This assessment involves both fact and degree and, in effect, consideration as to whether the activities are commercial in nature or a business activity carried on with a view to earning revenue. In approaching this task, I have also considered the substance and context of the activities and not merely the labels applied to them as part of the accounting and other reporting arrangements and it is the nature of Rowing Victoria as a whole that is being assessed.

[44] Based upon my findings, it is evident that the sport of rowing as administered by Rowing Victoria largely involves amateur and social athletes who pay relatively small fees to participate, rowing for clubs that are generally administered by volunteer committees, umpired by volunteer officials, attended by spectators that do not generally pay fees to watch, and where sponsorship (and Government funding) is at relatively low levels and does not have the corporate nature evident in many other sports. This overall context informs the consideration of the activities and the overall assessment being made in this case.

[45] I will deal with each of the major income sources. In general terms, I have considered the activities and income in the context of the 2015/16 financial year but noted where there has been some relevant change or uncertainty about that the level of that activity.

### **Affiliation fees**

[46] Club and individual affiliation fees amount to approximately \$250,000 per annum. The level of such fees has been set out earlier in this decision. The concept of affiliation under the Constitution is that the clubs or individuals become members and subject to the rules.

[47] In some circumstances, affiliation or membership of an association or club may bring with it the right to services of a commercial character. For instance, membership of a buyers group or mutual support group could involve the provision of free or heavily discounted services or products that are mercantile in nature. That is, services or products that are available to the community on a commercial basis, yet provided to the “members” as an essential part of the affiliation or membership deal. Further, if the membership or affiliation fees represented a significant commercial rate designed to provide access to relevant services or products, the same characterisation might follow.

[48] In this case, membership does involve access to services including access to accreditation for officials and advice to affiliates, the capacity to enter events conducted by Rowing Victoria, and assistance with the organisation and conduct of regattas. Much of this is provided free of charge although individual members will generally pay seat (regatta entrance) fees and the like. However, the nature of the membership and the services provided and the level of the affiliation fees is not consistent with the notion of these being considered to be commercial or trading in character. The affiliation fees are also directly connected to the membership basis of Rowing Victoria and the associated activities are not carried out for the purpose of revenue raising as contemplated by the authorities.

[49] I do not consider that the activities represented by the affiliation or membership fees are trading activities for present purposes. This finding is consistent with the nature of Rowing Victoria, the context of the sport as outlined earlier, and the nature of services provided as a result of affiliation or membership.

### **Regatta income**

[50] The conduct of the regattas for the member clubs is amongst the “raison d’être” for Rowing Victoria. That is, it is one of the central reasons for the existence of the association and the primary way in which the sport of rowing is facilitated and promoted. It is evident that (non-RV managed) regattas are not conducted as a means of raising revenue for Rowing Victoria and much of the income is to cover costs and/or remitted to the host clubs.



[51] The rowers are not paid for their participation in the regattas, in almost all cases spectators are not charged to attend, and these activities do not have a commercial or trading character.

[52] I do not consider that the activities associated with the regatta income are trading activities for present purposes.

### **Rowing Victoria managed events**

[53] Most of the findings in relation to the regatta income also apply to the managed events. The evidence reveals that the State Championships held at Nagambie every second year, involve spectators paying a nominal admission fee and some other incidental charges may be made.

[54] Whilst I accept that the charging of admission fees is an indicator of commercial activity and that some of the income from these events may underwrite some of the other services of Rowing Victoria to a limited degree, I do not consider that these events have a commercial or trading character. These events are not a business activity carried on with a view to earning revenue.

### **Government grants**

[55] Based upon the limited information before the Commission, the nature of the government grants provided to Rowing Victoria is not in the nature of services purchased by the Governments. That is, unlike the OOHC programs discussed in *Bankstown*, the grants are provided to support the work of the Association and not to have services provided by Rowing Victoria on behalf of the Governments. They would also not appear any of the hallmarks of commercial or business activity often associated with Government funded activities that are considered to be trading activities.<sup>21</sup>

[56] In general terms, this does not represent trading activity in the present context. I have however, as a matter of abundant caution, allowed for the potential inclusion of the Government grants associated with the coaching courses, given that this is a trading activity.

### **Dividends and interest**

[57] In terms of interest on deposits, dividend and share trading activities, these would appear to be a natural consequence of any incorporated association having cash and other investments. Activities in that regard may be considered to be indicative of a financial corporation,<sup>22</sup> depending upon context and degree. Although in this case the level of activity and income is such that they may be insignificant and coincidental for present purposes. I have included this element as a potential trading activity in the context of Rowing Victoria's operations.

[58] The value of this will, by definition, fluctuate from year to year. The previous financial year, this included just over \$51,000 on interest and dividends and a trading loss in shares of just under \$42,000.

### **Coaching courses**

[59] This represents trading activity and amounts to just over \$40,000 income per annum. The courses are conducted for a fee and are in the nature of trading. The amount of that activity actually conducted by Rowing Victoria, and the revenue derived, will be reduced in coming years. However, I have included the full extent of that activity for present purposes.

### **Sponsorships**

[60] There is no indication from the evidence that the particular sponsorship income or activities evident in this case has a commercial or trading nature. The sponsorships are generally given or used to underwrite some of the temporary infrastructure and other costs of events without a business or trading objective. As with the other activities, a broad approach should be adopted to this assessment.<sup>23</sup> However, when considered in context, the sponsorships here are not of a level or nature that would suggest that the activity involves a trade in services, a commercial character or a trading activity.

### **State team fees**

[61] These are entry fees for non-commercial competitions and there is no indication that this activity has a commercial or trading nature for present purposes.

### **Fundraising income**

[62] This primarily involves sales from the Rowing Victoria on-line shop. This represents trading activity for present purposes and involves up to \$5,000 income per annum.

### **Fines and other income**

[63] The fines arise from the enforcement of competition rules and other similar requirements and there is no indication that this income or activities has a commercial or trading nature.

[64] I have also considered the other income items, including that flowing from insurance premiums collected from affiliates and the same findings should be made in this respect.

### **Conclusions on trading corporation**

[65] I turn now to the overall assessment of Rowing Victoria.

[66] I consider that the following activities bear the necessary hallmarks of trading so as to be treated as being trading activities for present purposes:

- Shares, interest and dividends;
- Coaching courses (including the Government grant); and
- Fundraising activities (shop sales).

[67] Income from these activities amounts to approximately \$60,000 per annum, if the net effect of shares, interest and dividends is taken into account. This is in the order of 7% of the total operational income for Rowing Victoria in the previous financial year. Even allowing for year to year fluctuations in investment income, including higher returns and/or positive

investment outcomes, given the apparent level of those investments, this would not significantly change this overall assessment.

[68] In the context of Rowing Victoria, this combined level of trading activities is in my view insubstantial in the sense contemplated by the Federal Court in *UFU v CFA*. Further, Rowing Victoria's trading activities are trivial, insignificant, marginal, minor and incidental when considered as either an absolute or relative amount. I also note that given the context, I would also come to the same conclusion even if some of the "major Rowing Victoria events" involving spectator admission fees and higher levels of sponsorship were included as trading activities. I do not, however, consider their inclusion to be appropriate in the circumstances.

[69] Accordingly, I do not consider that Rowing Victoria is a trading corporation. Given my earlier findings, this also means that it is not a constitutionally-covered PCBU.

#### 4.4 An alternative source of jurisdiction for the Commission

[70] Ms Cowie has contended that this application may fall within the jurisdiction of the Commission as a result of the referral by Victoria of industrial matters to the Commonwealth.

[71] Division 2A of Part 1-3 of the FW Act deals with the application of the FW Act in States that referred matters before 1 July 2009. Victoria is the only state that is subject to this Division. Section 30H provides that a provision of Division 2A:

"...has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth matters mentioned in subsection 30B(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect."

[72] The most recent iteration of Victoria's referral law is the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* (the Victorian Referral Act). Section 4 of the Victorian Referral Act sets out the matters referred to the Commonwealth. Section 4(1)(b) deals with Victoria's referral to the Commonwealth of matters which can be the subject of amendments to the FW Act (which rely upon and apply in consequence of that referral) and these are described as the "referred subject matters".

[73] The coverage of the anti-bullying provisions of the FW Act in that particular context was extensively dealt with by this arm of the Commission in *Shoshana Amzalak*.<sup>24</sup> Without repeating all of that consideration and findings, the following is apposite to this matter.

[74] A significant portion of the FW Act relies upon the definition of "national system employee" and "national system employer" in ss.13 and 14 respectively. In States that have made referrals of certain powers to the Commonwealth,<sup>25</sup> that definition is extended by virtue of ss.30C, 30D, 30E, 30M and 30N to include other parties in the relevant State.

[75] Victoria is a referring State and the relevant extended definition of national system "parties" within the legislation applies in that State. However, these concepts are not relevant to the coverage of the anti-bullying provisions of the FW Act for reasons set out below.

[76] Whether the various provisions of the FW Act apply to those various “parties” depends upon how the coverage of those provisions is expressed within the legislation. This follows because different Parts of the FW Act are specified to apply to the entities specified in those Parts. This includes, in most Parts, reference to national system employees and employers,<sup>26</sup> whereas in other Parts of the FW Act, a different basis for the coverage is stated.

[77] Importantly, the coverage of the anti-bullying provisions in Part 6-4B of the FW Act is not based upon the definition of national system employees and employers, the coverage of the Crown or the referral of powers by most States including Victoria. This is evident from the express terms of the FW Act discussed earlier. Further, in that Part of the FW Act there is no reference to, or reliance upon, the extended definitions of employee and employer that arise from any of the State referrals. I would also note that these definitions, even if applicable, would not appear to include a (non-employee) volunteer, such as Ms Cowie.

[78] As a result, in order for the anti-bullying jurisdiction in Part 6-4B of the FW Act to be engaged, the Commission must find that a worker has been bullied at work within the meaning of s.789FD of the FW Act. This requires that the alleged conduct must take place whilst the applicant worker is at work in a constitutionally-covered business.

## 5. Conclusions

[79] In all of the circumstances I am satisfied that Rowing Victoria is not a trading corporation.

[80] Further, the workplace in which the alleged conduct took place is not conducted by a constitutionally-covered business and this means that there is no basis for the Commission to deal with the application under the anti-bullying provisions in Part 6-4B of the FW Act.

[81] This does not mean that Ms Cowie’s grievances with Rowing Victoria and the Rowing Tribunal concerning her alleged treatment, or the support afforded to race officials more generally within rowing, might not be dealt with in other forums.

[82] However, this application is beyond the Commission’s present jurisdiction and must be dismissed. I so order.

  


COMMISSIONER

*Appearances:*

*K Cowie*, the Applicant, on her own behalf.

*D Proietto* and *L Albiston* of Lander and Rogers, with permission,<sup>27</sup> on behalf of the Rowing Victoria Inc and the persons named.

*Conference details:*

2016.  
Melbourne:  
June 30.

Adelaide and Melbourne (telephone conference):  
May 24;  
June 15;  
July 27;  
September 9.

*Final written submissions on jurisdiction:*

Ms Cowie: 21 October 2016  
Rowing Victoria Inc: 7 October and 2 November 2016

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<sup>1</sup> See the discussion of the concept of a volunteer worker in *Gaylene May McDonald* [2016] FWC 300.

<sup>2</sup> Rowing Victoria submissions at par 48.

<sup>3</sup> Including *Aboriginal Legal Service (WA) Inc v Lawrence (No 2.)* (2008) 252 ALR 136 at par [68].

<sup>4</sup> *Hughes v Western Australian Cricket Association Inc* [1986] FCA 357.

<sup>5</sup> Victoria is not a Territory as defined in s.2B of the *Acts Interpretation Act 1901*, which refers to s.122 of the *Australian Constitution*.

<sup>6</sup> *Australian Constitution* s.52(i).

<sup>7</sup> (2008) 252 ALR 136 at par [68].

<sup>8</sup> (2010) 182 FCR 483 at par [48].

<sup>9</sup> (1991) 27 FCR 310.

<sup>10</sup> *Ibid* at 343.

<sup>11</sup> *Ibid* at 345.

<sup>12</sup> (2010) 182 FCR 483 at par [52].

<sup>13</sup> [2015] FCAFC 1.

<sup>14</sup> *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17. This was not disturbed on appeal by the Full Court.

<sup>15</sup> [1986] FCA 357 at [25].

<sup>16</sup> See *R v Trade Practices Tribunal Ex parte St George County Council* (1974) 130 CLR 533 at 569 and *Re: Ku-ring-gai Co-operative Building Society (No. 12) Ltd* (1978) 36 FLR 134 at 160. However, these authorities must also be considered in light of the more recent decisions of the Federal Court summarised in *Lawrence* and *Bankstown* and others outlined in this decision.

<sup>17</sup> *Adamson v West Perth Football Club (Incorporated)* [1979] FCA 81.

<sup>18</sup> Rule 4 of the Rowing Victoria Inc. Constitution.

<sup>19</sup> *Ibid*, Rule 13 and 14.

<sup>20</sup> Ibid, Rule 38.

<sup>21</sup> See: *Marie Pasalskyj* [2015] FWC 7309 at [57] and [58].

<sup>22</sup> See: *Re Mid Density Development Pty Limited v Rockdale Municipal Council* [1992] FCA 634 at 25.

<sup>23</sup> *Lawrence* at [68].

<sup>24</sup> [2016] FWC 6590.

<sup>25</sup> See the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*.

<sup>26</sup> Including for example the application of the unfair dismissal jurisdiction for national system employees in Part 3-2 of the FW Act.

<sup>27</sup> Permission was given pursuant to s.596 of the FW Act for the purposes of various preliminary and procedural conferences. Rowing Victoria was not externally represented at the conciliation conference convened by the Commission and permission was not required for the lodgement of written submissions and evidence – Rule 12 of the *Fair Work Rules 2013*.