



DECISION

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

Matina Bastakos
(AB2018/336)

COMMISSIONER MCKINNON

MELBOURNE, 18 DECEMBER 2018

Application for an order to stop bullying in relation to local government work – jurisdictional objection – whether the City of Port Phillip is a constitutionally-covered business – whether City of Port Phillip is a trading corporation – whether the City of Port Phillip engages in substantial trading activities – jurisdictional objection dismissed.

Introduction

[1] Marina Bastakos has applied under section 789FC of the *Fair Work Act 2009* (Cth) (the Act) for an order to stop bullying in relation to her work for the City of Port Phillip (the City).

[2] The City denies that any bullying behaviour has occurred. It objects to the application on jurisdictional grounds because it says it is not a trading corporation and thus not a “constitutionally-covered business” for the purposes of section 789FD of the Act.

[3] For the reasons that follow, I find that the City is a trading corporation and a constitutionally-covered business for the purposes of the Act.

The legislation

[4] Section 789FD of the Act provides 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*.”

Consideration

[5] The City is a Victorian local government entity and a body corporate established by an Order of the Governor in Council on 22 June 1994.¹ Its business or undertaking is conducted principally (if not wholly) within Victoria. Having regard to the terms of section 789FD(3) of the Act, the City will only be a constitutionally-covered business if it is constitutional corporation.

[6] A constitutional corporation is one that falls within the ambit of section 51(xx) of the *Commonwealth of Australia Constitution Act* (the Constitution), which relevantly confers power on the Australian Parliament “to make laws... with respect to... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.

Is the City a corporation?

[7] The City is constituted and organised according to the laws of Victoria, and specifically, the *Local Government Act 1989* (Vic) (the LG Act). Section 3 of the LG Act defines ‘corporation’ as follows:

“**corporation** includes—

(a) any body corporate, whether formed or incorporated within or outside the State of Victoria; and * * * * *

¹ Exhibit 1, Statement of Dennis Anthony O’Keefe, Attachment DAO-1

(b) any incorporated association within the meaning of the Associations Incorporation Act 1981—

but does not include a Council or any other body incorporated or constituted by or under this Act or any public statutory corporation constituted by or under any law of the State of Victoria, any other State or Territory of the Commonwealth or the Commonwealth.”

[8] The definition of ‘corporation’ in section 3 of the LG Act purports to exclude a Council (such as the City). However, State Parliaments cannot determine the limits of federal legislative power.² The description given to a body created by statute is not determinative of its character for the purpose of section 51(xx) of the *Constitution*. That is a matter of substance, not form.³

[9] The City is an entity established under the LG Act to perform a range of functions in the interests of its community and municipal district.⁴ It is specifically empowered to raise revenue⁵ and to do ‘all things necessary or convenient to be done in connection with the achievement of its objectives and the performance of its functions.’⁶ It can invest its money as well as borrow.⁷ It has the capacity to contract and to sue.⁸ It may own, possess and deal with real or personal property.⁹ It has entrepreneurial powers.¹⁰ It is a body corporate with “perpetual succession”.¹¹ In my view, the City has “the full character of a corporation”.¹² It is a corporation.

What is a trading corporation?

[10] A corporation will be a trading corporation if it has the capacity to trade and undertakes sufficient trading for that to be considered a substantial, and not merely peripheral activity of the corporation.¹³ This is the so called ‘current activities test’.

[11] Principles relevant to the characterisation of trading corporations were usefully set out in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]*¹⁴ and recently summarized by a Full Bench of this Commission in the context of whether an entity

² *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11

³ [2015] HCA 11

⁴ *Local Government Act 1989* (Vic), s.3E

⁵ *Ibid*, s.3E

⁶ *Ibid*, s.3F

⁷ *Ibid*, ss.143,144

⁸ *Ibid*, including ss. 5, 186,187

⁹ *Ibid*, pt.9

¹⁰ *Ibid*, s.193

¹¹ *Ibid*, s.5

¹² [2015] HCA 11

¹³ *R v the Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)* [1979] HCA 6; *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254; *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497

¹⁴ [2008] WASCA 254

established under statute and for public purposes was a trading corporation.¹⁵ As the Federal Court stated in *Bankstown Handicapped Children's Centre v Hillman*¹⁶, there is no 'bright line' that establishes the proportion of revenue that must come from a corporation's trading activities to warrant characterisation as 'substantial'. It is a matter of fact and degree, requiring an assessment both of the absolute and relative volume of the trading activities of the particular entity.¹⁷

[12] The City points to earlier observations of a Full Bench of the former Australian Industrial Relations Commission that a 'typical' local council would probably not be a constitutional trading corporation, and clearly there are a number of decisions where that observation has been made out.¹⁸ Other decisions have led to the opposite result, including by application of the current activities test described above.¹⁹ The point is that there is no general answer to the question of whether a Council is a trading corporation. It remains a question of fact and degree, to be answered in light of the particular circumstances of the case.

Does the City trade?

[13] The City's total income for the 2017-18 financial year was \$223,624,000.²⁰ It earned income from a range of sources, including rates and charges, user fees, grants, contributions and other income. The City's largest source of income was rates and charges, comprising 54.16% of total revenue. Almost 16% of revenue was derived from user fees, while 'other income' accounted for 7.8%. Federal and state government funding grants represented approximately 7% of total revenue.

[14] 'User fees' include fees and charges related to the City's provision of aged care and health services, leisure centre and recreation fees, childcare and children's programs and services, animal and local law fines and registrations, building permits, waste management services, debt collection fees, election fines, library fees and fines and tow away charges. In 2018, it included parking fees from the Metro Tunnel and other municipal parking spaces, as well as stallholder participation in the South Melbourne Market's Night Market and Mussel Festival.²¹

[15] 'Other income' includes donations, insurance recoveries and revenue derived from craft markets, festivals, local laws, right of way sales (where a former laneway is no longer required for access to surrounding properties), as well as transport and miscellaneous sources. In 2018, it included an adjustment for the market value of subsidised rent to community groups.²²

¹⁵ *Roads and Maritime Services v Leeman* [2018] FWCFCB 5772

¹⁶ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail & Anor* (2010) 182 FCR 483, [52]

¹⁷ *Leeman* [2018] FWC 3584

¹⁸ *Award Modernisation* [2009] AIRCFB 865 at [145]; *Cooper; Bagster* [2017] FWC 5974; *Boyd and Theedom v Shire of Yalgoo* [2016] FWC 2190

¹⁹ *Burrows v Shire of Esperance* Print Q8680, 16 November 1998

²⁰ Exhibit 1, Attachment DAO-1 "City of Port Phillip Annual Financial Report For The Year Ended 30 June 2018"

²¹ Exhibit 1, Attachment DAO-1

²² *Ibid*

[16] Among the particular revenue raising activities of the City are the following:

Activity	Amount (\$)	% of total income
Customer and corporate services	2,598,150 ²³	1.16
Children's services	11,448,364 ²⁴	5.12
Event services	593,957 ²⁵	0.27
Family services	321,668 ²⁶	0.14
Financial services	1,898,884 ²⁷	0.85
Festivals	898,247 ²⁸	0.40
Health services	896,389 ²⁹	0.40
Infrastructure maintenance services	420,071 ³⁰	0.19
Meetings and events	98,570 ³¹	0.41
Parking fees	17,090,000 ³²	7.64
Property rental	11,092,000 ³³	4.96
Albert Park Hockey and Tennis Centre	347,000 ³⁴	0.16
Shares in Regional Kitchen Group Pty Ltd	230,000 ³⁵	0.10
South Melbourne Market	7,071,915 ³⁶	3.16
Waste management services	873,003 ³⁷	0.39
Youth and middle years services	78,449 ³⁸	0.04
TOTAL	55,956,667	25.39

²³ Exhibit 1, Attachment DAO-4

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Exhibit 1, Attachment DAO-1 at p.16

³⁴ Exhibit 1, Attachment DAO-1

³⁵ Ibid

³⁶ Ibid

³⁷ Exhibit 1, Attachment DAO-4

³⁸ Exhibit 1, Attachment DAO-4

[17] The activities described in this table include property lease and rental arrangements, festivals and events, thirteen childcare centres (of which the City manages five centres directly and supports eight through grants and subsidised rent), user parking fees (as distinct from parking fines) as well as provision of a range of services and certain separate and specified business activities.³⁹ In each case I consider that the activities include trading activities, because they represent a revenue stream for the City arising from the exchange of goods and/or services.⁴⁰

[18] The childcare centres are businesses, just as they would be if they were operated by private providers. Through its childcare centres, the City offers, or makes available, childcare services to parents and carers in the local community. According to the City, childcare fees are the predominant source of funding for those centres.⁴¹

[19] Parking services are provided by the City which makes available, and maintains, facilities on land owned or managed by the City, in return for the payment of parking fees. These are services authorised by Schedule 11 of the LG Act, which empowers the City to fix, rescind or vary the conditions of any parking use and fees attached to it. In this respect, the City is similar to a commercial parking business. The commercialisation of public assets in this way is, in my view, trading activity.

[20] Waste management services are another example of services provided by the City to its constituents for a fee. They include cleaning services, collection and disposal of waste, recycling and graffiti management. The fact that it relates to services that might be considered ‘fundamental’ to the functions of local government, or that it is operated on a cost-recovery as opposed to profit making basis, does not prevent its characterisation as trading activity. It is a service that can be performed either by the City or a private provider. Indeed, the City contracts out much of its waste management function to third party providers.⁴² In my view the provision of waste management services is trading activity, whether it is undertaken directly by the City or by the City contracting with third parties for the delivery of that service.⁴³

[21] Building and infrastructure maintenance as well as property rental and lease arrangements are prima facie commercial in nature. While there is limited evidence before me about the nature of those activities, the City’s financial records speak to ‘assets we manage’ and income derived from both ‘property rental’ and ‘other rent’.⁴⁴ Operating leases and licenses are described as property owned or controlled by the City and used for commercial purposes under long and short term leases.⁴⁵ The City has varying categories of land under management, including that which it classifies as ‘commercial’, as distinct from ‘Council office land’. The City values and depreciates its property assets over time in accordance with relevant accounting standards.

³⁹ Exhibit 1

⁴⁰ *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; Exhibit 1

⁴¹ Exhibit 1

⁴² Exhibit 1

⁴³ Print Q8680, 16 November 1998

⁴⁴ Print Q8680, 16 November 1998; *Lim v Trade and Investment Queensland* [2016] FWCFB 6615

⁴⁵ Exhibit 1, Attachment DAO-1

[22] The South Melbourne Market is what the City considers its most ‘commercial’ service. The Market is run and operated by the City through a ‘section 86 Committee’ established under the LG Act. Its main revenue stream is from stallholder leases, from which it derives market-competitive rents and license fees.⁴⁶ As the name suggests, the Market is a trading activity. So too is the running of separate festivals and events.

[23] The Albert Park Hockey and Tennis Centre is a joint venture with Wesley College, subject to a tenancy from Parks Victoria. Its purpose is to provide, manage and maintain the Centre for use by sporting clubs, schools and local residents. The City derives a 50% share of any profit or loss made by the joint venture.⁴⁷ In my view, the Centre is a sporting business in which the City is a substantial shareholder. Its participation in the Centre is trading activity.

[24] As a purchaser of services, the City has contracts for the provision of building maintenance, garbage collection and recycling, community services, operational services, consultancies, computers and technology, open space management and cleaning contracts. The value of these contracts is \$37,145,000, not including the value of capital contracts related to buildings, parks, roads, open spaces and streetscapes (a total of \$9,199,000).⁴⁸

[25] In 2018, the City achieved a net surplus position of \$7,170,000,⁴⁹ roughly equivalent to the income it derived from operating the South Melbourne Market. On that analysis alone, the qualitative significance of the South Melbourne Market to the City is clear. The same can be said for a number of other revenue streams, such as its childcare services, parking services or rental arrangements. As standalone propositions, each have a material bearing on the financial position of the City. Taken together, they comprise a substantial proportion of its total revenue.

[26] While the City may not intend to operate on a ‘profit making basis’, its own record show that it has done so at least for the last two financial years. There is a reasonable basis to conclude that with sound financial management and an eye to its obligations under section 136 of the LG Act, it will continue to do so, although in the end whether or not it ultimately turns a profit is not decisive. It is also a distraction to seek to separate out from what might otherwise be characterised as ‘trading activities’ those which are not profitable. The mere fact that the City chooses to provide certain services on a cost-recovery basis, or to undertake activities that may not prove to be financially viable, does not deprive those services or activities of their character as trading activities.

What else does the City do?

[27] The City was established to operate for the benefit of its local community and municipal district, and has a range of powers and functions, many of which are regulatory in nature.

[28] The City is responsible for providing leadership for the good governance of its district and local community. To that end, it consults with, and makes decisions for, the community.

⁴⁶ Exhibit 1

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

It undertakes strategic and land use planning and provides and maintains community infrastructure. It makes and enforces local laws. It has responsibilities in relation to local elections and supports elected members of the Council in the performance of their functions. It administers rates and charges for rateable land and makes provision for transport plans and services. It enforces parking regulations and imposes and receives statutory fees and fines under local laws. It administers federal and state capital and operating grants, such as maternal and child health programs and ‘black spot’ road projects to improve road safety. It is an employer of up to 900 employees, some of who are likely to be engaged in trading activities and some of who may not.

[29] The City performs its regulatory functions in addition to, and in conjunction with, its trading activities. It does so in the context of its capacity to engage in trade and to undertake entrepreneurial activities with the aim of raising revenue.⁵⁰

Conclusion

[30] The City describes itself as “a multi-faceted entity providing a wide range of community-based, social and welfare services delivered within the statutory framework of local government”.⁵¹ As part of that overall context, the City trades in services and in my view it does so in a way that is not merely peripheral to its broader activities or functions. It is not the point that it is a local government entity, or that some of its activities may be subject to Ministerial direction, or that its functions are predominantly to be exercised for the public good.

[31] The City engages in trading activity for the benefit of its community, providing services to that community but also to consumers at large who engage with the City in a multitude of ways, including as visitors, customers and tenants. While trading may not be its predominant activity, it is a significant one. On my assessment, and notwithstanding the limited evidence before me, the value of its trading activities is almost \$56 million per year, or more than a quarter of total revenue. That is an amount that is not minimal, trivial or insignificant, either in an absolute or relative sense.⁵²

[32] The City has the capacity to trade under the LG Act and it undertakes sufficient trading for that activity to be considered a substantial, and not merely peripheral activity of the City.⁵³ The City is a trading corporation and a constitutionally-covered business for the purpose of s.789FD of the Act.

⁵⁰ *Local Government Act 1989* (Vic), pts 1A, 9

⁵¹ Exhibit 1

⁵² *United Firefighters’ Union of Australia v Country Fire Authority* (2014) 218 FCR 210, [102]

⁵³ *R v the Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)* [1979] HCA 6; *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254; *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497

[33] The jurisdictional objection is dismissed.

[34] Directions will issue separately for the further programming of the matter.



COMMISSIONER

Appearances:

MD Wyles QC and J Tierney of Counsel for the Applicant

N Green QC for the City of Port Phillip

M Minucci of Counsel for the Persons Named in the application

Hearing details:

2018.

Melbourne:

November 19.

Printed by authority of the Commonwealth Government Printer

<PR703225>