

THE AUSTRALIAN BEAUTY TRADE SUPPLIERS LIMITED v
CONFERENCE AND EXHIBITION ORGANISERS PTY LIMITED

General Division: Morling, Wilcox and Hill JJ

New South Wales District Registry

26 February, 18 April 1991

Trade Practices — Trading corporation — Whether a trade association was a “trading corporation” — Annual trade exhibition — Income from exhibition — Trading activities of members — Trade Practices Act 1974 (Cth), s 45.

The appellant was a company limited by guarantee, whose members were suppliers to the trade referred to as the beauty industry. The appellant did not itself engage in any such business but acted as a monitor in respect of the adherence by its members to its rules. This function was intended to ensure that the members acted in what was perceived to be their common interests. The main activity of the appellant was the organisation, annually, of a trade exhibition at which members were required to exhibit. The appellant did not directly organise its trade exhibition but engaged a professional conference organiser to do this. Evidence showed that the organiser did most of the work involved in running the exhibition, incurring contractual obligations in connection therewith, allocating space to members in the exhibition building, arranging for advertising and promotion, collecting rental payments from exhibitors and entrance fees from the public and attending to all expenditure. However there was a close liaison between the appellant and the organiser, the latter attending meetings of the appellant and its committee and regarding herself as being bound by decisions taken at those meetings. The appellant received from the organiser, at the conclusion of each exhibition, an amount of money which was equivalent to approximately 10 per cent of the net proceeds of the exhibition. In the financial records of the appellant these payments were treated as income and described as “members’ promotional levies”. They constituted the greater part of the moneys received by the appellant and were held at first instance not to be characterised as gifts as contended by the appellant.

The conflict between the parties arose in the context of a trade show organised on behalf of another trade association in the same industry by the respondent company. The question arose whether members of the appellant could exhibit at this show. This in turn depended upon whether certain of the appellant’s rules operated so as to prevent its members so exhibiting. The question before the court was whether the appellant was a trading corporation formed within the limits of Australia. If it was, some of the rules adopted as a code of ethics for its members were exclusionary within the meaning of s 45 of the *Trade Practices Act 1974* (Cth) and were therefore unenforceable.

Held: The appellant could properly be viewed as a corporation which existed solely because of the significant trading activities of its members and for the purpose of assisting, monitoring and regulating those activities and entering into arrangements on behalf of its members for the purpose of advancing their trade. In the process of performing the latter function it entered into a commercial arrangement which produced the bulk of its income. An overview of all its activities led to the conclusion that it was a trading corporation.

R v Judges of Federal Court of Australia; Ex parte Western Australian Football League (Inc) (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, applied.

APPEAL

I D Faulkner, for the appellant.

R W Cameron, for the respondent.

Cur adv vult

18 April 1991

THE COURT. The only question falling to be decided in this appeal is whether the appellant is a trading corporation formed within the limits of Australia. If it is, it is common ground between the parties that some of the rules which the appellant has adopted as a code of ethics for its members are exclusionary within the meaning of that word as used in s 45 of the *Trade Practices Act 1974* (Cth) and are therefore unenforceable. A trading corporation is defined in the Act as meaning "A trading corporation within the meaning of paragraph 51(xx) of the Constitution".

The appellant is a company limited by guarantee. It has about 37 members each of whom pays an annual membership fee of \$100. Those members are all suppliers to the trade referred to as the beauty industry. They are wholesalers to individuals, partnerships and companies who conduct businesses such as beauty salons and retail to the public what are commonly described as beauty products. The appellant, however, does not itself engage in any such business. It acts as a monitor in respect of the adherence by its members to its rules. This function is intended to ensure that the members act in what is perceived to be their common interests. The main activity of the appellant is the organisation, annually, of a trade exhibition at which members are required to exhibit and at which non-members may exhibit, but on less favourable terms than those available to members. The manner in which the exhibition is organised loomed large in the argument, both at first instance and before us. We will return to that subject.

Until 1990 the appellant's exhibition was the only such event in Australia. However, in that year another trade association operating in the same industry proposed to organise a trade show in Melbourne. It retained the respondent company to organise the show for it. The question arose whether members of the appellant could exhibit at this show. This, in turn, depended upon whether certain of the appellant's rules operated so as to prevent its members so exhibiting. By the time the proceedings at first instance came on for hearing, the question of exhibition at the Melbourne show was no longer significant since events had overtaken it. However, as the respondent intended to organise similar shows in the future it sought declaratory relief. This was granted by the trial judge, Foster J, who made appropriate declarations. From his decision this appeal is brought.

The appellant has never directly organised its trade exhibition. It has always engaged a professional conference organiser to do this. In recent years the organiser has been Ms Joan Cummings. The evidence shows that Ms Cummings does most of the work involved in running the exhibition and incurs contractual obligations in connection therewith. She allocates space to

members in the exhibition building, arranges for advertising and promotion and collects rental payments from the exhibitors and entrance fees from the public. She also attends to all expenditure. All contracts made in relation to the exhibition are made with her and not with the appellant. However, there is close liaison between the appellant and Ms Cummings as to the conduct of the exhibition. As is apparent from the numerous minutes which are in evidence, it has been Ms Cummings' practice to attend meetings of the appellant and of its committee at which arrangements for the exhibition have been discussed in some detail. Upon some occasions, decisions have been taken by the meeting, in relation to a future exhibition, which were contrary to the course advocated by Ms Cummings. But she has apparently regarded herself as bound by those decisions.

Notwithstanding the significant role of the organiser, it is clear that the appellant has always regarded the annual Australian Beauty Trade Suppliers exhibition as its own exhibition. Mr Robards, the secretary of the appellant, gave evidence that "the basic concept of our association [was] that we would employ a professional trade show organiser to run it for us". Members of the appellant are required to observe certain rules, one of which is in the following terms:

"8. . . .

Members shall abide by the Rules of the ABTS Trade Exhibition as set out by the ABTS Trade Exhibition Organiser, while acknowledging that any Contract or Agreement entered into with the Organiser is conditional upon approval by the current ABTS Committee who shall have the right to negate any such Contract or Agreement for any irregularity or infraction by the Member of the herein-contained. Members must acknowledge that the Trade Exhibition Organiser is contracted by the ABTS and that the Organiser is at all times subordinate to the current ABTS Committee in all matters relating to the ABTS Trade Exhibition and ABTS Membership."

The appellant has received from Ms Cummings (and from her predecessor in former years), at the conclusion of each exhibition, an amount of money which is equivalent to about 10 per cent of the net proceeds of the exhibition. In the financial records of the appellant these payments are treated as income and described as "members' promotional levies". They constitute the greater part of the moneys received by the appellant. For instance, for the year ended 30 June 1989 the appellant's total income was \$19,662 of which \$5,400 comprised members' subscriptions, \$1,542 interest received and the balance members' promotional levies.

It was submitted to Foster J that the members' promotional levies received by the appellant were no more than adventitious gifts made to it by the organiser of the exhibition to mark the fact that the exhibition had been successful. Foster J thought it was incorrect to characterise the payments as gifts. He considered that they were payments made to the appellant in consideration of its granting to the organiser of the exhibition the right or privilege of conducting the exhibition with a view to the making of a profit. We agree with his Honour's view. It is to be noted that the minutes of a meeting of the committee of the appellant held in July 1988 refer to the money expected to be received from the organiser of a past exhibition as an amount "owing" to the appellant and indicate that "some difficulty was

experienced in receiving acknowledgement ... of the debt ...". This minute is inconsistent with the payments being in the nature of gifts.

In our opinion Foster J was correct in deciding that the appellant was a trading corporation within the meaning of the Constitution and therefore of the *Trade Practices Act*. In *R v Judges of Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* (1979) 143 CLR 190 (*Adamson's case*) Barwick CJ said (at 208-209):

"The only sure guide to the nature of the company is a purview of its current activities, a judgment as to its nature being made after an overview of all those activities.

I remain of the firm conviction that for constitutional purposes a corporation formed within the limits of Australia will satisfy the description 'trading corporation' if trading is a substantial corporate activity. ... [O]nce it is found that trading is a substantial and not a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.

...

Trade for constitutional purposes cannot be confined to dealing in goods or commodities. Its full parameters may be difficult of definition. But the commercial nature of an activity is an element in deciding whether the action is in trade or trading."

In the same case Mason J (as he then was), speaking of the nature of a trading corporation, said (at 233):

"Essentially it is a description or label given to a corporation when its trading activities form a significantly sufficient proportion of its overall activities as to merit its description as a trading corporation."

His Honour made it plain (at 235) that the concept of trading was not limited to buying and selling at a profit, but extends to business activities carried on with a view to earning revenue.

Adamson's case was considered in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282. Mason, Murphy and Deane JJ, after referring to the rejection by the majority of the court in *Adamson* of the argument (which found favour in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 562) that the purpose for which a corporation is formed is the sole or principal criterion of its character as a trading corporation, said (at 304):

"Secondly, the judgments of the majority in *Adamson* make it clear that, in having regard to the activities of a corporation for the purpose of ascertaining its trading character, the court looks beyond its 'predominant and characteristic activity' (cf at 213, per Gibbs J). Barwick CJ (at 208) spoke of making a judgment 'after an overview' of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that 'trading is a substantial and not a merely peripheral activity'. Mason J said that it 'is very much a question of fact and degree' (at 234), having earlier stated (at 233) that the expression is essentially: '... a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.'

Murphy J said (at 239): 'As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation.' Indeed, it was essential to the majority's approach and to its rejection of *St George* that a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, eg as a sporting club, may nevertheless be a trading corporation. The point is that the corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorising the corporation as a trading corporation when it engages in the activities.

Indeed, we could go on to say that there is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorised as a trading corporation if other more extensive non-trading activities properly warrant its being also categorised as a corporation of some other type."

In our opinion the involvement of the appellant in the annual exhibition is a trading activity. The exhibition itself is a significant commercial enterprise. The appellant instigates the exhibition, appoints an organiser and oversees her arrangements. From time to time it directs her as to the course she must take. By the terms of its rules, the appellant compels its members to participate in the exhibition and it takes a share of its financial return. The appellant engages in the exhibition for the ultimate purpose of promoting the sale of its members' products. The exhibition generates the greater part of the appellant's income. The exhibition is a substantial and not a merely peripheral activity of the appellant.

It is true that, comparatively speaking, the appellant cannot be described as a large corporation. But that is not to the point. Such activities as it does have are, to a significant degree, business activities carried on with the dual purpose of earning revenue for itself per medium of the annual exhibition and of promoting the sale of its members' products through the exhibition.

Foster J was of the view that the actual commercial venture of the running of the exhibition could not be regarded as a trading activity of the appellant. He thought that Ms Cummings was an independent contractor in relation to the exhibition and could not be said to conduct it as agent for the appellant or as a partner in a joint venture with it. We do not think that it is necessary to identify with any precision the nature of the legal relationships into which the appellant entered to effectuate its purpose of ensuring that the exhibition was held annually. That purpose was, in our opinion, a trading purpose.

As Foster J said, the appellant can properly be viewed as a corporation which exists solely because of the significant trading activities of its members and for the purpose of assisting, monitoring and regulating those activities and entering into arrangements on behalf of its members for the purpose of advancing their trade. In the process of performing this latter function it enters into a commercial arrangement which produces for it the bulk of its

income. An overview of all its activities leads us to conclude that it is a trading corporation. Accordingly the appeal should be dismissed with costs.

Orders accordingly

Solicitors for the appellant: *Hunt & Hunt*.

Solicitors for the respondent: *Lee, Hourigan & Brooks*.

LEANNE THOMAS