

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Garvey v Institute of General Practice Education Incorporated

[2007] NSWIRComm 159

Wright J, President, Walton J, Vice-President, Boland J

30 March, 28 June 2007

Termination of Employment — Unfair dismissal — Victimisation — Jurisdictional challenge — Constitutional corporation — Characterisation as “trading corporation” — Identification of “trading activities” — Evidence of revenue from trading activity — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 16(1) — Constitution, s 51(xx) — Associations Incorporations Act 1984 (NSW).

Victimisation — Application for relief — Jurisdictional challenge — Constitutional corporation — Characterisation as “trading corporation” — Identification of “trading activities” — Evidence of revenue from trading activity — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 16(1) — Constitution, s 51(xx) — Associations Incorporations Act 1984 (NSW).

Words and Phrases — “Trading corporation”.

Words and Phrases — “Trading activities”.

The applicant commenced proceedings seeking relief from victimisation and unfair dismissal arising from the termination of her employment with the respondent. The respondent subsequently filed a notice of motion, which raised a jurisdictional challenge based on the contention that as the respondent was a constitutional corporation, s 16(1) of the *Workplace Relations Act 1996 [Post Work Choices]* (Cth) (the WR Act) operated to remove the Commission’s jurisdiction in respect of the respondent. During the hearing, it was accepted by the parties that if the respondent was able to satisfy the Commission that it was a constitutional corporation for the purposes of s 51(xx) of the *Constitution*, the Commission would not have power to hear the applicant’s applications by operation of s 16(1) of the WR Act.

As the matter developed, it was accepted by the parties that the only issue in dispute was whether the respondent was a “trading corporation” and that this issue gave rise to two questions: (a) whether, as a matter of fact, the respondent engaged in trading activities; and (b) whether, as a matter of law, those trading activities, if any, were such that the respondent could properly be characterised as a trading corporation. The only trading activity ultimately pressed by the respondent was

teaching services provided to the University of New South Wales, deriving revenue of \$760.98 for the year ended 30 June 2006, being the financial year immediately prior to the relevant date of the applicant's dismissal.

Held: (1) The respondent's provision of teaching services to the University of New South Wales could properly be described as trading activities. However, in light of the relevant authorities and legal principles, the respondent could not properly be characterised as a trading corporation on the basis of its single trading activity.

(2) In reaching this conclusion, the Full Bench compared the proportion of revenue arising from its sole trading activity to the respondent's total revenue. Based on this comparison, the Full Bench held that it could not be said such proportion was substantial or even significant. In the context of the total revenue of the respondent, it constituted a very small percentage amount; it was also a small amount in itself. On this basis, therefore, the respondent was not a trading corporation.

E v Australian Red Cross Society (1991) 27 FCR 310, distinguished.

Cases Cited

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169; 1 IR 397.

Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1.

E v Australian Red Cross Society (1991) 27 FCR 310.

Fencott v Muller (1983) 152 CLR 570.

Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10.

Ku-ring-gai Co-operative Building Society (No 12) Ltd, Re (1978) 36 FLR 134.

New South Wales v Commonwealth (2006) 81 ALJR 34; 156 IR 1.

Orion Pet Products v Royal Society for Prevention of Cruelty to Animals (Vic) Inc (2002) 120 FCR 191.

Quickenden v O'Connor (2001) 109 FCR 243.

R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190.

State Superannuation Board (Vic) v Trade Practices Commission (1982) 150 CLR 282.

Williams v Hursey (1959) 103 CLR 30.

Notice of motion

TJ Dixon, for the applicant.

A Moses, for the respondent.

Cur adv vult

The Commission

1 The applicant, Kirrilly Garvey, commenced proceedings on 22 September 2006 seeking relief from victimisation and unfair dismissal arising from the termination of her employment with the respondent, The Institute of General Practice Education Incorporated, on 1 September 2006.

2 During a conciliation conference held on 14 November 2006 by Grayson DP, the respondent raised a jurisdictional challenge and in response his Honour issued directions regarding the filing of evidence and submissions on that issue.

3 On 15 February 2007, the respondent filed a notice of motion in respect of its jurisdictional challenge seeking orders that:

1. The Applicant's Section 84 Application for Relief against the Respondent dated 22 September 2006 be dismissed.
2. The Applicant's Section 213 Application for Relief against the Respondent dated 22 September 2006 be dismissed.
3. The Applicant pay the Respondent's costs of this motion as agreed or assessed.
4. Any other orders that the Court deems fit.

4 In short, the jurisdictional challenge was based on the contention that as the respondent was a constitutional corporation, s 16(1) of the *Workplace Relations Act 1996* (Cth) (WR Act) operated to remove the Commission's jurisdiction in respect of the respondent. During the hearing, it was accepted by the parties that if the respondent was able to satisfy the Commission that it was a constitutional corporation for the purposes of s 51(xx) of the Commonwealth *Constitution*, the Commission would not have power to hear the applicant's applications by operation of s 16(1).

The hearing of the motion

5 The respondent's jurisdictional challenge was referred to the Full Bench and heard on 30 March 2007 when the following evidence was relied on:

- (a) affidavits of Dr George Kostalas dated 24 November 2006 and 29 March 2007; and
- (b) affidavit of Ms Kirrilly Garvey dated 14 December 2006.

6 Submissions were also received from both parties. In addition, the respondent filed supplementary submissions following the hearing on 30 March 2007 at the request of the Full Bench.

7 As the matter developed, it was accepted by the parties that the only issue in dispute was whether the respondent was a "trading corporation" and that this issue gave rise to two questions:

- (a) whether, as a matter of fact, the respondent engaged in trading activities; and
- (b) whether, as a matter of law, those trading activities, if any, were such that the respondent could properly be characterised as a trading corporation.

Factual background

8 The following facts relating to the respondent were not in dispute during the hearing:

- (a) the respondent, the Institute of General Practice Education Incorporated (referred to as the respondent or "IGPE"), was incorporated under the *Associations Incorporation Act 1984* (NSW) on 20 June 1994 (when it was then known as South West Sydney Institute for General Practice Education Incorporated);
- (b) by virtue of being incorporated under the *Associations Incorporation Act*, it is subject to the provisions of that Act which relevantly include:

4 Association trading or securing pecuniary gain

For the purposes of this Act, an association shall not be deemed to trade or secure pecuniary gain for its members or to be formed or carried

on for the object of trading or securing pecuniary gain for its members by reason only that:

- (a) the association itself makes a pecuniary gain, unless that gain or any part of it is divided among or received by the members of the association or any of them,
- (b) the association buys or sells or deals in or provides goods or services where those transactions are ancillary to the principal object of the association and, where the transactions are with the public, the transactions:
 - (i) are not substantial in number or value in relation to the other activities of the association, or
 - (ii) consist of admission fees to displays, exhibitions, contests, sporting fixtures or other occasions organised for the promotion of the objects of the association,
- (c) the association is established for the protection of a trade, business, industry or calling in which the members of the association are engaged or interested, and the association itself does not engage or take part in, or in any part or branch of, any such trade, business, industry or calling,
- (d) members of the association derive pecuniary gain through enjoyment of facilities or services provided by the association for social, recreational, educational or other like purposes,
- (e) any member of the association derives pecuniary gain from the association by way of bona fide payment of remuneration,
- (f) any member of the association derives from it pecuniary gain to which the member would be entitled if the member were not a member of the association,
- (g) members of the association compete for trophies or prizes in contests directly related to the objects of the association, or
- (h) the association:
 - (i) engages in trade which is, or
 - (ii) secures for its members pecuniary gain which is,
 of a class prescribed for the purposes of this section.

66 Trading etc by incorporated association

- (1) An incorporated association shall not:
 - (a) trade,
 - (b) secure pecuniary gain for its members, or
 - (c) as trustee, trade or secure pecuniary gain for members of the incorporated association.

Maximum penalty: 5 penalty units.

- (2) Where an incorporated association contravenes subsection (1), any members and officers of the association who by reason of the operation of section 70 are deemed to have contravened that subsection also are jointly and severally liable to any creditor of the association for all debts and liabilities incurred by the association in or in consequence of the trading or the securing of pecuniary gain for members of the association.
- (3) The contravention by an incorporated association of subsection (1) does not affect the validity of any transaction.

(c) regulation 10 of the Regulation to the *Associations Incorporation Act* provides:

- 10 Charities taken not to infringe the prohibition against trading trade engaged in for a charitable purpose within the meaning of the *Charitable Fundraising Act 1991*:
- (a) by an incorporated association (whether or not holding an authority under that Act); or
 - (b) by a body or organisation to which (by virtue of Section 7 of that Act) apart from Section 48, does not apply, is prescribed for the purposes of section 4 of the *Associations Incorporations Act 1984*.
- (d) the respondent has a constitution, which inter alia, includes the following provisions:

2 Objects

The (relevant) objects of the Association are:

- 2.1 To promote, assist, deliver general practice and primary care education at all levels of undergraduate, post graduate, vocational and non vocational training.
 - 2.2 To encourage, carry out, collaborate or assist in research into all facets of general practice and primary care (including general practice education) as it is able.
 - 2.3 To co-operate, collaborate with other organisations concerned with general practice education or research including where appropriate entering into joint ventures.
 - ...
 - 18.2 The funds of the Association shall be derived from the fees of members, donations, grants and such other sources approved by the Association.
 - 18.3 The assets and income of the Association must be applied solely in furtherance of its objects and no portion may be distributed directly or indirectly to its members or delegates except as bona-fide compensation for services rendered or expenses incurred on behalf of the Association. Members of the Association may provide services to the Association on a fee for service basis.
- (e) the respondent is recognised by the Australian Taxation Office as a Tax Concession Charity on the basis that it is a Health Promotion Charity;
- (f) the principal source of funding for the respondent is by way of a grant from the Federal Government pursuant to the terms of an agreement between General Practice Education and Training Limited (referred to in the agreement as the Purchaser) and the respondent (referred to in the agreement as the Provider) (the Agreement). Relevantly, the Agreement includes the following provisions:
- 9.4 The Provider must use the Funds only for the provision of the Program.
 - 9.6 The Provider must not charge Registrars for providing the Program or for Agreement Material. The Provider must ensure that subcontractors to the Provider do not charge Registrars for education or training or for Agreement Material.
 - 11.3 The bank account is not to contain any monies other than the Funds and interest earned on the Funds.
 - 11.4 The Provider must use and deal with any interest earned on the Funds as if that money earned were part of the Funds.

19.4 On termination of this Agreement, or for the duration of any suspension of dealings with the Funds, the Provider must hold the Funds in utmost good faith for use only in accordance with the directions of the Purchaser and will cease all other dealings with the Funds.

20.1 If:

(a) on the expiry of the Program Period, or on any earlier termination of this Agreement, any Funds:

(i) remain unspent or uncommitted;

...

the Purchaser may by written notice to the Provider require the Provider to repay that part of the Funds, and the Provider must repay to the Purchaser the amount set out in the notice, within 28 days of receipt of the notice.

25 Compliance with laws

The Provider must, in carrying out this Agreement, comply with the provisions of any relevant statutes,

(g) the following definitions from clause 1 of the Agreement are also relevant:

“Agreement Material” means material which the Provider owns, or has a licence to use; brought into existence for the purpose of the Program using the Funds, including course materials in whatever form.

“Funds” means the amount payable by the Purchaser or part thereof as specified in the Schedule.

“Program” means the program described in the Schedule.

“Registrars” means medical practitioners selected by the Purchaser undertaking formal training through the Australian General Practice Training Program, leading ultimately to their recognition as general practitioners.

Identification of the respondent’s “trading activities”

9 The major factual enquiry in the present proceedings involved identifying the respondent’s “trading activities”. It is necessary to examine the submissions of the parties, particularly those of the respondent, sequentially in order to crystallise the identification of those activities. This process of identification occurred by reference to the revenue said to derive from the respondent’s “trading activities”.

10 At the outset, we observe that the respondent’s motion required that the respondent show that it engaged in “trading activity” as at the relevant date, being 1 September 2006 — the date of the applicant’s dismissal. The respondent, however, adduced historical data only from which we could extrapolate as to the respondent’s trading activity at the relevant date. Putting to one side the unsatisfactory nature of this situation, we turn to consider the parties’ evidence and submissions.

11 In his first affidavit of 24 November 2006, Mr George Kostalas, the chief executive officer of the respondent, attested to the activities of the respondent that generated revenues. Mr Kostalas attested that since 2001, the primary source of revenue for the respondent had been Federal Government funding provided pursuant to the Agreement. Further, the respondent had earned the following revenue (at para 35):

- (a) teaching engagements at universities by staff members resulting in annual revenues of approximately \$7,000;
- (b) sales of software developed by the respondent resulting in revenues of approximately \$5,000;
- (c) sales of training materials developed by the respondent resulting in revenues of approximately \$2,000;
- (d) membership fees resulting in annual revenues of up to \$180;
- (e) interest on the funds received from the Federal Government resulting in annual revenues of approximately \$60,000; and
- (f) in 2003, the Federal Government provided the respondent with a payment of \$70,000 by way of an incentive bonus as a result of the efficiency relating to the prior judgment period and in respect of which there were no conditions attached to the funds and the respondent was not required to account for the funds.

12 Mr Kostalas also attested:

56 Although currently the primary source of funding for the IGPE is the Federal Government grant provided for the education and training of general practitioner registrars, the IGPE earns income from activities associated with and related to the provision of education and training to general practitioners.

57 In particular, from 2001 to 2005, the IGPE earned income in the range of \$50,000 annually and in 2006, the IGPE earned income in the range of \$74,000.

13 Mr Kostalas' affidavit of 24 November 2006 included as an annexure the respondent's special purpose financial report for the year ended 30 June 2006, which included an income and expenditure statement for the year ended 30 June 2006 listing the following income:

<i>Income</i>	<i>2006</i>	<i>2005</i>
Member fees	-	180.00
Grant funds	2,308,700.00	1,958,300.00
Academic posts	-	47,892.50
Other funds	36,490.31	5,114.55
Outer metro funds	151,705.82	98,292.31
Interest received	67,449.69	63,398.77
Profit on disposal of fixed assets	-	1,440.92
Total income	2,564,345.82	2,174,619.05

14 Mr Kostalas also filed a supplementary affidavit on 29 March 2007 in which he clarified certain of the amounts referred to in paragraph 11 above. In particular, Mr Kostalas attested to the following changes:

- (a) the amount referred to earlier in paragraph 11(a) was reduced from \$7,000 to \$4,565.88;
- (b) the amount referred to earlier in paragraph 11(b) was broken down into the financial years 2003 and 2004 as \$7,605.00 for 2003 and \$2,035.00 for 2004. No amounts were provided for other financial years;
- (c) the amount referred to earlier in paragraph 11(c) was reduced to \$187.00 and limited to the 2003 financial year only;

(d) contrary to the amount referred to earlier in paragraph 11(d), a breakdown of membership fees was provided in the following terms:

Year	Revenue earned from membership fees
2001	\$10,601.87
2002	\$2,000.00
2003	\$180.00
2004	0
2005	180.00

15 During the hearing, Mr A Moses of counsel, who appeared for the respondent, made a number of submissions regarding the income of the respondent. In relation to the affidavit evidence of Mr Kostalas, Mr Moses conceded that the bonus of \$70,000 received in the 2003 financial year did not represent income from trading activity. He also did not press the amounts referred to in [14](b) and (c) above as falling into that category.

16 Further, in relation to the income and expenditure statement for the year ended 30 June 2006 summarised in paragraph 13 above, Mr Moses:

- (a) conceded that “outer metro funds” was analogous to the grant money the respondent received from the Federal Government and, as such, was not income from trading activity;
- (b) conceded that he did not have sufficient evidence as to the composition of “other funds” and, accordingly, withdrew the respondent’s contention that it represented income from trading activity;
- (c) submitted that interest on the funds received from the Federal Government represented income from trading activity and agreed to provide additional information by way of supplementary submissions to support this; and
- (d) submitted that “profit on disposal of fixed assets” received in the year ended 30 June 2005 represented income from trading activity.

17 Mr Moses also submitted that the membership fees the respondent received (which were listed earlier in [14](d)) represented income from trading activity, although conceded that no membership fees were received during the 2006 financial year and that there was insufficient evidence before the Commission as to what a person received in return for paying the membership fees.

18 The consequence of the evidence presented and submissions made during the hearing by the respondent was the contention that the income of the respondent arising from trading activity for the financial year ended 30 June 2006 comprised:

- (a) \$67,449.69 arising from interest earned on unspent grant moneys, which was not of itself income from trading activity; and
- (b) a further amount to be clarified arising from the teaching activities identified in Mr Kostalas’ affidavits, referred to earlier in [11](a) and [14](a).

19 The respondent agreed to provide additional information by way of supplementary submissions, which it duly did. In that submission, the respondent submitted:

IGPE submits that in 2005 and 2006 it engaged in trading activity by way of

teaching and received income in the sum of \$3,804.90 in 2005 and \$760.98 in 2006 as set out in the attached chart summarizing the Respondent's income derived from trading activities in 2005 and 2006.

20 The respondent also included a chart setting out income derived from trading activities in the following form:

IGPE 2005 and 2006 Income Derived from Trading Activities

<i>Source</i>	<i>2005 Income</i>	<i>2006 Income</i>
Teaching	\$3,804.90	\$760.98
Software sales	\$0	\$0
Training material sales	\$0	\$0
Membership fees	\$180.00	\$0
Interest	\$63,398.77	\$67,449.69

21 The amounts arising from teaching are consistent with the information provided in Mr Kostalas' second affidavit and are verifiable by reference to tax invoices issued by the respondent to the University of New South Wales (Office of Medical Education, Faculty of Medicine), which were annexed to Mr Kostalas' second affidavit. While the supplementary submission did not indicate how these amounts were included in the respondent's financial statements for the relevant years, as there was not a separate line item entitled "teaching" or one in similar terms, we have drawn the inference that they were subsumed into "other funds", notwithstanding that during the hearing Mr Moses conceded that this item did not represent income from trading activity.

22 The respondent also submitted that income derived from interest did not constitute income arising from a trading activity.

23 Accordingly, as a result of the supplementary submission, the respondent's position as to its income from trading activity for the financial year ended 30 June 2006 was the following:

- the amount of \$760.98 derived from teaching services provided to the University of New South Wales.

24 In reply, the applicant submitted that:

- (a) the trading activities in 2005 and 2006 are not able to be discerned from the business records and were in fact \$0; and
- (b) in any event, the amount relied upon by the respondent of \$760.98 in the 2006 financial year is patently de minimis, considering only 0.029 per cent of the respondent's total income of \$2,564,345.82.

What constitutes a "trading corporation"?

25 Having identified the respondent's trading activities to the extent possible in light of the available evidence, we turn to consider the second question arising in these proceedings, namely whether, as a matter of law, the respondent's trading activities are such that the respondent should properly be characterised as a trading corporation.

26 As already mentioned, the parties correctly accepted that if the respondent was able to satisfy the Commission that it was a constitutional corporation by reason of meeting the requirements to be identified as a "trading corporation"

for the purposes of s 51(xx) of the Commonwealth *Constitution*, the Commission would have no power to hear the applicant's applications by virtue of the operation of s 16(1) of the WR Act.

27 A corporation will be identified as a constitutional corporation if it can be properly regarded as one or more of a foreign corporation, a trading corporation formed within the limits of the Commonwealth or a financial corporation formed within the limits of the Commonwealth: s 51(xx).

28 In these proceedings, the parties' submissions were limited to characterisation as a trading corporation while in another matter to be decided shortly, the question has arisen as to the characterisation of a corporation as both a trading and financial corporation. While the present matter can be dealt with in short order, we nevertheless propose to set out the key principles relevant to the characterisation of a corporation as a trading corporation, particularly given the frequency with which this issue is arising in proceedings before this Commission. We observe that the approach to the characterisation of trading corporations and financial corporations is largely the same (subject to making due allowance for the difference between "trading" and "financial"): *State Superannuation Board (Vic) v Trade Practices Commission* (1982) 150 CLR 282 at 303.

Relevant principles

29 The High Court in *New South Wales v Commonwealth* (2006) 81 ALJR 34; 156 IR 1 was not required to examine the question as to what constituted a trading or financial corporation, observing (at [55]):

[55] The challenge to the validity of the legislation enacted in reliance on the corporations power does not put in issue directly the characteristics of corporations covered by s 51(xx). It does not call directly for an examination of what is a trading or financial corporation formed within the limits of the Commonwealth. (Plainly, a foreign corporation is a corporation formed outside the limits of the Commonwealth.) No party or intervener called in question what was said about trading and financial corporations in *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; 23 ALR 439, *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169; 40 ALR 609, *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; 44 ALR 1 or *Fencott v Muller* (1983) 152 CLR 570; 46 ALR 41.

30 Having reviewed the authorities identified by the High Court in *NSW v Commonwealth*, the authorities helpfully identified by the parties and other relevant case law, we consider that the key principles relevant to the question as to whether a corporation can properly be characterised as a trading corporation on the current state of the law are as follows:

- (a) whether a corporation is a trading corporation depends upon the current activities of the corporation. In *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, Barwick CJ, for the majority, found (at 208):

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. Its activities rather than the purpose of its incorporation will designate its relevant character. But so to say assumes that such trading activities are within its corporate powers, actual or imputed. It is the corporation which satisfies the description which is the subject matter of the power. Thus its corporate capacity or incapacity cannot be ignored. But once it is found that trading is a substantial and not merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.

(See also *Fencott v Muller* (1983) 152 CLR 570 at 600-601 and *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 19).

- (b) a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade. In *State Superannuation*, Mason, Murphy and Deane JJ noted (at 304):

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.

Similarly, in *Quickenden v O’Connor* (2001) 109 FCR 243, Black CJ and French J held (at 261):

For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the university does. The university was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.

- (c) the focus is not on the purpose of the corporation: see *State Superannuation* at 303-304, although the objects of the corporation will not be completely irrelevant: see *Adamson* at 208; *Fencott* at 611 and *Hughes* at 19;
- (d) the test as to whether the trading activities of a corporation mean that it is a trading corporation has been stated in terms of whether the trading activities are:
- “substantial”: see *Adamson* at 208 per Barwick CJ;
 - “not insubstantial”: see *Adamson* at 239 per Murphy J; and
 - “a sufficiently significant proportion of its overall activities”: see *Adamson* at 233 per Mason J and at 237 per Jacobs J.

(See also *Hughes* at 19; *Quickenden* at 260-261; *E v Australian Red Cross Society* (1991) 27 FCR 310 at 342, 345; and *Orion Pet Products v Royal Society for Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 191 at 219);

- (e) a trading corporation (or a financial corporation) may exist even though its trading activities (or financial activities) do not form the predominant part of the overall activities of the corporation: see

Adamson at 239; *State Superannuation Board* at 303-304; *Tasmanian Dams* at 156, 240, 293; *Australian Red Cross Society* at 242; *Quickenden* at 260; *Orion Pet Products* at 218-219;

- (f) a trading corporation (or a financial corporation) may exist notwithstanding that its trading activities are not motivated by the hope of private gain but to enable other activities to be performed: see *State Superannuation* at 304-305; *Australian Red Cross Society* at 343, 345;
- (g) “trading activities” generally connote the activities of a commercial nature involving, in essence, the exchange of goods or services for reward: see *Adamson* at 209 per Barwick CJ, *Hughes* at 19-20 and *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 139, 167. Trading activities are not, however, confined to dealings or communications within open markets or between strangers and are not limited to profitable activities: *Re Ku-ring-gai Co-operative* at 167 per Deane J; and
- (h) whether the trading activities of a corporation are sufficient to warrant it being characterised as a “trading corporation” is a question of fact and degree: see *Adamson* at 234; *State Superannuation Board* at 304; *Quickenden* at 260-261; *Orion Pet Products* at 216 and *Fencott* at 589.

Application of principles to the respondent

31 As already mentioned, the only trading activity ultimately pressed by the respondent was teaching services provided to the University of New South Wales, deriving revenue of \$760.98 for the year ended 30 June 2006, being the financial year immediately prior to the relevant date of the applicant’s dismissal. Based on the authorities, the concessions made by the respondent as to its other activities, particularly as to the services it provides pursuant to the Federal government grant and the interest it receives on unspent grant moneys, appear to us to be well founded.

32 We have proceeded on the basis that the provision of teaching services to the University of New South Wales can properly be described as trading activities. Given our conclusion as to the characterisation of the respondent, it is strictly unnecessary to test the correctness of this assumption.

33 In light of the principles set out above, we consider that the respondent cannot properly be characterised as a trading corporation on the basis of its single trading activity. It is sufficient to reach this conclusion by comparing the proportion of revenue arising from its sole trading activity to the respondent’s total revenue. Based on this comparison, it cannot be said that such proportion is substantial or even significant. In the context of the total revenue of the respondent, it constitutes a very small percentage amount. It is also a small amount in itself (and so is not akin to the situation in *Australian Red Cross*). On this basis, the respondent is not a trading corporation.

34 In the circumstances it is unnecessary for us to examine an issue that arose in the proceedings as to the impact of the general prohibition on trading in the *Associations Incorporation Act* (see s 66 set out earlier). We observe that this issue does not appear to have been conclusively addressed in the authorities. On the one hand, it seems clear that a breach of such a prohibition will not affect the corporate nature of the body: see *Adamson* at 199 per Barwick CJ, and also Murphy J’s observations in *Adamson* (at 239):

A corporation which trades is a trading corporation even if it gained incorporation

under an Act which forbids trading. The suggestion that such a corporation ceases to be one when engaged in the forbidden activity resembles the submission which was rejected by Fullagar J in *Williams v Hursey* (1959) 103 CLR 30 where he stated that the notion of qualified legal personality is unintelligible.

35 On the other hand, Barwick CJ's observations (at 208) as to corporate power are also relevant:

But once it is found that trading is a substantial and not merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.

(See also *Quickenden* at 270-271 per Carr J).

36 A question arises as to the consequences if the substantial trading activity is forbidden by the organic rules of the corporation. Does such activity thereby cease to be trading activity? While the relevant internal rules or constitution may provide the resolution of this issue, it seems open to conclude that the fact of trading activity remains and may still play a role in the resolution of the constitutional issue, even though there may be a separate issue arising from the breach. This, however, appears to run counter to the enunciation of the activities test by Barwick CJ in *Adamson*. In the circumstances of the present matter where the constitution does not itself contain the prohibition on trading found in the *Associations Incorporation Act*, it is unnecessary to resolve this issue.

Notice of discontinuance and withdrawal of motion

37 After the foregoing reasons were prepared and the parties were notified of the decision being delivered, two developments occurred. First, a notice of discontinuance was filed on Wednesday 27 June 2007 by the solicitors for the applicant. Secondly, at about 2.25 pm on the same day, the President's Associate was advised in a facsimile message by the respondent's solicitors that the parties had entered into a settlement of the "referenced matters" and, therefore, the respondent "withdrew" its notice of motion raising a jurisdictional challenge to the applicant's "referenced applications". The respondent also sought that the "hearing" scheduled (for 12.45 pm) on Thursday 28 June 2007 for the handing down of the decision on its motion be vacated.

38 We note the respondent's advice that the parties have entered an agreement to settle this matter. That is a matter for the parties but we take the view that there is a significant public interest in the decision in these proceedings being published. We have decided, therefore, to deliver our decision on the jurisdictional question as previously scheduled before granting leave to discontinue the proceedings.

Orders

39 We decline to grant leave to withdraw the notice of motion. For the reasons we have given, there is no basis to make the orders sought by the respondent in its notice of motion. On this basis, the Commission orders that the respondent's notice of motion dated 15 February 2007 be dismissed. No issue of costs arises in that respect. We have determined to grant leave to discontinue the proceedings effective from 12 noon Friday 29 June 2007.

Notice of motion dismissed

Solicitors for the applicant: *Maurice Blackburn Cashman*.

Solicitors for the respondent: *Colin Biggers & Paisley*.

GREG MARTIN