

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.170LJ application for certification of agreement

University of Western Australia

and

National Tertiary Education Industry Union

(C No. 60180 of 1997)

**UNIVERSITY OF WESTERN AUSTRALIA ACADEMIC, ACADEMIC RESEARCH
AND RELATED STAFF AGREEMENT 1997**

Academics and related staff

Educational services

COMMISSIONER O'CONNOR

PERTH, 20 JUNE 1997

Certification of agreement - whether the University of Western Australia is a constitutional corporation

DECISION

On 11 April 1997, the University of Western Australia (UWA) and the National Tertiary Education Industry Union (NTEU) made *an* application for certification of an agreement; the University of Western Australia Academic, Academic Research and Related Staff Agreement 1997, under Division 2 of Part VIB of the *Workplace Relations Act 1996*.

The application was listed before me on 29 April 1997.

At that time Mr Patrick Gethin sought leave to intervene on behalf on Dr Quickenden, a member of the academic staff of the University, whose terms and conditions of employment the agreement sought to regulate.

Mr Gethin contended that the University of Western Australia was not a constitutional corporation and therefore was unable to avail itself of Division 2 of Part VIB of the Act, as required by s.170LH.

The matter came before me again on 9 May 1997 at which time Mr Le Miere appeared for the University of Western Australia, Mr Ford for the NTEU and Mr Tsaknis for Dr Quickenden.

The interveners outline of submissions were:

1. The intervener submits that an agreement proposed to be made between the University of Western Australia and the National Tertiary Education Industry Union titled the University of Western Australia Academic, Academic Research and Related Staff Agreement 1997 ("Agreement") pursuant to section 170LJ of the Workplace Relations Act 1996 (WA)("Act") is not within the powers conferred by that section for the reason

that the University of Western Australia ("University") is not a "constitutional corporation" within the meaning of that section.

2. "Constitutional corporation" is defined in section 4 of the Act to mean a foreign corporation, a body corporate that is a financial corporation or a body corporate that is a trading corporation for the purposes of paragraph 51 (xx) of the Constitution. The relevant category for present purposes is whether the University is a trading corporation.

3. The term "trading corporation" is not a term of art or one having a special legal meaning. It is 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:

Federal Court of Australia; Ex parte Western Australian National Football League ("Adamson") (1979) 143 CLR 190 per Mason J at 233 and Jacobs J at 237.

4. In *Adamson* Barwick CJ spoke of making a judgement after an overview of all the corporations 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" (at 208). Murphy J thought a corporation should be characterised as a trading corporation so long as its trading activities were "not insubstantial" (at 239).

5. *The State Superannuation Board v The Trade Practices Commission* (1982) 150 CLR

282 in a joint majority judgement Mason, Murphy and Deane JJ followed *Adamson* and described the different comments made by the majority in that case as one of emphasis only. The majority accepted that:

(a) a judgement had to be made after a overview of all the corporations current activities; and
(b) a corporation will be a trading corporation if it carries on independent trading activities on a significant scale. The mere fact that a corporation trades does not mean it is a trading corporation (at 304).

6. The decisions in *Adamson* and the *State Superannuation Board* were followed by a majority of the High Court in *Commonwealth v Tasmania* (the Tasmanian Dams Case) (1983) 158 CLR 1 per Mason J at 155-157; per Murphy J at 179; per Brennan J at 240 and Deane J at 292-3.

7. The authorities were usefully collected by Toohey J in *Hughes v Western Australian Cricket Association* (1986) 69 ALR 660 at 67 1-2.

8. It is therefore necessary to determine whether the University carries on trading activities and whether those activities are quite "substantial" or "significant". To do that it is first necessary to determine what constitutes "trade" or "trading".

9. The terms "trade and commerce" are not terms of art. They are expressions of fact and terms of common knowledge:

Re Ku-ring-gai co-op Building Society (No 12) Ltd (1978) 22 ALR 621. *Argy v Blunts and Lane Cove Real Estate* (1990) 94 ALR 719 at 733-7.

10. The dictionary definition given to these words variously define them to mean "buying and selling for a profit"; "a business" or "commercial arrangement":

The Shorter Oxford English Dictionary at 376 and 3357; The Macquarie Dictionary, Second Edition at 362 and 1851.

11. Of particular relevance in determining whether an activity of a corporation is in trade or trading will be the commercial nature of the activity:

Adamson per Barwick CJ at 209 and Mason J at 235;

The Australian Beauty Trades Suppliers Ltd v Conference and Exhibition

Organisers Pty Ltd (1991) 29 FCR 68;

Re Ku-ring -gai Co-op Building Society (No 12) Ltd (1978) 22 ALR 621;

Argy v Blunts and Lane Cove Real Estate (1990) 94 ALR 719

12. The following are relevant factors in determining the commercial nature of a corporation's activities:

Whether it is involved in commercial enterprises, that is business activities carried on with a view to earning revenue;

What proportion of its income the corporation earns from its commercial enterprises;

Whether the commercial enterprises are substantial or peripheral;

Whether the activities of the corporation advances the trading interests of its members:

The Australian Beauty Trades Suppliers Ltd (supra).

13. After an overview of the organisation's current activities, its trading activities are not sufficiently "substantial" or "significant" to constitute its a trading corporation within the meaning of s51 (xx) of the Constitution. Accordingly, it is not a constitutional corporation within the meaning of s170LH of the Act.

University of Western Australia *Calendar* 1995;

University of Western Australia *Annual Report* 1995

14. Further, or in the alternative, if, which is denied, the University is a trading corporation with the constitutional definition, s170LH of the Act is in its real substance not a law about trading corporations:

Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1 at 7 per Kitto J.

15. The fact that a law is specifically addressed at a trading corporation is not sufficient to make it a law with respect to a trading corporation:

Strickland v Rocla & Concrete Pipes Ltd (1971) 124 CLR 468 at 489-90 per Barwick CJ.

16. The fact a law to come within s51 (xx) of the Constitution the nature of the corporation to which the law relates must be significant as an element in the nature or character of the law. This means that the fact that a corporation is a trading corporation should be significant in way the law relates to it. Section 170LH is not aimed at the enhancement, impairment or protection of the corporations (University's) trade but rather at the internal employment relationship between the University and it's staff. The trading character of the University is not significant in the way the law operates or relates to the University.

17. In the *Tasmanian Dams Case* (supra) Gibbs CJ, Wilson and Dawson JJ rejected the possibility that a law applying to a s51(xx) corporation was a valid law merely because the law applied to that corporation regardless of the content or character of the law enacted. In their view, the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid: per Gibbs CJ at 117-8: Wilson J at 199-202 and Dawson J at 314-318. Of the other judges Mason, Murphy and Deane JJ were prepared to hold that s51(xx) empowered the Commonwealth to legislate with respect to any activity carried on by a trading corporation regardless of whether the activity was carried on for the purposes of its trading activity: per Mason J at 147-150, 156-7: Murphy J at 179 and Deane J at 268-271. Brennan J expressed no view on this point.

UWA's outline of submissions were:

1. The application to certify the agreement is made under Division 2 of Part VIB of the Workplace Relations Act 1996 (the Act).
2. Section 170L1 of the Act provides that for an application to be made to the Commission under Part VIB Division 2, there must be, relevantly, an agreement made by an employer who is a constitutional corporation.
3. Section 4 of the Act defines constitutional corporation to mean, relevantly, "a body corporate that is, for the purposes of paragraph 51 (xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth".

What is a trading corporation?

4. Trading is the activity of acquiring, or supplying, goods or services, in a commercial or business context. It is not necessary that the corporation should make, or desire to make, a profit.

Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd (1978) 36 FLR 134 per Bowen CJ at 139, Deane J at 167.

The Queen v Trade Practices Tribunal ex parte St George County Council (1974) 130 CLR 533 per Stephen J at 569-70.

State Superannuation Board v TPC (1982) 150 CLR 282 per Mason, Murphy and Deane JJ at 304.

Australia Beauty Trade Supplies Ltd v Conference and Exhibition Organisers Pty Ltd (1991) 29 FCR 68.

5. A trading corporation is one which engages in trading as a substantial and not merely peripheral activity.

R v Federal Court of Australia ex parte WA National Football League (Adamson`s case) (1979) 143 CLR 190 per Barwick CJ at 208, Mason J at 233 with Jacobs J concurring at 237, Murphy at 239.

State Superannuation Board v TPC (1982) 150 CLR 282 per Mason, Murphy and Deane JJ at 304.

The Commonwealth v Tasmania (1983) 156 CLR 1 (*Tasmanian Dam case*) per Deane J.

6. A corporation may be regarded as a trading corporation even though its trading activity is only undertaken in order to facilitate some other activity with which it is primarily concerned.

Adamson's case per Mason J at 143 CLR 234.

E v Australian Red Cross Society (1991) 99 ALR 601.

7. Bodies with a close connection to Government and performing a predominantly public function nevertheless may be a financial corporation or a trading corporation.

State Superannuation Board v TPC (1982) 150 CLR

The Commonwealth v Tasmania (1983) 156 CLR 1 (*Tasmanian Dam case*)

E v Australian Red Cross Society (1991) 99 ALR 601

8. Corporations which have been held to be trading corporations include:

A football club and a football league - *Adamson's case*;

A cricket association *Hughes v WA Cricket Association* (1986) 69 ALR 660;

The Hydro-Electric Commission of Tasmania - *The Tasmanian Dam Case*;

The Australian Broadcasting Corporation - *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101;

The Australian Red Cross Society - *E v Australian Red Cross Society* (1991) 99 ALR 601;
and

The Royal Prince Alfred Hospital - *E v Australian Red Cross Society* (1991) 99 ALR 601.

9. In the *Red Cross* case, blood transfusion was easily the most significant activity carried out by the Australian Red Cross Society, accounting for some 80% of all its activities [99 ALR 628]. The Society received grants of about \$45m from the Federal and State Governments to enable it to provide the blood transfusion service [99 ALR 633]. The Society's total income was about \$56m [\$45m from government grants and \$11 from other sources - 99 ALR 629]. The blood transfusion service was not itself a trading activity. The Society did not sell blood. The Society was held to be a trading corporation on the basis of the money it earned by the sale of goods in the course of fund raising, and that earned by charging for attendance at its First Aid courses. The Society earned about \$2m from those trading activities [99 ALR 634]. That was less than 4% of its annual income.

10. In the *Red Cross* case, the Royal Alfred Hospital was also held to be a trading corporation. The predominant activity of that body was the provision of medical and surgical care to patients. It was found to be not profitable, but rather requiring enormous subsidy from the public purse. The hospital was not free to set either its own charge, which were fixed by the Minister by reference to allowable health rebates from the Commonwealth, or the amount paid to staff. Accommodation fees did not even approximate the actual cost of delivery of the service. The hospital received about \$14.5m in patients' fees in return for services rendered by it. It also received about \$3.7m from "business activities". The hospital received a government subsidy of about \$112. Wilcox J held the receipt of fees in return for medical services to be a trading activity. The other factors did not deny the character of that activity. Trading activities, yielding some \$18m per year of a total budget of approximately \$130m [about 16%] were described by Wilcox J as substantial and such that the hospital should as a trading corporation.

Investment income

11. The activities of the University in buying and selling property, renting property and investing are clearly trading activities. The University derived \$44.393m in 1995 and \$48.048 in 1996 from those trading activities. That investment income represents 16.83% and 16.79% of total operating revenue for 1995 and 1996 respectively.

Other business activities

12. Other business activities, other than the supply of education services, from which the University derived income in 1995 and 1996 are:

Activity	1995	1996
	\$M	\$M
Festival of Perth	3.079	3.295
Sale of publications and services	5.371	4.147
Parking	0.769	0.804
Accommodation - Currie Hall	1.747	1.777
Winthrop Technology	4.892	4.353
Total	15.858	14.376

Those trading activities represent 6.01% and 5.03% of the total operating revenue for 1995 and 1996 respectively.

Fees and charges for educational services

13. The legislation and guidelines under which the fees charged by the University is regulated does not prevent those fees having the character of payment for services provided. First, the compulsion on the University to comply with the guidelines is economic, the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law - see Higher Education Funding Act 1988. Secondly, the guidelines themselves do not limit the University in such way as to deny the character of the fees as payment for the services and facilities provided in the courses. There are no limits imposed on the number or content of the courses; no limits are imposed on either the promotion of the courses, or the design of courses, or those

ancillary matters such as accommodation and other student benefits which may attract potential students.

14. The level of fees for post graduate courses is effectively unregulated. For overseas students a minimum fee is required which is designed to recover the whole of the cost of the courses. But subject to this minimum there is no other limitation of fee level. The fees recovered in each case are retained by the University.

15. Accordingly, the fees recovered by the University from post graduate and overseas students are recovered as payment for services and the use of facilities and constitute revenue from a trading activity.

16. The University's income from full fee paying overseas students and post graduate students was \$14.321m in 1995 and \$17.371m in 1996. Full fee paying students comprise 14% of all students.

17. The balance of the revenue derived from "fees and charges" of \$19.42m for 1995 and \$23.729m for 1996 comprise continuing education and other fees and charges for education services. They are fees for providing services.

18. Fees and charges for education services comprise 7.56% and 8.29% of total operating revenue for the University for 1995 and 1996 respectively.

University as a trading corporation

19. The scale of activities for which fees are received is substantial, and significant both as an absolute sum and as a proportion of the University's total budget. Even if attention is confined to fee paying students, property rental, and the trading activities involved in the Festival of Perth and other business activities described above, the revenue from those activities is \$80.193m for 1995 and \$86.153m for 1996. That is more than 30% of the University's total operating revenue. That is amply sufficient to constitute the University a trading corporation.

Other trading income

20. Apart from the trading income specifically identified, the University derives income from other trading activities. These are identified in paragraphs 19, 20, 25 and 26 of the affidavit of Alan David Robson.

HECS fees

21. HECS contributions are fees for services. Some students pay HECS contributions directly to the University. That is, they pay a fee for the services rendered to them. Fees paid directly by the students to the University amount to \$8.849m. Those students who do not pay HECS contributions directly to the University are funded by the Commonwealth which pays such funded contributions to the University. The University competes for students, incurring considerable promotional costs. The legislative and economic framework by which HECS contributions are exacted does not detract from their character as payments on account of services.

22. HECS payments paid by the Commonwealth to the University amount to \$17.318m. That should properly be characterised as revenue derived from trading activities. However, it is unnecessary to resolve this issue of characterisation because the University's level of trading is otherwise so significant as to warrant the characterisation of the University as a trading corporation.

The NTEU's outline was:

1. The present application for certification of the agreement between the University of Western Australia and the National Tertiary Education Industry Union is made in accordance Division 2 of Part VIB of the *Workplace Relations Act 1996* (Cth)("the Act").
2. The University of Western Australia ("The University") is a body corporate established by s.6 of the University of Western Australia Act 1911 (WA) and falls within the definition of a "single business" contained in s.170LB of the Act.
3. The National Tertiary Education Industry Union ("NTEU") is an organisation of employees as defined in s.4(1) ("organisation") of the Act.
4. The agreement in respect of which the present application for certification is made is an agreement in writing between the University and an organisation of employees (the NTEU) about matters pertaining to the relationship between the University and such persons employed by the University as are, as are eligible to be, members of the NTEU.
5. The application for certification of the agreement has been made in accordance with, and satisfies the requirements set out in, s.170LM of the Act.
6. The conditions for certification set out in and mandated by s.179LT of the Act have been met. None of the grounds on which the Commission is able and/or required to refuse to certify the agreement pursuant to s.170LU of the Act arise or apply in relation to the present application. The provisions of s.170LT of the Act therefore require that the agreement be certified forthwith by the Commission.
7. In opposing certification of the present agreement, the Intervener, in his outline of submission, raises two issues, namely:
 - (i) The University is not a constitutional corporation within the definition contained in s.4(1) of the Act (paragraphs 2-13 of the Interveners's outline); and
 - (ii) s.179LH of the Act is ultra vires the Federal Constitution, not being in truth a law with respect to s.51(xx) corporations (paragraphs 14-17 of the Intervener's outline).
8. The second of these submissions - that concerning the alleged unconstitutionality of s.170LH - is not a matter in respect of which the Commission possess jurisdiction. Although under the Act the Commission is not competent to entertain that particular question the argument which the Intervener puts in his outline of submissions is quite clearly contrary to the views expressed by all the Justices of the High Court, with the sole exception of Dawson J, in their reasons for judgement delivered in *Re Dingjan*; *Ex parte Wagner* (1985) 183 CLR 323. All relevant recent authority suggests that s. 170LH is valid, being a law with respect to s.51 (xx).
9. As to the first issue raised and relied upon by the Intervener - that the University of Western Australia is not a constitutional corporation as defined - the information contained in

the affidavit of Alan David Robson sworn on 7 May 1997 and lodged with the Commission on the same day unambiguously establishes that in both character and extent various of the activities carried on by the University are such as to merit the University's description as a constitutional corporation. On the evidence before the Commission (particularly the information which is contained in paragraphs 12, 16, 17, 18, 19, 22, 23, 24, 26 and 29 of Alan David Robson's affidavit), the University is a trading corporation in that it is a corporation whose trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation. (See *R v Federal Court of Australia; Ex parte WANFL* (1979) 143 CLR 190 at 233 per Mason J (Jacobs J concurring); *Actors and Announcer Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 168 at 221 per Brennan J.) The trading activities of a corporation need only be substantial or significant (either in an absolute sense or relative to its overall operations) to warrant it being properly classified as a trading corporation. Those activities do not have to be the sole, predominant or even principal activities of the corporation. Nor is it any obstacle to a corporation being a trading corporation that it is a body established for public purposes under a State statute.

10. In light of the evidence filed by the Applicants, and given the limited jurisdiction of the Commission to entertain arguments going to the validity of the statute under which it operates, neither of the issues raised by the Intervener provide a proper basis for the Commission to refuse to certify the agreement.

Mr Tsaknis contended that they relied on two matters in arguing that UWA is not constitutional corporation, as defined in s51(xx) of the Constitution. Firstly the true character of the corporation having regard to its activities are not sufficiently substantial to constitute it as a trading corporation. That on true characterisation of the corporation it is an educational institution nothing more.

He contended the University is a body corporate under s.6 of the Act pursuant to s.3 of the University of Western Australia Act 1911.

He contended that the essential powers under the Act are granted to the Senate. s.32 which sets out the Powers of the Senate of the University of s.31 and all the powers are related to educational activities of some form or another.

He stated there were two exceptions; the University is given control in investment of the property of the University and a catch all at the end of s.31 that generally the University has power of all other matters not inconsistent with the provisions of the Act.

He referred the Commission to what should be the test of a trading corporation. He referred to what is commonly known as the *Adamson* case, where he contended their Honours asked whether the activities of a corporation were "not insubstantial" or whether the activities were substantial activities.

He referred to the *State Superannuation* case, where the Court adopted the observation of Mason J, where he said:

It is very much a question of fact and degree having earlier stated 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.

He then contended that one had to balance the extent of trading activities against the total activities. He disagreed with the figures in Mr Robson's statement as to what were genuine trading activities and what were not, taking the Commission through the Balance Sheet and challenging UWA's description of trading activities and eliminating those areas he said were not trading activities.

Mr Tsaknis conceded some 14% of income as being derived for trading activities and argued this was not so great as to constitute a trading corporation. He contended the substantial activity of the University was not trading, but academic and teaching, and therefore should be found to not be a trading corporation.

Mr Le Miere for the University of Western Australia contended that what Mr Tsaknis was proposing was that the Commission should rely on a legal test in determining whether the University was a trading corporation. He contended that this was reflected in the High Court in at least three of the cases Mr Tsaknis relied on, namely *Adamson's* case, the *State Superannuation* case and the *Tasmanian Dams* case.

Mr Le Miere referred the Commission to the *State Superannuation Board and Trade Practices Commission* (1982) 150 CLR at page 282. He also referred to the *Red Cross Society* case and *Royal Prince Alfred Hospital*.

In a recent decision of Vice President McIntyre in relation to Wollongong University, he summarised these cases in the following manner:

R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc.). [(1979) 143 CLR 190] (*Adamson*).

State Superannuation Board and Trade Practices Commission [(1982) 150 CLR 282] (*State Superannuation*).

E v Red Cross Society (Federal Court of Australia, Wilcox J) [(1991) 99 ALR 601] (*Red Cross Society*).

"I do not need to refer directly to the first two case. They are dealt with fully by Wilcox J in *Red Cross Society*. With respect to *Adamson*, Wilcox J said (p.632-3):

"That case arose under the 1974 [Trade Practices] Act, the question being whether certain corporations concerned with Australian league football were 'trading corporations'. By majority, the court held that they were. The test favoured by Barwick CJ and Stephen J in *St George County Council* [(1974) 130 CLR 533], with whom Aickin agreed, deferred with the majority as to the application of that test to the facts of the case.

For the majority, Barwick CJ (CLR at 208) pointed out that, under modern conditions, 'the nature of a company may not be discernible from a perusal of its memorandum'. He went on:

'The only sure guide to the nature of the company is a purview of its current activities, a judgement 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 with the limits of Australia will satisfy the description 'trading corporation' if trading as 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 a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.'

Mason J, which whom Jacobs J agreed, expressed agreement (CLR at 233) with the minority approach in *St George County Council*. He said that 'trading corporation' is '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 went a little further, saying (CLR at 239):

'A trading corporation may also be a sporting, religious, or governmental body. 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. For example, a very large corporation may engage in trading which though incidental to its non-trading activities, and small in relation to those, is nevertheless substantial and perhaps exceeds or is of the same order in amount as the trading of a person who clearly is a trader.'

Wilcox J, a few lines further on, said with respect to *State Superannuation*, that:

"Mason, Murphy and Deane JJ applied the *Adamson* approach to the determination of what constituted a 'financial corporation'. After quoting the tests adopted by each of Barwick CJ, Mason and Murphy JJ in *Adamson*, their Honours added (CLR 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.'

In the course of a discussion about the meaning of 'financial corporation' they said (CLR at 305):

'However, just as a corporation may be a trading corporation, notwithstanding that its trading activities are entered into in the course of carrying on some primary or dominant undertaking,

so also with a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking.'

Wilcox J, in the light of the material before him, concluded that the New South Wales Division of the Australian Red Cross Society and the Australian Red Cross Society, each of which was an incorporated body, were trading corporations within the meaning of s.4 of the Trade Practices Act 1974.

His Honour then considered the position of the Royal Prince Alfred Hospital (incorporated under a New South Wales statute). Wilcox J said (p.635):

"It seems to me that the critical question is the nature of the Prince Alfred Hospital's activities at the relevant time. Accepting that its predominant activity was the provision of medical and surgical care to patients, they were not objectives antithetical to the notion of trade. Many trading corporations supply services rather than goods. Many privately owned hospitals provide medical and surgical care for reward with the purpose of thereby trading profitably. There was nothing in the intrinsic nature of the Prince Alfred Hospital's activities to disqualify it as a trading corporation.

If the question be asked whether the scale of the corporation's trading activities was 'substantial', 'a sufficiently significant proportion of its overall activities' or 'not insubstantial' - to apply the tests adopted in *Adamson* - it is relevant to note that, in the financial year ended 30 June 1985 it received \$14,584,456 in patient's fees in return for services rendered by it. It also received \$3,736,662 from 'business activities'. It is true that these amounts were dwarfed by its State Government subsidy of \$112,127,706. But that does not matter. 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 1984-85 was such that it should be regarded as then being a trading corporation."

To summarise the relevant parts of Wilcox's J's judgement in *Red Cross Society*, I quote from the headnote (p.602):

"(i) The Australian Red Cross and the New South Wales Division were each a 'trading corporation' within the meaning of s.4 of the [Trade Practices] act.

R v Judges of Federal Court of Australia: Ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190; 23 ALR 439, followed.

(ii) The fact that the trading activities of the Red Cross and the New South Wales Division were not motivated by the hope of private gain, but purely to earn revenue for charitable activities, did not matter.

R v Judges of Federal Court of Australia: Ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190; 23 ALR 439, followed.

(iii) The critical question concerning whether the hospital was a trading corporation was the nature of the hospital's activities at the relevant time.

R v Judges of Federal Court of Australia: Ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190; 23 ALR 439; *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625, followed.

(iv) The scale of the hospital's trading activities in 1984-85 was such that it should be regarded as then being a trading corporation.

(v) It was not necessary that trading activities be profitable, or even intended to be profitable, to constitute the trader as a 'trading corporation'.

(v) It was not necessary that trading activities be profitable, or even intended to be profitable, to constitute the trader as a 'trading corporation'.

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533; 2 ALR 371, applied."

Mr Ford for the NTEU submitted that the Intervener subscribed to the correct test but then proceeded to apply the wrong test.

He argues that the Intervener invites the Commission to embark on an exercise of determining the essential character of University. He submitted the determination has to be made in accordance with the current activities of the corporation.

I agree with this view and it is one that all the authorities relied upon subscribe to.

An affidavit lodged by Alan David Robson had amongst other matters a breakdown of the University's trading activities: to wit

The 1995 and 1996 financial accounts show the extent to which the University traded in those financial years. In the Operating Statement they show the consolidated operating revenue for the University and associated entities. They also show the total operating revenue for the University itself for 1994 to be \$196,656,000, for 1995 to be \$253,840,00 and 1996 to be \$286,784,000.

There are no significant changes in the 1996 year and the 1995 year as the last year for which audited accounts are available shows the extent of trading activity of the University in that year in the context of overall activity.

Slightly more than half of the University's income in 1995 was derived from Commonwealth Government Grants (\$118,866,000) and the Higher Education Contribution Scheme (\$21,167,000).

The revenue from the Higher Education Contribution Scheme (Scheme) derives from the Higher Education Funding Act 1988 (Commonwealth) (in this clause "Scheme Act"). Under the Scheme the University must require the payment of the contribution to it in order to be

eligible for Commonwealth grants. The contribution is not characterised by the Scheme Act as a fee exacted by the University for services but as a contribution to the costs of the provision of the course of study, the level of which is set by the Scheme Act. Unless Australian undergraduate students choose to pay the contribution themselves, the contribution is payable to the University by the Commonwealth in respect of all Australian undergraduate students who comply with the Scheme Act. In 1995 the University received \$17.3 18m from the Commonwealth Higher Education Trust Fund and \$8.849m from the students themselves. This Scheme money is received as a result of the number of students the University attracts and the number of students it is entitled to enrol. The University effectively bids for a quota of places and bidding is on the basis of undergraduate student numbers the University reasonably expects to attract. There is accordingly competition between universities for limited Commonwealth funds and for Australian undergraduate student places.

In 1995 the University obtained operating revenue of \$19.942m from "Fees and Charges" which is explained in Note 20 as mainly comprising fees and charges collected from continuing education (\$3 .3m), full fee paying overseas students (\$13.59m), postgraduate award students (\$0.73 1 m) and "Other" fees and charges for the provision of services of by the University (\$2.228m). In 1996 a total of \$23,729,000 was obtained from these sources; \$2.899m for continuing education, \$16.426m for full fee paying overseas students, and \$3.459m for "Other" fees and charges. Continuing education is professional and occupational training to keep skills and knowledge current. Postgraduate award students fees are non HECS students charges of various kinds.

Fee paying students currently comprise approximately 14% of student places in the University. About 12.3% of full time student places are taken by fee paying overseas students.

In 1995 \$4.892m and in 1996 \$4.353m was derived from the trading activities of the University's computer and equipment and software trading arm "Winthrop Technology". Income from this source will drop in future years due to the sale of that business.

Income from departmental consulting does not have to be reported as a separate item. It can form part of the item "Miscellaneous Other" or "Miscellaneous Academic Activities" under "Other Income" and (see item below about the University as an investor). Of those two latter items \$822,000 represents research contracts attributed under that head. The University is aware that much of these two items, not identified as

research contracts, relates to consulting fees or charges for activities or products, which is attributed to those items. Whether it comprises all, most or part of the total of \$1 0.3m and or \$3.2m is uncertain.

Under the heading "Other Research Grants and Contracts" revenue of \$21 .594m is reported in the 1995 financial accounts and \$25.048m in the 1996 financial accounts. The bulk of this

is grant moneys but some part is income as trading in consulting and research activities undertaken for industry. Industry often uses University staff and facilities as a research and development arm of their own enterprises. This area of income is growing.

Under the headings "Commonwealth Government Grants" and "Other Research Grants & Contracts" the research grants shown above, represent moneys attracted by research projects undertaken by academic staff and postgraduate students which are competitively awarded by the respective grant bodies, including the Commonwealth. Bidders compete for the available grant money against bidders from all other institutions in Australia.

The University is an investor. It invests both the money held for a short term which is derived from operating grants and other income, and long term holdings which represent returns from the investment of its endowment and bequest funds and accumulations. These investments are held principally in cash deposits and real estate. In the 1995 financial account \$44.393m is reported and in the 1996 financial accounts \$48.048m is reported as derived from "Investment Income". The University derived property rental income of approximately \$12.6m in 1995 and \$13.956m in 1996, see above. Total investment in 1995 and 1996 was approximately 17% of total income.

Under the item "Other" as disclosed by the above paragraph, \$3.079m in 1995 \$3.295 in 1996 was derived from the University's activities as the Festival of Perth.

Under the same heading, \$5.371m in 1995 and \$4.147m in 1996 was derived from the Sales of Publications and Services, see above.

Under the same heading \$2.863m in 1995 and \$3.253m in 1996 was derived from "Miscellaneous - Order" and in 1995, \$10.744m and in 1996, \$13.651m was derived from "Miscellaneous Academic Activities". Part of this is clearly commercial activity either by the raising of charges for public activities and programs, product sales and the sale of tickets to events.

Under the same heading, the item "Parking, Services and Sales, Salary Recoveries" shown on the Statement of Cash Flows, includes about \$580,00 in 1995 which was income to the Department of Human Movement for charges it makes for its public activities and programmes and product sales (CD-ROM).

Under the same heading in 1995, \$0.804m is shown as income from parking and some of the item "Parking, Services and Sales, Salary Recoveries", which in 1995 was \$12.024m, and in 1996 \$11.325m also represents income from the letting of car bays on University property.

Under the same heading in 1995 \$1.747m, and in 1996 \$1.777m is shown as the income from the operations of Curie Hall, the University's student hall of residence.

In respect of attracting overseas students in 1996 the University expended some \$627,000 on marketing related activities and promotion and paid approximately \$200,000 in agents fees. Approximately \$233,000 was expended in 1996 on attracting local students.

In the University's interpretation of the figures, trading activities constitute \$86m for 1996 or 30%. The Intervener however, would concede \$32.8m or 14%.

I don't think on the face of that concession I need to determine whose calculation is right. Mr Le Miere in his submission contended:

We would say even if one turns only to the concessions made by the intervener the matter is foreclosed on that argument. On the concessions made by the intervener this is conceded, that the revenue derived from fees and charges, that is the rendering of services and receiving payment in exchange, from overseas students, post graduate students and continuing education, that is conceded. Also conceded is the trading income from the activity of conducting Winthrop Technology. Also conceded is the parking, the publications, the Festival of Perth, Currie Hall, all of that is conceded to be trading activities and trading revenue and my learned friend puts all together and says:

On their account they concede \$32.8 million -

I think is my friend's calculation -

...is derived from trading activities -

and that is about 14%, i.e. about the same as the Royal Prince Alfred Hospital derived and in percentage terms more than three times as much as the percentages with the Red Cross Society and in dollar terms sixteen times as much as the revenue derived by the Red Cross Society which his Honour Wilcox J found to be sufficient to constitute a trading corporation. So we say even on the Intervener's concessions the argument is foreclosed; it is clearly a trading corporation.

Mr Le Miere then went on to say:

We note that the intervener in putting forward its concessions and dealing with the investment income of the University argued that the income from the pooled investments was not trading activity and not trading income for the reasons put, no reference was made to the rental property and the buying and selling of properties. That is another - we chuck that in - another I think \$12 million which would have taken the figure up to about \$44 million and I think that probably takes it to something like 20 per cent of the revenue, so one could go on forever with putting forward the various permutations.

This view sits well also with the recent decision of Vice President McIntyre in the University of Wollongong where he found that institution derived trading income sixteen times the amount that was found to be substantial in the Red Cross case.

Having assessed all the evidence and submission in this matter I am of the view that UWA engaged in trading activity in 1996 to the extent that they should be regarded as a trading corporation.

I conclude that the University of Western Australia is a trading corporation within paragraph

(c) of the definition of a constitutional corporation in s.4(1) of the Act. I will therefore certify the University of Western Australia Academic, Academic Research and Related Staff Agreement 1997.

BY THE COMMISSION:

COMMISSIONER

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