

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Lindsay Cameron [2023]FWC 2902

Fair Work Commission, Commissioner Schneider, 3 November 2023

Whether a Church was a 'constitutionally covered business' for the purposes of the Fair Work Act 2009 (Cth) and whether a person was a 'worker'.

Key words: Employer, Australia, Church, Bullying, Worker, Constitutionally Covered Business

1. The National Conference of the Wesleyan Methodist Church (the Church) of Australia acts as the chief governing board of the Church, which is divided into five districts that contain local churches.
2. The Church has five part-time employees. Properties are owned by the Wesleyan Methodist Church Property Trust, which owned two investment properties of the Wesleyan Methodist Church of Australia in Queensland.
3. The districts and local churches all have their own ABN and ACNC registration, and pay for their own Pastor and any additional employees (where applicable).
4. The local churches fund their operations by member offerings of which 10% is passed on to the District (70%) and the National Church (30%). There was some minimal rental of local church space to community groups.
5. C alleged being bullied at work by the Church and two named individuals and sought redress under section 789FC of the [Fair Work Act 2009](#) (Cth) (the Act).
6. There were two jurisdictional matters being:
 - Whether the Commission had jurisdiction, as C may not be a worker as required by the Act and defined within the [Work Health and Safety Act 2011](#) (Cth) (WHS Act); and
 - Whether the employer was a constitutionally covered business, pursuant to section 789FD(3) of the Act.

Worker

7. The Act adopts the meaning of worker in the WHS Act.
8. The Commission was satisfied that the unpaid volunteers that the Church relied upon in its operations, satisfy the definition of worker under section 7(1)(f) of the WHS Act, and that C satisfied the definition of worker for the purposes of the Act.

9. For the purposes of section 7 WHS Act, the person conducting a business or undertaking was defined in section 5 WHS Act as not including a volunteer association. The Commission found that the Church was not a volunteer association.

Was the employer a constitutionally covered entity (constitutional corporation)?

10. The Act applies to a constitutional corporation. The [Commonwealth of Australia Constitution](#) provides the definition of “constitutional corporation” at paragraph 51(xx) as:

51. Legislative powers of the Parliament.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth

...

11. The Commission looked to *Aboriginal Legal Service of WA Inc v Lawrence* [No 2] (2008) 252 ALR 136 quoting from that judgment (at [35]):

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

- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* at 239; *State Superannuation Board* at 303-304; *Tasmanian Dam case* at 156, 240, 293; *Quickenden* at [49]-[51], [101]; *Hardeman* at [18].
- (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* at 208, 234, 239; *State Superannuation Board* at 303-304; *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 20; *Fencott* at 622; *Tasmanian Dam case* at 156, 240, 293; *Mid Density* at 584; *Hardeman* at [22].
- (3) In this context, “trading” is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* at 139, 159-160; *Adamson* at 235; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184-185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 at 330; *Quickenden* at [101].
- (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* at 539, 563, 569; *Ku-ring-gai* at 140, 167; *Adamson* at 219; *E* at 343, 345; *Pellow* at [28].
- (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* at 543, 569; *Ku-ring-gai* at 160; *State Superannuation Board* at 304-306; *E* at 343. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as “trade”: *St George County Council* at 543 (Barwick CJ); *Tasmanian Dam case* at 156 (Mason J).
- (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a “trading corporation” is a question of fact and degree: *Adamson* at 234 (Mason J); *State Superannuation Board* at 304; *Fencott* at 589; *Quickenden* at [52], [101]; *Mid Density* at 584.
- (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* at 294-295, 304-305; *Fencott* at 588-589, 602, 611, 622-624; *Hughes* at 20; *Quickenden* at [101]; *E* at 344; *Hardeman* at [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: Adamson at 209, 211; Ku-ring-gai at 139, 142, 160, 167; Bevanere at 330; Hughes at 19-20; E at 343; Fowler; Hardeman at [26].

12. Using these principles, the Commission could not find that the Church engaged in trading, even if a broad construction was used.
13. If it was wrong in this conclusion, and the Church did trade, the Commission found any revenue generated was incidental, and not enough to support a conclusion that it was a trading corporation, being merely peripheral.
14. The Commission found that while C may have been a worker, the Church was not a constitutional corporation, and the application was out of its jurisdiction.

COMMENT



Determining whether an entity is a trading or financial corporation formed within the limits of the Commonwealth is no easy task.

The Royal Society for the Prevention of Cruelty to Animals (RSPCA) was found to be a trading corporation because it earned a substantial income from trading activities ([Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals \(Vic\)](#) [2002] FCA 860).

The Children's Medical Research Institute was found not to be a trading corporation because its trading activities were insubstantial and peripheral to its central activity of medical research ([Hardeman v Children's Medical Research Institute](#) [2007] NSWIRComm 189).

The determination will depend on a close scrutiny of an entity's purposes and actual activities.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2023/2902.html>

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