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**JURISDICTION** : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

**CITATION** : ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) -v- LAWRENCE [No 2] [2008] WASCA 254

**CORAM** : STEYTLER P  
PULLIN J  
LE MIERE J

**HEARD** : 12 JUNE 2008

**DELIVERED** : 10 DECEMBER 2008

**FILE NO/S** : IAC 4 of 2007

**BETWEEN** : ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)  
Appellant

AND

MARK JAMES LAWRENCE  
Respondent

THE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION  
Intervener

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**ON APPEAL FROM:**

**Jurisdiction** : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Coram** : RITTER AP  
BEECH CC  
SMITH SC

**Citation** : [2007] WAIRC 00435

**File No** : FBA 1 of 2007

*Catchwords:*

Constitutional law - *Commonwealth Constitution* s 51(xx) - Trading corporations - Activities - Whether Aboriginal Legal Service engaged in 'trade' - Non-profit organisation - Gratuitous provision of a public welfare service at government expense - Funded under a contract with the Commonwealth Government

Constitutional law - *Commonwealth Constitution* s 51(xx) - Trading corporations - Whether trading activities significant or substantial proportion of overall activities

Industrial Relations - Industrial Appeal Court - Jurisdiction - Industrial Relations Commission's determination of its own jurisdiction - 'Industrial matter'

*Legislation:*

*Commonwealth Constitution* s 51(xx), s 109

*Industrial Relations Act 1979* (WA), s 7(1), s 23(1), s 23A(1), s 24(1), s 86(1), s 90(1)

*Workplace Relations Act 1996* (WA), s 4, s 5, s 6, s 16

*Result:*

Appeal dismissed

*Category:* A

**Representation:**

*Counsel:*

Appellant : Mr T H F Caspersz & Ms A Beaumont  
Respondent : Dr C N Kendall  
Intervener : Mr R J Andretich

*Solicitors:*

Appellant : Blake Dawson  
Respondent : Curwood & Co Pty Ltd  
Intervener : State Solicitor for Western Australia

**Case(s) referred to in judgment(s):**

- Aboriginal Legal Service of Western Australia (Inc) v Lawrence [2007] WAIRC 00435
- Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169
- Bank of New South Wales v The Commonwealth (1948) 76 CLR 1
- Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325
- Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1
- E v Australian Red Cross Society (1991) 27 FCR 310
- Fencott v Muller (1983) 152 CLR 570
- Fowler v Syd-West Personnel Ltd [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)
- Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196
- Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10
- J S McMillan Pty Ltd v Commonwealth (1997) 77 FCR 337
- Lawrence v Aboriginal Legal Service of Western Australia (Inc) [2006] WAIRC 05849
- Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579
- Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290
- New South Wales v Commonwealth (2006) 229 CLR 1
- Pellow v Umoona Community Council Inc [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006)
- Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243
- R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) (1979) 143 CLR 190
- R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533
- Ransom v Higgs [1974] 1 WLR 1594
- Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134
- State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

1     **STEYTLER P:** This appeal turns upon the question whether the appellant, the Aboriginal Legal Service of WA (Inc), is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

### **How the issue arose**

2     The respondent worked for the appellant. On about 21 July 2006 his employment was terminated. He alleges that this was done harshly, oppressively or unfairly in breach of s 23A(1) of the *Industrial Relations Act 1979* (WA) (State Act). He filed a claim accordingly in the Western Australian Industrial Relations Commission (Commission). The appellant contended that the Commission lacked the jurisdiction to hear the claim. It submitted that it was a constitutional corporation for the purposes of the *Workplace Relations Act 1996* (Cth) (Commonwealth Act) because it was a trading corporation for the purposes of s 51(xx) of the Constitution. If that was so, the Commonwealth Act applied to the exclusion of the State Act.

### **Commissioner Kenner's decision**

3     The jurisdictional question came before Commissioner Kenner of the Commission. He held that the appellant was not a trading corporation and that the Commission consequently had jurisdiction: *Lawrence v Aboriginal Legal Service of Western Australia (Inc)* [2006] WAIRC 05849.

### **The decision of the Full Bench**

4     The appellant appealed to the Full Bench of the Commission (Full Bench). It dismissed the appeal: *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* [2007] WAIRC 00435.

5     The appellant's funding comes almost exclusively from the Commonwealth of Australia, represented by the Attorney General's Department (Department), under a contract dated 13 April 2005 (contract). The contract essentially requires the appellant to provide legal services to indigenous Australians in consideration of the funding provided by the Commonwealth. The Full Bench held that the entering into, and performance of, the contract by the appellant constituted trading, but that the provision of the legal services required by the contract did not. The Full Bench went on to say [331]:

The providing of the legal services is not just the predominant activity of the appellant. It permeates through and enshrouds all that it does. The

obtaining of funds from the department, although involving trading, is not an independent trading activity to enable the appellant to carry out a non trading activity. The two are inextricably linked. The funds obtained are required to be used for an activity which is not trading. This affects the extent, in a qualitative sense, of the trading with the department as against the activities of the appellant as a whole. When the activities of the appellant are considered as a whole, in the words of Mason J in *Adamson [R v The Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)]* (1979) 143 CLR 190] trading activities do not 'form a sufficiently significant proportion of its overall activities to merit its description as a trading corporation'. Put slightly differently, to use the process of Toohy J in *Hughes [v Western Australian Cricket Association Inc]* (1986) 19 FCR 10], from evaluating the extent of the trading activities against the totality of activities, we have reached the conclusion that the trading activities are not so significant to give the appellant 'the character of a trading corporation'.

### **Grounds of appeal, notice of contention and procedural issues**

6 The grounds of appeal are prolix and, in some respects, difficult to fathom. Essentially, they amount to the single proposition that, having found that the entry into, and performance of, the contract was a trading activity, the Full Bench should have gone on to find that the appellant was a trading corporation.

7 In its notice of contention, the respondent contends that the Full Bench erred in finding that the appellant's entry into, and 'partial performance of', the contract amounted to trading for the purposes of s 51(xx) of the Constitution.

8 As was the case before the Full Bench, the Minister for Consumer and Employment Protection (WA) (Minister) sought, and was granted, leave to intervene. Also, because the matter involves the interpretation of the Commonwealth Constitution, at each stage of the proceedings notices were issued pursuant to s 78B of the *Judiciary Act 1903* (Cth). None of the Attorneys-General has chosen to intervene.

### **The preliminary issue**

9 A preliminary issue arose whether this court has jurisdiction to hear the appeal. The appellant and the respondent submit that it has. However the Minister submits that it does not have jurisdiction.

10 This court has very limited jurisdiction to hear and determine appeals. Such jurisdiction as it has is given by s 86(1) of the State Act. That section provides that the court has jurisdiction to hear and determine

appeals under s 90 and s 96K. Section 96K is not presently relevant. Section 90(1) reads as follows:

Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -

- (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
- (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
- (c) on the ground that the appellant has been denied the right to be heard,

but upon no other ground.

11 The appellant's contention that the Full Bench was wrong to find that the appellant is not a trading corporation for the purposes of s 51(xx) of the Constitution, and that the Commission consequently had jurisdiction, seems to me to be justiciable by this court under s 90(1)(a).

12 The source of the Commission's jurisdiction is essentially s 23(1) of the State Act. That section provides that the Commission 'has cognizance of and authority to enquire into and deal with any industrial matter'. The State Act defines an industrial matter as 'any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein ... ': s 7(1). Under s 24(1) of the State Act the Commission has jurisdiction to determine, in any proceedings before it, whether any matter to which those proceedings relate is an industrial matter.

13 Section 16 of the Commonwealth Act provides that that Act is intended to apply to the exclusion of a State or Territory industrial law 'so far as [it] would otherwise apply in relation to an employee or employer'. The word 'employee' is defined in s 5(1) of the Commonwealth Act as meaning an individual employed by an employer. The word 'employer' is defined in s 6(1) as meaning 'a constitutional corporation, so far as it employs, or usually employs, an individual ... '. A 'constitutional corporation' is one to which s 51(xx) of the Constitution applies: s 4(1) of the Commonwealth Act. Section 4(1) of the Act also provides that the State Act is a State industrial law.

14 The parties agree that, because the Commonwealth Act applies to industrial matters as between constitutional corporations and their employees to the exclusion of the State Act (so far as the State Act would otherwise apply in relation to an employee or employer), the effect of s 109 of the Constitution is that, so far as the State Act purports to give to the Commission jurisdiction to deal with industrial matters concerning relations between a constitutional corporation and its employees, or one of them, it is invalid. That, in turn, means that, if the Full Bench was wrong to find that the appellant was not a trading corporation, then its decision that the Commission had jurisdiction to embark upon the appellant's claim was also wrong 'in that the matter the subject of the decision is not on [sic] an industrial matter'. This would be so because the word 'employer(s)' in s 7(1) does not extend to a constitutional corporation and the word 'employee(s)' does not extend to a person employed by a constitutional corporation.

15 It is unnecessary to consider whether s 90(1)(b) is applicable. Section 90(1)(c) is not applicable.

### **Is the appellant a trading corporation?**

16 That brings me to the question whether there was an error of the kind contended for. In order to answer that question, it is necessary to give some attention to the appellant's constitution, its activities, the nature of its funding arrangements and the contract entered into with the Department.

### **The appellant's constitution**

17 The appellant is an association incorporated under the *Associations Incorporation Act 1895* (WA). Its objects, identified by cl 4 of its constitution, are:

To provide direct relief to all Aboriginals from poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with the laws of the Commonwealth or States of Australia and all matters ancillary thereto ...

Clause 4 goes on to specify the methods by which these objects are to be achieved. As might be anticipated, there are many of them. The first of them is the provision of 'legal assistance to Aboriginals in Western Australia'. Amongst the others is a power (cl 4(r)) 'to receive and spend grants of money from the Government of the Commonwealth ... '.

18 Clause 5 provides for the general powers of the appellant. These are provided for the purpose of carrying out its objects. One of them is to 'enter into any arrangements with any Government ... that may seem conducive to the [appellant's] Objects, or any of them; and to ... carry out, exercise and comply with any such arrangements ... '.

19 Clause 6(1) requires that the income and property of the appellant, derived from whatever source, be applied solely and exclusively towards the promotion of its objects and that 'no portion' is to be 'paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit, to Members of the [appellant]'. Similarly, cl 34 provides that the appellant's funds are to be applied in carrying out its objects.

### **The appellant's activities**

20 As might be expected, the principal activity of the appellant is the provision of legal services to Aboriginal clients. The appellant has been in operation, and has provided these services, for over 30 years. Its 2006 Annual Report (which was tendered in evidence) reveals that it has offices in 18 locations across Western Australia and that, in the year covered by the report, its staff provided legal assistance in over 27,000 matters. The appellant deals with criminal law, family law and other matters, including such areas as criminal injuries compensation, debts, motor vehicle accidents, personal injuries and fatal accident claims. It has been involved in a number of law reform initiatives. It has also obtained funding to enable it to monitor the implementation of the recommendations made by the Royal Commission into Aboriginal Deaths in Custody. It employs around 30 lawyers and some 26 court officers who, while not legally trained, are permitted by s 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) to represent clients in court. These court officers also conduct prison visits and provide community education.

21 The appellant is classed as a public benevolent institution. It enjoys tax concessions accordingly. It is endorsed as a deductible gift recipient.

### **The appellant's funding**

#### *Prior to 2005*

22 Until 2003, the appellant's activities were funded by grants provided through the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC was abolished in 2003. After that, the appellant received funding

from ATSIIC's successor body, the Aboriginal and Torres Strait Islander Services (ATSIS). It applied for, and was given, grants by that body.

*Post-2005*

23 In 2005, the Commonwealth Government changed its funding arrangements. It decided that, henceforth, funding for legal services provided to indigenous people throughout Australia was to be allocated under a competitive tender process. It consequently put out a request for tender for the provision of legal aid services to indigenous Australians in Victoria and Western Australia. The appellant put in a successful (and perhaps the only) tender for the provision of services in Western Australia. That led to its entry into the contract with the Commonwealth under which, as I have said, it obtains almost all of its funding. Nearly all of its activities are carried out under that contract. The appellant's only other sources of funding are a very limited amount provided by the Western Australian State Government and money received from those few clients who have the means to contribute to their legal costs.

24 Commissioner Kenner, at first instance, made an uncontested finding that the evidence established that the request for tender was not put out in order to obtain bids based upon competitive prices. Rather, the Department set the amount of funding available over the term of the proposed contract. There is no real contest between the parties concerning the fact that the purpose of the tender process was to ensure, as best that could be done, that there would be greater accountability and efficiency in the expenditure of the legal aid funding provided by the Commonwealth.

**The contract with the Commonwealth**

25 The contract with the Commonwealth is dated 13 April 2005. It commenced operation on 1 July 2005. Its duration was for a term of three years, unless terminated earlier and subject to the Department's discretionary right to offer to extend it for a further period or periods of up to three years.

26 Recital A of the contract records that the Department 'wishes to engage organisations to provide the Services with the aim of improving the access of indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens'. The 'Services' are identified in cl 3, which provides a detailed set of prescriptions. Amongst these is a requirement that the appellant must assess whether each person applying to it for

provision of legal assistance under the contract is indigenous, or an indigenous group or body, or a person or body to whom services might be provided that will be of direct and substantial benefit to an indigenous person or group or body (eligible clients). An assessment is required to be made whether each eligible client satisfies the 'Means Test' (a procedure that is designed to identify 'the relatively small minority of indigenous people who have the personal means to finance their own legal aid assistance without suffering undue hardship').

27 Having satisfied itself accordingly, the appellant is required to ensure that services are made available to the client under the terms of the contract. These detail the nature of the services to be provided, the priority to be accorded to different categories of eligible clients and a range of other matters. The appellant is required to provide services only to those eligible clients who satisfy the means test. It must use any contributions paid by clients in respect of costs to enhance the quality of the services provided.

28 Clause 3.4 provides that the appellant may provide services to a non-indigenous eligible client only where it can be shown that the services will be provided in accordance with the contract and that there will be a direct and substantial benefit to one or more indigenous persons, or indigenous groups or bodies.

29 The appellant is required to comply with the conditions, priorities, procedures and other requirements specified in a document headed 'Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians'. This document (Policy Directions), as amended by the Department from time to time, is incorporated into the contract.

30 The contract prescribes the minimum number of 'clients/cases' to be handled in different areas and the types of services that must be supplied in each of the metropolitan, regional and remote areas. Clause 3.10 provides that the appellant must liaise with the Department's contract manager and comply with any directions from him 'as reasonably required from time to time'.

31 Fees are provided for by cl 4 of the contract. These are payable in instalments and the appellant is required to submit invoices in respect of them. The fees are payable by way of an establishment payment of \$1,448,441, payable on the commencement date, and thereafter by monthly service payments made on the last day of each month during the contract period, starting from the end of the first month after the

commencement date. In the first year there are to be 12 payments of \$482,813.50 each. In the second year there are to be 12 payments of \$651,654.08 each. In the third year there are to be 12 payments of \$698,153.25 each. The total contract value is expressed to be \$23,439,890.96.

32 Clause 4.7 provides that the appellant must not seek payment from any other source for providing the same legal services to the same eligible client for which the appellant will be paid under the contract.

33 Clause 4.8(a) gives to the Department the right to defer or reclaim payment or reduce the amount of any instalment of the fees payable if, and for so long as, the appellant has not completed or delivered the part of the services to which the instalment relates in the manner required under the contract.

34 Clause 11.1 gives to the Department the right, at any time, by notice to terminate all or part of the contract immediately for any reason. Clause 11.6 provides for the implementation of sanctions if the appellant should fail to satisfy any of the terms and conditions of the contract.

35 By cl 20.1, the appellant acknowledges that it is not, by virtue of the contract, 'an officer, employee, partner or agent of the Department' and that it does not have 'any power or authority to bind or represent the Department'.

36 There is a wide range of other obligations imposed upon the appellant by the contract. These include such matters as the obligation to give the Department access to its premises, documents and records and to cooperate with and permit the Department to audit any aspect of the appellant's compliance with its obligations under the contract or of its provision of the services (cl 16.1(b)).

37 The Policy Directions commence with an introduction, the first four paragraphs of which read as follows:

- 1.1 Aboriginal and Torres Strait Islander people experience far higher rates of adverse contact with the justice system than do other Australians, and are incarcerated at significantly higher rates than non-Indigenous people. They are also one of the most profoundly disadvantaged groups in Australian society, falling well below relevant national benchmarks on virtually every measure of well-being and socioeconomic status (Steering Committee for the Review of Government Service Provision 2003, *Overcoming*

*Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra).

- 1.2 As part of a broader strategy designed to address both the causes and the effects of Indigenous disadvantage, the Attorney-General's Department (the Department) administers a number of inter-related programs in the broad field of Law and Justice. These include a national program of Legal Aid for Indigenous People (the subject of these *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians (Policy Directions)*) and a range of complementary programs in the areas of Law and Justice Advocacy, Family Violence Prevention Legal Services and Prevention, Diversion and Rehabilitation. These programs were previously administered by Aboriginal and Torres Strait Islander Services (ATSIS). Details of these programs may be found in ATSIS' Annual Report for 2003-04.

### **Objectives**

- 1.3 The primary objective of the Legal Aid for Indigenous People program is to improve the access of Indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens. It is the role of other programs and policy strategies - administered variously by the Department, other Commonwealth agencies and State and Territory Governments - to deal with the underlying sources of Indigenous disadvantage and thereby to reduce the incidence of adverse contact with the justice system. The leaders of all Australian Governments have committed themselves to a program of strategic policy action designed to reduce the level of Indigenous disadvantage in Australian society (Council of Australian Governments, Communiqués of 3 November 2000 and 5 April 2002).

### **Legal Aid Services Program**

- 1.4 Under the grant arrangements to be gradually phased out from 1 July 2005, the Department has provided grant funding of some \$42.9m annually to a national network of 25 Aboriginal and Torres Strait Islander Legal Services (ATSILS). This network has delivered legal aid services at some 94 separate service sites across Australia, and in 2002-03 provided legal representation to 69,292 Indigenous people in 113,698 case and duty matters. Grant funding to ATSILS has been provided on an annual basis and has been subject to a range of specified terms and conditions, including compliance with the terms of a Legal Services Policy Framework (*Policy Framework for Targeting Assistance Provided by Aboriginal and Torres Strait Islander Legal Services*, Law and Justice Group, June 2004 issued by the Aboriginal and Torres Strait Islander Services).

38 The Policy Directions go on to deal, in detail, with such matters as eligibility for assistance, priorities for assistance, services to be provided, means testing and client contributions, recovery of costs, administrative requirements and performance and accountability requirements. There is also detailed provision concerning the standard for the provision of legal services. Amongst many other requirements, accessibility and cultural sensitivity are said to be fundamental to the effective provision of legal services for indigenous Australians. Various obligations are required to be met in order to ensure that services are delivered in a culturally sensitive and appropriate manner.

### Relevant principles

39 There are five frequently cited decisions of the High Court as regards the test to be applied in determining whether or not a corporation should be categorised as a 'trading corporation' for the purposes of s 51(xx) of the Constitution. These have followed a variable course.

40 In *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533, two of the majority (Menzies and Gibbs JJ) emphasised the importance of the purpose for which a corporation was formed. Menzies J considered that the fact that a corporation trades 'is clearly insufficient by itself to bring it within the classification of a trading corporation' (553). He found that the County Council, which engaged in the supply of electricity, existed in 'its original and existing character' for local government purposes (551) and that, although it traded, it was not a trading corporation (554). Gibbs J said that, in s 51(xx), the word 'trading' formed part of a composite expression and indicated the essential attribute of the kind of corporation to which it referred (561). On this view, a trading corporation was one 'formed for the purpose of trading' (562). The mere fact that it traded did not make it a trading corporation. The third member of the majority, McTiernan J, appears to have taken a different approach. He said that the words in question are 'a trading corporation' and not 'any trading corporation' and that it could 'hardly be contended that the legislature intended any corporation which trades' to be encompassed within those words (546). However, his judgment appears to have turned upon the proposition that Parliament had intended to legislate with respect to a 'free enterprise corporation' and that it was too remote a deduction to draw, from the general words 'trading corporation', that the legislature intended to make a body within the central government of a State, or a local authority, amenable to the jurisdiction of the Trade Practices Tribunal because it was a supplier of goods or services within the State (547).

41 The minority (Barwick CJ and Stephen J) placed emphasis on the activities of the corporation at the time of assessment. Barwick CJ said that the description 'trading corporation' referred 'not to the purpose of incorporation but to the activities of the corporation at the relevant time' (539, 541 - 543), although he added that the power to trade must be within the corporate charter (542). He accepted that the application of this test did not mean 'that a corporation which to any extent engages in trade is a trading corporation' (543). Stephen J similarly considered that the description 'trading corporation' is one of 'actual or intended activities' (568). He regarded 'matters domestic to the County Council' as irrelevant to the question whether it was a trading corporation (568).

42 The dissenters in *St George County Council* gained the upper hand in *R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)* (1979) 143 CLR 190 (*Adamson*). Barwick CJ said that 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' (208). He went on to say (208):

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 a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.

43 Mason J, with whom Jacobs J agreed, preferred the view of Barwick CJ in *St George County Council* that 'it is not necessary that a corporation be formed for trading or financial purposes and that "the activities of a corporation at the time a law of the Parliament is said to operate upon it will determine whether or not it satisfies the statutory and therefore the constitutional description"' (233). He added that not every corporation which is engaged in trading activity is a trading corporation and that the trading activity of a corporation may be so slight and so incidental to some other principal activity that it could not be described as a trading corporation (234). He said that whether the trading activities of a particular corporation are sufficient to warrant its being characterised as a trading corporation is 'very much a question of fact and degree' (234).

44 Gibbs J adhered to what he had said in *St George County Council* (212 - 213). However, he went on to say that if, contrary to his opinion, the activities of a corporation at the relevant time determine whether it satisfies the constitutional test, it is the predominant and characteristic activity that has to be considered (213).

45 Stephen J, too, seemingly adhered to what he had said in *St George County Council* (219). He added that, as all who participated in that case agreed, 'to engage in trade is not in itself to be a trading corporation' (220).

46 Subsequently, in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, Mason, Murphy and Deane JJ summarised the effect of *Adamson* as follows (303 - 304):

First, the majority of the Court (Barwick CJ, Mason, Jacobs and Murphy JJ), rejecting the argument that the purpose for which a corporation is formed is the sole or principal criterion of its character as a trading corporation, concluded that the relevant character of the football leagues and the football club was to be ascertained by reference to their established activities ((1979) 143 CLR, at pp 208 - 211, 233 - 237, 239 - 240). In adopting this view their Honours disapproved the approach taken by the majority in *St George* which placed emphasis on the purpose for which the County Council was formed (see, for example, p 562).

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 p 213 per Gibbs J). Barwick CJ ((1979) 143 CLR, at p 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 ((1979) 143 CLR, at p 234) said that it 'is very much a question of fact and degree' having earlier stated ((1979) 143 CLR, at p 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 ((1979) 143 CLR, at p 239) said '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 categorizing the corporation as a trading corporation when it engages in the activities.

Indeed, we would 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 categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type.

47 Gibbs CJ and Wilson J summarised *Adamson* as follows (294):

In our opinion, the case is authority for the proposition that a corporation whose principal activity is trading is a 'trading corporation' within s 51(xx). Barwick CJ, Mason J and Jacobs J clearly grounded their decision on that view of the activity of the prosecutors. Murphy J was content to say that their trading activities were substantial. So far as obiter dicta is concerned, while it is true that Mason J, with Jacobs J concurring, adopted a relative test in terms of a 'sufficiently significant proportion of overall activities' ((1979) 143 CLR, at p 233) and Murphy J in terms of 'not insubstantial' ((1979) 143 CLR, at p 239), the remaining four members of the Court (Barwick CJ, Gibbs, Stephen and Aickin JJ) all either expressly or in our opinion implicitly indorsed the predominant and characteristic activity test.

They went on to express their own view of the approach that should be taken (294 - 295):

We should now state the view which we take of the proper approach to the question of characterizing a trading or financial corporation for the purposes of s 51(xx) and the *Trade Practices Act*. If the matter were free of authority, we would favour in substance the view expressed by Gibbs J in *St George*. As a matter of language, s 51(xx) seems to us to identify distinct types of corporations, thereby alluding more to their nature and purpose than to the activities in which they engage. Of course a consideration of what corporations do may well be relevant to a determination of their nature and purpose; but to concentrate exclusively or primarily on the current activities of a corporation in the process of classification is to construe the legislative power as a power with respect to trading or financial activities rather than as a power with respect to certain types of corporation.

However, the matter is not free of authority. We regard ourselves as bound by *Adamson* to give greater weight to the current activities test than we would otherwise have thought appropriate. On the other hand, the process of characterization is not to be narrowly pursued. It calls for a consideration of all the circumstances touching the corporation in question before one can determine whether it satisfies the constitutional description.

Such an approach is in our view necessarily implicit in a process of characterization and we do not understand *Adamson* to deny it.

48 In *Fencott v Muller* (1983) 152 CLR 570, Gibbs CJ (who, with Wilson & Dawson JJ, was in dissent on the question whether a corporation, Oakland Nominees Pty Ltd, was a trading or financial corporation) said that the words 'foreign', 'trading' and 'financial', which govern 'corporations' in s 51(xx), indicate that the paragraph refers only to corporations of particular kinds and that those words make it necessary to consider the character of the corporation which, in turn, may be discovered by considering what it does and what it is intended to do (588). He went on to say (588 - 589):

But a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on. It may indeed be wrong to insist on finding activities that are 'primary' or 'predominant', but it is equally wrong to be satisfied with activities that are 'substantial', if the latter activities do not, in all the circumstances, show that the corporation has a character which the Constitution requires. It is true that the question will often be one of degree.

Gibbs CJ returned to the issue of purpose of formation (589 - 590). He said that this will be particularly relevant when the corporation has not yet begun, or has only just commenced, the activities which it was intended to carry on but that the width with which an objects clause of a company's memorandum of association is customarily drafted might render it an inadequate and misleading guide. He said that to accept that the intended, as well as the actual, functions of the corporation are relevant for the purpose of determining its character does not mean that only the memorandum of association might be looked at for that purpose. Rather, the whole of the evidence as to its intended operations is relevant.

49 Mason, Murphy, Brennan and Deane JJ, who formed the majority, said that the 'activities test' was the relevant test to determine the character of a corporation (600 - 601). However, they went on to say (601 - 602):

The majority judgments in [*Adamson*] which held that the established activities of the football league concluded its character as a trading corporation did not suggest that trading activities are the sole criterion of character. Absent those activities, the character of a corporation must be found in other indicia. While its constitution will never be completely irrelevant, it is in a case such as the present where a corporation has not begun, or has barely begun, to carry on business that its constitution, including its objects, assumes particular significance as a guide ...

50 Wilson J regarded the activities of the corporation and its intended purpose as being relevant to its characterisation (611). He said that the purpose is not necessarily to be found in the scope and range of the objects contained in its memorandum of association. He agreed with the views of Gibbs CJ as to how the task of characterisation was to be pursued (611).

51 Dawson J, too, touched upon the issue of purpose. He said (623):

If purpose is initially relevant in determining character, it must remain relevant after a corporation has commenced to engage in some or all of its eventual activities. True it may be that these activities may throw more light upon the true nature of the corporation than can any purpose which may be expressed in the formation of a corporation, but that is far from excluding the purpose of its formation, if it can be ascertained, as a factor of relevance for the purposes of s 51(xx) once the corporation has commenced to function actively. If that were not so, the approach would be a pea and thimble one which would serve to confuse rather than assist in the solution of the problem.

He went on to say (623 - 624):

The fact that the objects and powers are sufficiently wide to enable the corporation to undertake trading and financial activities does not indicate purpose and to regard them as doing so, in my view, would be to confuse capacity with purpose. As Barwick CJ remarked in *Adamson's Case* ((1979) 143 CLR, at p 208):

'In modern times having regard to the diversification of corporate activity and the virtual elimination of ultra vires from the law relating to companies registered under the Companies Acts, eg, s 20 of the *Companies Act 1961* (NSW), the nature of a company may not be discernible from a perusal of its memorandum.'

His Honour went on to say:

'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.'

If by the last statement his Honour was suggesting that the current activities of a company are the exclusive guide to its nature, then it is a viewpoint which is not shared by a majority of the Court. But what his Honour does say serves to demonstrate that in searching for the proper classification of a company it may not always be fruitful to resort to its memorandum of association, especially in the case of a company incorporated under one of the Companies Acts with wide objects and powers intended to enable the corporation to engage in an extended variety of activities, some of which may be described as trading or financial and

some of which may not. The fact that the corporation in question has not engaged in activities of any significance cannot endow its memorandum with a relevance which disappears upon the commencement of business. If the objects of a corporation point to its nature, they continue to do so whether or not it commences and continues to pursue them. However, in this case, having regard to the capacity of the corporation in question to exercise its functions with or without engagement in trading or financial activities, I can find no indication in its objects or powers that it is properly to be described as a trading or financial corporation.

52 In the *Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam case*), the court considered whether a statutory body corporate, the Hydro Electricity Commission (HEC), was a trading corporation within the meaning of s 51(xx) of the Constitution. A majority (Mason, Murphy, Brennan & Deane JJ) held that it was. Gibbs CJ and Dawson J dissented in this respect. Wilson J found it unnecessary to decide the question.

53 Mason J, in finding that the HEC was a trading corporation, referred (155) to what had been said by Barwick CJ in *St George County Council* (541) to the effect that the connection of a corporation with the government of a State would not take it outside s 51(xx). He also referred (156) to what had been said by the majority in *Adamson*, to the effect that a trading corporation whose trading activities take place so that it may carry on some other primary or dominant undertaking (which is not trading) may nevertheless be a trading corporation. Murphy J once again said that the constitutional description of trading corporations includes bodies incorporated for the purpose of trading and also those which trade (179). He regarded the HEC as a trading corporation both by virtue of its constitution and its activities which, he said, made it a major trader (179). Brennan J regarded the trading activities of the HEC as being a substantial part of its overall activities, if not the predominant part, and said that, consistently with the views which had prevailed in earlier cases, the HEC must be held to be a trading corporation (240). Deane J referred to what had been said by the majority in *Adamson*, in particular to the effect that a corporation will be a trading corporation when its trading activities form a sufficiently significant proportion of its overall activities so as to merit its description as such (293). He concluded that, whatever other descriptions might be applied to the HEC, in the context of its overall activities it was a trading corporation.

54 Gibbs CJ, in his dissenting judgment, regarded the HEC as 'a corporation sui generis' (117). He said that its activities included trading (it supplied electricity for profit) on a substantial scale, but also included

the construction, on a large scale, of generating plants and works for the distribution of electricity to enable it to keep Tasmania supplied with electricity (117). He said that, in this respect, it discharged a public function of vital importance to the State. He added that it performed other governmental functions of less importance. He considered that to describe the Commission as a 'trading corporation' was to rob those words of all distinctive meaning. Dawson J found it unnecessary to consider whether the HEC was a trading corporation. However, he went on to say that, had he needed to do so, he would have come to the same conclusion in that respect, and for the same reasons, as Gibbs CJ (318).

55 Other courts have since considered the issue. However, before turning to these, I propose first to refer to an earlier case, *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, decided after *St George County Council*, but before *Adamson*. Bowen CJ said (139):

The terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements (*W & A McArthur Ltd v State of Queensland* ((1920) 28 CLR 530 at p 547)). The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing (*Commissioners of Taxation v Kirk* ([1900] AC 588 at p 592) per Lord Davey; *W & A McArthur Ltd v State of Queensland* ((1920) 28 CLR 530)). The commercial character of trade was mentioned more recently by Lord Reid in *Ransom v Higgs* ([1974] 1 WLR 1594). His Lordship there said: 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services ([1974] 1 WLR at p 1600)'.

He also said, when addressing the 'mutuality' that he found to have been present in that case on the part of the applicants in relation to their members, that it 'excludes the commercial element which is a necessary part of "trade or commerce"' (142). In his judgment, Deane J also mentioned the element of commerciality (167).

56 In *Ransom v Higgs* [1974] 1 WLR 1594, referred to by Bowen CJ in the extract that I have quoted from his judgment, Lord Wilberforce made the following comments concerning 'trade' (1610 - 1611):

'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found

which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.

57 That brings me to some of the later cases.

58 In *E v Australian Red Cross Society* (1991) 27 FCR 310, Wilcox J was called upon to consider whether or not the Australian Red Cross Society and the Royal Prince Alfred Hospital were trading corporations. The applicant had contended, amongst other things, that the Society, and its New South Wales Division, although making no charge for the blood supplied by them, conducted blood transfusion activities which constituted substantial businesses by which they supplied valuable commodities, blood and blood products, in return for large payments. The applicant pointed to the fact that the Society received from governments a total of \$44,965,328 in respect of its blood transfusion services, of which the New South Wales Division received more than \$10 m. Wilcox J said, of these contentions (343):

These were, of course, substantial sums. They were earned only because the respondents are prepared to carry on blood transfusion services at a scale, in terms of labour and resources, greater than that of many organisations which are undoubtedly 'trading corporations'. But I do not think that it is appropriate to describe the gratuitous provision of a public welfare service, substantially at government expense, as the conduct of a 'trade'. It is pertinent to recall the words of Stephen J in *St George County Council*: 'It is the acts of buying and selling that are at the very heart of trade', and also to remember the distinction he made in respect of the distribution of electricity free of charge. In relation to the supply of blood, it seems to me that the first and second respondents do not engage in trading activities. They engage in a major public welfare activity pursuant to agreements with the Commonwealth and the various State governments under which they will be reimbursed most of their costs.

59 When considering the position of the Royal Prince Alfred Hospital, Wilcox J accepted a submission that, despite the adoption of the 'activities' test, the purpose for which the corporation was formed retained some relevance (344). However, when he examined the scale of the hospital's trading activities, he regarded them as 'substantial' enough to require that the hospital should be regarded as a trading corporation (345).

60 In *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579, Davies J considered whether the Municipal Council of the Shire of Rockdale was a trading or financial corporation and, hence,

subject to the provisions of the *Trade Practices Act 1974* (Cth). He expressed the test, as it applied to the circumstances before him, in the following way (584):

The issue is, therefore, whether Rockdale's trading activities or financial activities formed a sufficiently significant proportion of its overall activities as to justify its description as a trading or financial corporation. The adjectives 'significant' and 'substantial' were considered in the context of characterisation in *Deputy Commissioner of Taxation (Cth) v Stewart* (1984) 154 CLR 385 at 390, 397 and 399- 400. The activities must be of a sufficiently significant or substantial scale as to confer the character of 'trading' or 'financial' upon the corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison to the extent of the corporation's activities overall are relevant.

Importantly, he also said that the 'carrying out of a function of government in the interests of the community is not a trading activity' (585).

61 A subsequent appeal was successful. However, it was unnecessary for the Full Federal Court to consider whether the Council engaged in trade: *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290.

62 In *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337, Emmett J was required to consider a similar question in respect of the Australian Government Publishing Service (AGPS). AGPS was the primary publisher, printer and distributor of Commonwealth parliamentary and government information and was a business unit within the Department of Administrative Services of the Commonwealth. The services provided by AGPS included a package (described as 'package 3') which included core parliamentary and government printing, general government printing, graphic design and editorial services. Emmett J said, in this respect (355):

Even if AGPS has not been providing services to arms of the Commonwealth Government on a profit-making basis, the services which it has been providing are services of the nature which an entity carrying on a business could well provide. Regularly and systematically providing services of the nature of the services comprised in package 3 is carrying on a business. General printing services, dispatch and distribution services, graphic design services and editorial services are activities comprising the carrying on of business albeit that they are provided in connection with government.

The Commonwealth contended that, in providing those services, AGPS was undertaking functions which are inherently functions of government such that they cannot be considered a trading activity, much less the carrying on of a business: see, for example, *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579 at 585. Clearly, there is a distinction between those functions of a Government which are purely governmental or regulatory and those functions which entail the carrying on of business. However, that contention appears to confuse the two aspects of the Commonwealth's involvement in the package 3 services. Insofar as the Commonwealth, in the guise of the Department of the Senate, the Department of the House of Representatives and other departments, utilises the services provided or procured by AGPS, it does so in the carrying out of governmental functions. It could not be said that the Commonwealth in those guises is carrying on a business. It is acquiring the services systematically and regularly, but only for the purpose of governing.

However, in its guise as AGPS, the Commonwealth is doing what any citizen or private trader might do, namely, providing those services for remuneration. That remuneration may or may not be a commercially adequate remuneration. Further, those services are being provided to the Commonwealth in its governmental guises. Nevertheless, I consider that the Commonwealth, in providing those services, is carrying on a business within the meaning of s 2A.

63 In *Fowler v Syd-West Personnel Ltd* [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998), the respondent corporation was established to create and operate a long-term employment programme for people with intellectual disabilities and to place other workers in employment. Most of its income comprised grants from the Commonwealth Department of Health and Family Services. The relationship between the respondent and the Department was governed by a contract which required the respondent to use the funding only for the provision of services under the contract in accordance with the *Disability Services Act 1986* (Cth) and the Minister's funding priorities. McIntyre VP, after referring to a number of the cases, including *E*, concluded that the respondent was not a trading corporation. He reached this conclusion upon the basis that the respondent was engaged in the gratuitous provision of a public welfare service substantially at government expense which, he said, was not the conduct of a 'trade'.

64 In *Quickenden v O'Connor* [2001] FCA 303; (2001) 109 FCR 243, the court (Black CJ, French & Carr JJ) held that the University of Western Australia was a trading corporation by virtue of its substantial trading activities, such as the buying, selling and renting of property, the sale of publications and services and the operation of the Festival of Perth [49],

[51] (Black CJ & French J), [109] (Carr J). However, Black CJ and French J considered it questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act 1988* (Cth) (HEF Act) amounted to trading. They said, in this respect [50] - [52]:

The University also submitted that the fees charged by it for courses are fees for services notwithstanding that they are regulated by legislation and ministerial guidelines. So it was said that under the *Higher Education Funding Act* the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law. The guidelines themselves, it is said, do not limit the University in such a way as to deny the fees the character of payment for services and facilities provided in the courses offered by the University. No limits are imposed on the number or content of the courses nor on their promotion or design, nor on ancillary matters such as accommodation and other student benefits which may attract potential students. Specifically, in respect of payments made by the Commonwealth to the University under the *Higher Education Funding Act* it is said that they should properly be characterised as revenue from trading activities. The argument is put thus. Some students pay HECS contributions directly to the University. That is, they pay a fee for services rendered to them. In 1995 fees paid in this way amounted to \$8.849 million. HECS payments by the Commonwealth to the University in that year amounted to \$17.318 million. Those payments, it was submitted, should also be characterised as revenue derived from trading.

It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. 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.

It may be added that the characterisation of a body corporate as a trading corporation is a matter of fact and degree. Dr Quickenden has been unable to point to any error in that assessment on the part of the learned primary judge. As to the status of the University as a financial corporation that too is established on the evidence. His Honour's reasons and findings in that respect also are not shown to have been in error.

65 Carr J disagreed with the majority as regards the provision of educational services under the HEF Act. He said [106]:

Although it is not necessary for me to decide, in my view there were other aspects of the University's activities which could be characterised as trading. Judicial notice can, I think, be taken of the fact that these days universities compete for students. The competition may be more intense within a particular State, but it certainly extends overseas and probably extends interstate. The Higher Education Contribution Scheme, in essence, works as follows. Relevantly, if the University wishes to participate in the Scheme it is obliged to charge fees to the students for the provision of education. If a student elects to pay those fees to the University directly and immediately out of his or her own funds the student gets a discount of 25 per cent, with the Commonwealth paying the balance to the University. Otherwise the student borrows the amount of the fees from the Commonwealth (which the Commonwealth pays to the University on the student's behalf) and subsequently repays that loan when he or she earns certain levels of income. The evidence was that the University derived, in the year ended 31 December 1997, an amount of \$29.5 million under the Higher Education Contribution Scheme. I would regard that as being a trading activity.

66 In *Pellow v Umoona Community Council Inc* [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006), the respondent council, which was incorporated under the *Associations Incorporation Act 1985* (SA), engaged in activities which included the provision of a housing programme, a youth programme, an alcohol strategy, a child-care centre, a Centrelink agency, an advocacy service and other relief or aid facilities for local communities. O'Callaghan SDP distinguished between grant funded social service activities and agency arrangements involving a charge on a government department for the provision of a designated service. He said, in this respect [29]:

The fact that the Council is incorporated in accordance with its constitution to undertake activities directed at the public good does not automatically take it outside the scope of being a trading corporation. Rather, consistent with the authorities, it is the activities in which it is involved which will determine whether it is, or is not, a trading corporation. In this respect there is a difference between grant funded social service activities such as the Coober Pedy Alcohol Strategy, including the Sobering Up Centre, and the provision of services on an agency basis for Government instrumentalities such as Centrelink. The Centrelink services appear to be undertaken by the Council on an agency basis and must be regarded as trading activities notwithstanding that the Council may have entered into these arrangements with the objective of improving social services for the local community. They differ from a grant in that the agency arrangement involves a charge on a Government department for the provision of a designated service which the department

would be otherwise required to provide at its own cost. This is consistent with common arrangements for the delivery of traditional government services through private providers. For instance, the provision of job search services by a private provider involves trading as the provider makes a charge or even bids to the Government for the right to provide that service. In these instances the trade is actually constituted by the provision of the commodity or service. It reflects a commercial undertaking. In contrast, grant funding is provided for defined purposes which cannot be defined as commercial activities.

67 In *Hardeman v Children's Medical Research Institute* [2007] NSWIRComm 189; (2007) 166 IR 196, the New South Wales Industrial Court (Wright, Walton & Boland JJ) considered whether the respondent, a company limited by guarantee incorporated under the *Corporations Act 2001* (Cth), was a trading or financial corporation. Among the principles accepted by the court was one that 'trading activities' generally connote activities of a commercial nature involving, in essence, the exchange of goods or services for reward. The court analysed the trading activities of the respondent as a proportion of its total activities and concluded that it was not a constitutional corporation ([21] - [22]). The court said that there was no indication from the respondent's annual report, organisational structure, staff arrangements or its objects that gave rise to the impressions that trading activities were engaged in to a 'substantial', 'not insubstantial' or 'sufficiently significant' degree [22].

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* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
- (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [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* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films*

*Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].

- (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
- (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (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* (543) (Barwick CJ); *Tasmanian Dam case* (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* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (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* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
- (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26].

### Application of the principles

69 It is important to bear in mind, at the outset, that s 51(xx) of the Constitution does not give to the Commonwealth a power to legislate with respect to trading, or even with respect to trading by corporations: *State Superannuation Board* (295) (Gibbs CJ and Wilson J). It gives a power to legislate with respect to some, but not all, corporations, including those that are classified as trading corporations: *St George County Council* (543) (Barwick CJ), (546) (McTiernan J).

70 The appellant in the present case was set up to perform what are best described as public welfare services. As is apparent from cl 4 of its constitution, its function is to provide direct relief to indigenous people from 'poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with [the law] ... '. It was for this purpose that it was given power to provide legal assistance to indigenous persons and to receive and spend grants from the Commonwealth. It exists for no other purpose and there is no suggestion that its activities had ever deviated from those necessary to achieve its primary purpose in the public interest.

71 That, of itself, is not determinative. However, there are other factors which point against the appellant's trading character. As I have said, its constitution requires that all of its income and property, derived from whatever source, be applied exclusively towards the 'promotion' of its objects and its members are not to receive any form of profit, bonus or dividend. There is no suggestion that the appellant earns, or tries to earn, any form of profit, bonus or dividend. Nor is there any suggestion that it profits from, or tries to profit from, its activities under the contract so as to fund any other activities that are permitted under its constitution. There is no suggestion, even, that it undertakes any other activities of any significance at all. Also, I have said that it is classed as a public benevolent institution and that it enjoys tax concessions accordingly. Its services are provided only to those it has been set up to help and it does not compete for those, or any other, clients.

72 There is nothing in its funding arrangements that alters any of this. Although the appellant tendered for its funding contract, the tender was not one based on price. Rather, as I have said, the whole process was designed to enhance efficiency in respect of services funded by government. The recitals to the contract, and the provisions to which I have referred, make it plain that the funding is designed to ensure that indigenous Australians have access to high quality and culturally appropriate legal aid services so as to enable them fully to exercise their legal rights as Australian citizens. Those who are given access to these services must demonstrate both that they are eligible persons and that they satisfy a means test establishing that they are unable to pay for their legal services. The overwhelming majority of the services are provided free of any charge. If contributions can be made towards expenses, they must be used to enhance the quality of the services provided. Services under the contract are overseen, and controlled, by Government. Although fees are paid on invoice, this is merely an accounting device and the fees must be provided in the pre-ordained sums, so long as the contracted services are

provided. The Policy Directions make it plain that the funding is provided in order to achieve a welfare function in fulfilment of government policy.

73 The services performed by the appellant under the contract are essentially the same services, with the same welfare or public interest purpose, as had previously been the case. Also, as had previously been the case, the funding still came primarily from government. The only change of any substance was that the nature and quality of the services were controlled under the contract rather than by grant conditions. Although, theoretically, a private law firm intending to derive some profit from the contract might have tendered for it, that has no bearing on the characterisation of the appellant. It remained the same public interest, non-profit organisation that had previously performed welfare services of the same kind.

74 None of these factors, taken individually, necessarily has the consequence that the appellant is not a trading corporation. A trading corporation can contract with government to provide a charitable or welfare function in fulfilment of government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character, as I have said. However, when all of the factors to which I have referred are taken together, it cannot be said that what is done by the appellant has a commercial character. Rather, its activities, including its entry into the contract, seem to me to be removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as those of a government-run legal aid agency. As I have stressed, its services are provided, in all but the most exceptional cases, free of charge: *St George County Council* (569). They are provided for altruistic purposes, not shared by ordinary commercial enterprises (*Ku-ring-gai* (160) (Deane J)), under a constitution which requires the appellant to act only in furtherance of the altruistic objects. The appellant engages in a major public welfare activity pursuant to an agreement with the Commonwealth under which it will be re-imbursed for most of its costs: *E* (343) (Wilcox J); *Fowler*. Although its services have been 'purchased' by the Commonwealth under the contract, its activities continue to lack a 'commercial aspect': *Hardeman* [26]; *J S McMillan* (355) (Emmett J); *Ku-ring-gai* (142) (Bowen CJ), (167) (Deane J). It follows from what I have said that the appellant is not a 'trading corporation' for the purposes of s 51(xx) of the Constitution and the notice of contention succeeds. The Commission has jurisdiction to determine the issue before it.

STEYTLER P  
PULLIN J

75 This conclusion makes it unnecessary for me to determine whether if, as the Full Bench found [318], the 'entering into and performance of the contract' with the Commonwealth was a trading activity, the Full Bench erred in holding that trading was not a substantial corporate activity of the appellant. However, I will comment, very briefly, on that issue.

76 Generally speaking, if a corporation trades, and its trading activities are 'substantial' or 'significant', it will fall within the ambit of the Commonwealth's legislative powers, as I have said. If the Full Bench was right in its conclusion that the entering into, and performance of, the contract by the appellant constituted trading, it seems to me that it must have been in error in concluding that the appellant was nonetheless not a 'trading corporation'.

77 The performance of the contract was, as I have stressed, close to the entirety of what the appellant did. That appears to have been recognised by the Full Bench. They say that what the appellant provided for the government under the contract were 'specifically directed and highly controlled services which enhance a particular ... policy' [319]. This is plainly a reference to the legal aid services provided by the appellant to indigenous people. However, the Full Bench goes on, immediately, to say that all of the activities of the appellant need to be assessed and that these 'include the provision of legal representation to indigenous people for which they are not charged' [320]. This activity, being, as I have said, the activity that constitutes performance of the contract, is said not to amount to trading [320]. Consequently (and notwithstanding what it said in [318]), it seems as if the Full Bench treated the making of the contract as an act of trading, but that it regarded the performance of the contract by the appellant, so far as it involved the provision of free legal assistance to indigenous people, as not amounting to trade. In my respectful opinion, that is a distinction that is conceptually unsustainable. If the contract was entered into in the course of trade, contrary to the conclusion at which I have arrived, then, it seems to me, so too were the acts that were done in performance of that contract. These acts were, as I have said, undoubtedly a substantial part of the appellant's activities.

### **Conclusion**

78 I would dismiss the appeal.

79 **PULLIN J:** I agree with Steytler P, for the reasons that he gives, that the appeal should be dismissed.

PULLIN J  
LE MIERE J

80 The President, in his reasons, has identified the relevant authorities bearing on the subject and the factors which, taken together, lead me also to the conclusion that the appellant was not, at the relevant time, a trading corporation.

81 The High Court authorities on the subject, set out in the president's reasons, grapple with the issue about whether the activities, rather than the purpose of incorporation, are determinative of the issue and whether relevant activities must be 'substantial' or 'primary' or 'not insubstantial'. Other cases of the Federal Court and in England also referred to in the president's reasons emphasise the ordinary meaning of the word 'trade' which, as Bowen CJ said in *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, at 139, is 'Commonly used to denote operations of a commercial character.'

82 The usual meaning of the word 'commercial' is 'capable of being sold' or 'preoccupied with profits or immediate gain': *Macquarie Dictionary*. The decision about whether a corporation is a trading corporation is a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the conclusion that the particular corporation is a trading corporation. Whether the operations or activities of the corporation produce a profit or are intended to produce a profit may not be determinative, but it will often be an important relevant factor. It is one of the important relevant factors in this case. The president has drawn the factors together in [74] of his reasons.

83 **LE MIERE J:** I have had the advantage of reading in draft the reasons of Steytler P. I agree that this court has jurisdiction to hear the appeal for the reasons stated by the president.

84 The president has set out the essential facts and circumstances giving rise to this appeal. It is unnecessary for me to repeat them. As the president states, this appeal turns upon the question whether the appellant is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

### **Respondent applies for relief for unfair dismissal**

85 The respondent applied to the Western Australian Industrial Relations Commission for relief on the grounds that he had been harshly, oppressively or unfairly dismissed from his employment as a solicitor with the appellant. The appellant contended that it is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and s 4 of

the *Workplace Relations Act 1996* (Cth) (the WRA) and that consequently the Commission did not have jurisdiction to hear and determine the respondent's application.

86 At first instance Kenner C held that the respondent was not a trading corporation. The commissioner said the issue to be resolved was how the activities of the appellant are to be characterised. The commissioner referred to the appellant's contention that the provision of legal services to Indigenous persons in this State in return for which the Commonwealth pays the appellant, is trading. The respondent contended that the activities of the appellant were a gratuitous provision of welfare services, with the means by which those services were funded being a matter of form and peripheral to the essential enquiry to be undertaken by the Commission. Kenner C found that the appellant was not acting on a commercial basis and that the tender process was not truly competitive. Despite the contractual form of the arrangement, the commissioner characterised it as a funding agreement that provided for the gratuitous provision of a public welfare service, substantially at government expense. Kenner C described the fact that the Commonwealth was invoiced as 'simply an administrative mechanism by which the funding was dispersed'. Kenner C found that the appellant does not, in reality, charge fees to the Commonwealth for the service it provides.

87 The appellant appealed to the Full Bench on the ground that the Commission erred in fact and in law in determining that the appellant was not a trading corporation when the Commission failed to appreciate and give effect to the fact that the three year contract between the Commonwealth and the appellant for the purchase by the Commonwealth of the appellant's services to Indigenous persons, and the corresponding sale by the appellant to the Commonwealth of such, constituted trading activity engaged in by the appellant.

88 The Full Bench said that the determination of the appeal depends in part upon the meaning of 'trading' and whether the entering into, performance of and payment under the contract between the Commonwealth and the appellant (the Contract) constitutes trading.

89 The Full Bench found that the entering into and performance of the Contract by the appellant constituted trading with the Commonwealth but that the appellant is not a trading corporation. The Full Bench reached that decision by treating the provision of funds by the Commonwealth to the appellant pursuant to the Contract and the delivery of legal services by the appellant to its clients as discrete activities. The Full Bench found that the provision of funds by the Commonwealth to the appellant pursuant to

the Contract constituted trade because the Commonwealth paid money and received value in return, being the benefit of the appellant carrying out a service for a part of the community in attempting to fulfil a policy of the government. The Full Bench found that the delivery of services by the appellant to its clients was not trading activity because there was no exchange of value between the appellant and its clients. The Full Bench concluded that the appellant was not a trading corporation because the trading activity of entering into the Contract and receiving funds from the Commonwealth was not significant compared to the appellant's non-trading activities of providing free legal services to its clients.

### **Did the Full Bench err?**

90 The Full Bench erred in treating the provision of funds by the Commonwealth to the appellant and the use of those funds by the appellant to provide services to its clients as discrete activities. The Full Bench itself acknowledged that the two were inextricably linked. The appellant provides services to its clients. Those services are provided in performance of the appellant's obligations under the Contract and in accordance with the terms and conditions of the Contract. The fees paid by the Commonwealth under the Contract are paid in consideration for the appellant providing to its clients the services specified in the Contract and provides the resources for the appellant to deliver those services. The provision of services by the appellant to its clients cannot be treated as an activity discrete from the payment of fees by the Commonwealth to the appellant under the Contract when characterising the activities of the appellant. In determining whether the appellant is a trading corporation, it is necessary to have regard to the activities of the appellant as a whole. I now turn to that question.

### **Legal principles**

91 In *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 a majority of the High Court held that the council was not a trading corporation. The majority decision was based on a 'nature and purpose test' - that is, the nature and purpose of the council was not found to be 'trading activities'. Barwick CJ and Stephen J in dissent held that the council was a trading corporation using a test based on the 'substantial trading activities' of the council.

92 In *R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)* (1979) 143 CLR 190 (*Adamson*) the High Court held that a corporation will be a trading corporation if trading is a substantial corporate activity. The court

declined to apply the nature and purpose test. Mason J said of a 'trading corporation':

Essentially 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 (233).

93 The 'activities test' has been applied ever since: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Fencott v Muller* (1983) 152 CLR 570; *Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam case*); *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices case*) at [157], [158].

94 The 'activities test' raises two issues. The first is whether an activity of a corporation is to be characterised as trading or non-trading. The second concerns the level of trading activity that is necessary for the corporation to be characterised as a trading corporation.

95 'Trade' and 'trading' are ordinary words that must take their meaning from their context. The first meaning of 'trade' in the fourth edition of the Macquarie Dictionary is 'the buying and selling, or exchanging, of commodities, either by wholesale or by retail, within a country or between countries'. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 (*Re Ku-ring-gai*) Bowen CJ said that the terms 'trade' and 'commerce' in the phrase 'in trade or commerce' in s 47 of the *Trade Practices Act 1974* (Cth) are ordinary terms which describe 'all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements' (139). Bowen CJ said that the word 'trade' is used with its accepted English meaning: 'traffic by way of sale or exchange or commercial dealing'. His Honour went on to say that the word covers intangibles such as banking transactions as well as the movement of goods and persons. Deane J said of the terms 'trade' and 'commerce':

The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of the development of trade, commerce and commercial communication, the terms are clearly of the widest import... They are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary

commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making (167).

96 In *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 381 Dixon J said that in s 92 of the Constitution the meaning of 'trade' is much wider than the buying and selling of goods and its history emphasises rather use, regularity and course of conduct than concern with commodities.

97 In *Adamson* Barwick CJ said:

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 (209).

98 Most people who trade intend or wish to make a profit. But it is not essential to the carrying on of trade that the corporation should make a profit, nor is it necessary that the corporation should desire or wish to make a profit. In *Adamson* Mason J said:

I do not limit the concept of trading to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue (235).

99 References to trading activities connoting activities of a commercial nature are to be found in a number of authorities including *Re Ku-ring-gai* (139, 142, 160, 167); *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 19 - 20 and *E v Australian Red Cross Society* (1991) 27 FCR 310, 343.

100 The Macquarie Dictionary definitions of 'commerce' include 'trade, business'. The Macquarie dictionary definitions of 'commercial' include 'capable of returning a profit'. To the extent that 'commerce' is a synonym for 'trade', the word does not help to determine the meaning of trade. To the extent that the words 'commerce' or 'commercial' connote profit-making they do not provide a guide to the relevant meaning of trade because trade may be carried on even though there is no intention to make a profit.

101 In *Re Ku-ring-gai* Bowen CJ said:

The commercial character of trade was mentioned more recently by Lord Reid in *Ransom v Higgs*. His Lordship there said:

'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.'

Moreover the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (139). (footnotes omitted)

102 In *Bevanere* Morling, Neaves and Spender JJ held that where a company sold its business of a cosmetic clinic as a going concern, the sale constituted conduct in trade or commerce within the meaning of that expression in s 52 of the Trade Practices Act. The court referred to dicta of Deane J and Bowen CJ in *Re Ku-ring-gai* concerning the meaning of 'trade' and 'commerce'. The court referred to a series of United States decisions under consumer protection legislation in which it had been held that a private sale of property by an individual is not conduct in trade or commerce except if done in the course of a business activity or otherwise arising in a 'business context'.

103 The commercial nature of an activity may be an element in deciding whether the activity is a trading activity. But in that context commercial refers to activities which earn revenue and are conducted in a business-like way rather than with a view to profit.

104 Each case where it is necessary to determine whether an activity of a corporation is a trading activity must be decided on its own facts. The approach of the courts in the cases to which I have referred has been to examine the facts and look for the presence or absence of characteristics or indicia of trade. The most important indicium is whether the corporation is engaged in the buying or selling or exchange of goods or services or valuable intangibles.

105 An intention to make a profit supports trading but is not a necessary feature of trading. In *Adamson* Mason J treated all of the activities of the Western Australian National Football League and the South Australian National Football League which produce revenue as trading activities although they were not engaged in with an intention to make a profit. The earning of revenue is an indicium of trading activity. The earning of revenue is usually associated with commercial activity.

106 Carrying on an activity in a commercial or business-like way is an indicium of trade. Repetition and regularity of the activities and organisation of activities in a business-like manner may be significant.

107 The second part of the activities test is whether the level of trading activity is sufficient to constitute the corporation a trading corporation. In *Adamson* Mason J described the required level of trading activities to be 'a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation'. Murphy J held that the trading activity must not be insubstantial. In *State Superannuation Board v Trade Practices Commission*, Mason, Murphy and Deane JJ said:

[A] corporation whose trading activities take place so that it may carry on its primary or dominant undertaking may nevertheless be a trading corporation ... [A]ctivities 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 (304).

108 Notwithstanding the rejection of the 'nature and purpose test' by the High Court in *Adamson*, there are references in the authorities to the relevance of the objects and purposes of a corporation. Those references must be understood in the context of the facts and the arguments presented in the case. In *Fencott v Muller* (1983) 152 CLR 570, Mason, Murphy, Brennan and Deane JJ had regard to the objects and purpose of the corporation in circumstances where the corporation was a shelf company that had not yet begun trading. Mason, Murphy, Brennan and Deane JJ said that where a corporation has not begun, or has barely begun, to carry on business its constitution, including its objects, assumes particular significance (601 - 602).

### **Application of the principles**

109 The predominant activity of the appellant is to provide legal advice and representation and related services to its clients under and in accordance with the Contract.

110 The Contract is entitled 'Contract for the provision of legal aid services for Indigenous Australians in Western Australia'. The parties are the appellant (described as the Provider) and the Commonwealth represented by the Attorney-General's Department (Department). The recitals include:

- A. The Commonwealth wishes to engage organisations to provide the Services with the aim of improving the access of Indigenous Australians to high-quality and culturally appropriate legal aid

services, so that they can fully exercise their legal rights as Australian citizens.

- B. The Provider has fully informed itself about the Services and has submitted a response to the Legal Services Contract Request for Tender dated 13 November 2004 (the RFT).
- C. The Commonwealth has agreed to engage the Provider to provide the Services upon the terms and conditions contained in this Contract.

111 The Contract is a comprehensive document of 27 sections, many of which consist of multiple clauses and paragraphs, together with schedules. The Contract is for a period of three years unless terminated earlier and is subject to extension for a further period or periods of up to three years. The Services are defined to include legal advice and representation covering criminal, civil and family law matters. The Contract provides that when providing the Services, the Provider must, amongst other things, comply with the conditions, priorities, procedures and other requirements specified in the Policy Directions document.

112 The Contract sets out the minimum of each type of service that is to be provided during each year of the contract. For example, in the first year legal case work representation and assistance is to include a minimum of 9,100 criminal law cases, 250 family law cases and 340 civil law cases in the metropolitan area.

113 Clauses 3.10 and 3.11 provide that the Provider must liaise with, and comply with any directions from, the Contract Manager as reasonably required from time to time, including any directions related to the performance of the Services. The Contract Manager is an officer of the Department.

114 Clause 4 provides detailed conditions relating to the fees to be paid to the appellant. The appellant is to be paid an initial sum on the commencement date of the contract and thereafter monthly payments in arrears on the last day of each month during the contract period. The amount of each of the monthly payments in the first year are fixed and thereafter the fixed monthly payments increase in the second and third years of the contract. The appellant is required to submit an invoice for each instalment of the fees.

115 Clause 11 provides for the Commonwealth to terminate the contract. Clause 11.1 provides that the Commonwealth may, at any time by notice, terminate all or part of the Contract immediately for any reason. In the

event of the Commonwealth terminating the contract in that fashion it will only be liable to pay any instalment of fees relating to Services that are completed before the date of the notice and reimburse any of the appellant's expenses unavoidably incurred by the appellant relating entirely to the Services not covered by the instalment of fees relating to services completed before the date of the notice. There are also contractual provisions entitling the Commonwealth to terminate the contract if the appellant fails to satisfy any of the terms or conditions of the contract and in other circumstances.

116 The first question is whether the activity of the appellant in providing assistance, legal advice and representation and related services to its clients under and in accordance with the Contract is a trading activity. There is a tripartite arrangement between the Commonwealth, the appellant and its clients. However, it does not matter whether the Commonwealth or the appellant's clients are engaged in trading activities. The question is whether the appellant is.

117 The activity of providing assistance, legal advice and representation and related services to clients in consideration for fees paid by the Commonwealth under and in accordance with the Contract is trading. It consists of providing valuable services to clients in consideration for receiving fees from the Commonwealth. It does not matter that the appellant is paid by a different person than it provides the services to. Many corporations indisputably engaged in trading are paid by one person or organisation to provide services to a different person or persons.

118 There is nothing about the intrinsic nature of the services provided by the appellant to its clients that makes the activity of providing those services a non-trading activity. The providing of legal services is, or is capable of being, an activity in trade: see *Adamson* per Murphy J (240). The nature of the activities - that is, the provision of legal and related services to clients - is similar to that carried out by private law firms.

119 The providing of services for reward is at the very heart of trade. The activity of providing services to its client earns the appellant revenue. Earning revenue from carrying out an activity is characteristic of trade.

120 The appellant carries out its activities on a relatively large scale. In the three year period of the contract the appellant is to receive approximately \$23.4 million from the Commonwealth for providing services to its clients. The appellant has approximately 18 office premises around the State. The appellant employs approximately 30 legal

practitioners and approximately the same number of court officers. A court officer is a person employed to represent clients on minor matters and help to facilitate instructions to legal practitioners and assist with things like language and local knowledge.

121 Such evidence as there is of the appellant's organisation and operations shows that the appellant carries out its activities in a business-like way. The appellant carries out its activities with the repetition and regularity characteristic of business-like activities. The activities of the appellant are organised in a business-like manner. The services are delivered by legal practitioners and court officers operating out of regional offices. The appellant invoices the Commonwealth for the services it provides at the end of each month. It is apparent that the appellant keeps books and records characteristic of a business. That may be inferred from the accounts incorporated in the appellant's annual report and the auditors' certification of those accounts.

122 Having regard to the nature of the activity of providing services to its clients, the revenue earned from that activity, the manner in which the activity is carried out and the contractual context in which it is conducted, the activity of providing services to its clients is on the face of it a trading activity.

123 The respondent and the Minister submit that the principal activity of the appellant is non-trading. The appellant is an altruistic or pro bono body that carries out its activities for the public benefit, or a section of it. The appellant does not and does not intend to make a profit and could not distribute any profit to its members. It is submitted that the revenue received by the appellant is really in the nature of public funding by the government.

124 A corporation whose trading activities take place so that it may carry out its primary or dominant undertaking may nevertheless be a trading corporation. 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: *State Superannuation Board v Trade Practices Commission* (304). In the *Tasmanian Dam case* the High Court held that the Hydro-electric Commission, a Tasmanian statutory corporation, was a trading corporation notwithstanding that its operations are largely conducted in the public interest.

125 The appellant is a non-profit organisation. But if the corporation carries on trading activities to a sufficient level the fact that it is a non-profit organisation does not mean that it is not a trading corporation. In recent years in Australia there has been a significant increase in outsourcing, corporatisation and privatisation of government service provision and an accompanying diminution in the delineation between the public and private sectors. In addition there has been an increase in the number and operations of non-government not-for-profit organisations. Non-profit organisations vary from school parents associations to organisations like the Australian football leagues that carry on large scale operations that earn large amounts of revenue. Some not-for-profit organisations buy or sell goods or services on a large scale, employ large numbers of employees, have a large amount of capital and conduct their affairs in a business-like way similar to that of large profit-making corporations. That a corporation is a not-for-profit organisation may be relevant in characterising its activities where those activities are otherwise equivocal or it has not begun to carry out those activities but where its activities are on the face of it trading activities the organisation is a trading corporation notwithstanding that it is a not-for-profit organisation.

126 In this case the activities of the appellant have the indicia of trading. Those activities do not cease to be trading activities merely because the appellant is a not-for-profit organisation.

127 The respondent submitted that before the appellant entered into the Contract to provide the specified services to its clients, the appellant provided a similar service to its clients that was funded by government grants. The respondent submitted that the character of the respondent's activities did not change because it entered into the Contract.

128 In 'The meaning of "trading or financial corporations": Future directions' (2008) 19 PLR 110 Nicholas Gouliaditis makes the following observation:

[T]he authorities seem to establish that revenue from grants should not count as trade. That must be correct. However, there is a growing trend for grants to take the forms of contracts, especially funding provided to non-profit organisations and municipal corporations. Whether the contract is in truth a trade arrangement or simply a mechanism to provide funding will turn on the facts of each case. But activities undertaken pursuant to a grant in the guise of a commercial arrangement should not be taken to be trading activities (127).

129 As Gouliaditis points out whether the arrangement between the government and the non-profit organisation is a trade arrangement or

simply a mechanism to provide funding will turn on the facts of each case. It is necessary to examine the arrangement at the relevant time. In this case, the relevant time is after the Contract had been entered into. Entering into the Contract brought about a fundamental change in the relationship between the government and the appellant. After entering into the Contract the relationship was a contractual one. The appellant provides services to its clients on the terms and conditions of and in fulfilment of the obligations imposed upon it by the Contract. It is not helpful to consider whether or not the appellant was engaged in trading activities at an earlier time when it delivered services free of the obligations imposed upon it by the Contract.

130 Kenner C found that the appellant was not acting on a commercial basis and that the tender process was not truly competitive. The commissioner described the service provided by the appellant as a public welfare service and found that the means by which those services are funded is a matter of form and the fact that the Commonwealth was invoiced was simply an administrative mechanism by which the funding was dispersed. The commissioner found the appellant does not, in reality, charge fees to the Commonwealth for the service it provides.

131 The evidence is that the tender process was a competitive process. The Commonwealth, through the Department, issued a request for tender. The tender document stated that the Australian Government was seeking to purchase a range of legal aid services for Indigenous Australians. The document stated that the Department will ensure that the tendering process is fair and equitable and that it had appointed the Australian Government Solicitor to act as an independent legal process advisor (or Probity Auditor) to the tender.

132 Mr Eggington, the Chief Executive Officer of the appellant, gave evidence that there was a pre-contract meeting held by the Department attended by anyone who was interested in putting in a tender. Mr Eggington said that in addition to the appellant, representatives of two other groups attended the meeting. One was the Chief Executive Officer of the Legal Aid Commission and the other was a representative of a private legal firm. Mr Eggington did not know whether or not either of those groups, or anyone other than the appellant, lodged a tender.

133 There is nothing to suggest that the tender process was not a competitive tender process. If the appellant was the only body that submitted a tender, that does not mean that the process was not a competitive tender process. Nor is the tender process non-competitive or

not commercial because the Commonwealth specified the total amount of fees that was available for payment to the successful tenderer. Tenderers may compete in relation to the services provided, the quality of the services provided, the manner in which the services are provided and the manner in which the contract is performed as well as by in relation to price.

134 The submissions of the respondent and the Minister are to the effect that the fees paid to the appellant by the Commonwealth were in form a contractual payment but in reality a grant. There is nothing to suggest that the Contract is a sham. That is, there is nothing to suggest that the Contract was executed by the appellant and the Commonwealth with the intention to give to third parties the appearance of creating legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.

135 In this case the proper approach is to consider the relationship between the government and the non-profit organisation and the contract under which money is paid by the government to the organisation. If the contract is not a sham then whether the contract is a trade arrangement must be determined by considering the terms of the contract and the legal rights and obligations it creates. In this case, a consideration of the relationship between the Commonwealth and the appellant and the Contract leads to the conclusion that the arrangement is a trade arrangement.

136 The Contract, in its terms, and in the way in which it operated, provides for the appellant to provide the defined services in consideration of fees to be paid by the Commonwealth. The appellant is required to deliver a minimum number of specified services to Indigenous clients. The Contract creates a relationship between the Commonwealth and the appellant which has the indicia of a commercial relationship in the sense that the appellant is to provide defined services in consideration of receiving specified fees and the provision of the services and the receipt of the fees is prescribed by detailed contractual conditions giving rise to legal rights and obligations.

137 For the reasons stated, I find that the activity of the appellant in providing services to its clients in consideration of the payment of fees under and in accordance with the Contract is trading.

**Is the appellant a trading corporation?**

138           A corporation is a trading corporation if its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation. In this case the delivery of services to its clients in consideration for the payment of fees under and in accordance with the Contract is the predominant activity of the appellant. It is a trading activity.

139           In determining whether a corporation is a trading corporation, the primary focus is on the activities of the corporation. The purposes for which a corporation is formed may be relevant in determining its character. That may be so when the corporation has not yet begun, or has only just commenced, the activities which it was intended to carry on. However, where, as here, a consideration of the whole of the activities carried on by the corporation lead to the conclusion that it is a trading corporation, that finding is not to be negated by a consideration of the purposes for which the corporation was formed. The appellant is a trading corporation.

**Conclusion**

140           I would allow the appeal.