DECISION

Fair Work Act 2009
s.773—Termination of employment

Peter Bracegirdle
v
Shire of Irwin
(C2024/3613)

DEPUTY PRESIDENT BEAUMONT PERTH, 19 SEPTEMBER 2024

Application to deal with an unlawful termination dispute— jurisdictional objection—local government—whether the Respondent is a national system employer—whether the Respondent is a constitutionally-covered entity—jurisdictional objection dismissed—application to proceed.

[1] Mr Peter Bracegirdle (the **Applicant**) was employed by the Shire of Irwin (the **Respondent**) as the Manager of Community Services. On 16 May 2024, he was summarily dismissed for serious misconduct. Following his dismissal he made an application to the Fair Work Commission under s 773 of the *Fair Work Act 2009* (Cth) (the **Act**) alleging that his employment had been unlawfully terminated for reasons including trade union membership, acting or having acted in the capacity of a representative of employees, and his filing a complaint against the Respondent involving alleged violation of laws or regulations to a competent administrative authority.

[2] The Respondent objected to the application on the basis that the Applicant was not entitled to bring an unlawful termination application because s 723 of the Act provides that, if a person is entitled to make a general protections court application, they are precluded from bringing an unlawful termination application. To explain further, the basis of the Respondent's objection is essentially that whilst it was not a 'national system employer', it was, nevertheless, a 'constitutionally covered entity' and therefore it was open to the Applicant to have brought a general protections application under Part 3-1 of the Act.

[3] The parties were directed to file written submissions and evidence dealing with the objection that had been raised. On doing so, the parties informed the Commission that they were content to have the matter determined in the papers. I considered it appropriate to adopt that course.

[4] For the following reasons the Respondent's jurisdictional objection is not upheld, and therefore the matter will be programmed for conference.

Legal framework

[5] Part 6-1, Division 2 of the Act sets out certain actions that are not permitted if alternative actions, or remedies, are available. This includes s 723, which provides that a person must not make an unlawful termination application if the person in question is entitled to make a general protections court application in relation to the conduct.

[6] The general protections provisions of the Act are set out in Part 3-1. Division 2 of Part 3-1 (ss 337-339) sets out the circumstances in which Part 3-1 applies. In short, s 338 of the Act provides that Part 3-1 applies to action taken by a 'constitutionally covered entity' and s 339 of the Act extends the operation of Part 3-1 to 'national system employers'.

[7] Section 14 of the Act defines the term 'national system employer'. Subsection 14(2) specifically provides that a particular employer is not a national system employer if they meet the criteria set out in subsections (a), (b) and (c) of that section. For present purposes, the relevant criteria are as follows:

a) subsection 14(2)(a)(ii) - that employer is a 'body established for a local government purpose by or under a law of a State or Territory';
b) subsection 14(2)(b) – that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
c) subsection 14(2)(c) - an endorsement by the Minister under paragraph 4(a) is in force in relation to the employer.

[8] For the following reasons, I am satisfied that the Respondent meets each of the abovementioned criterion.

National system employer

[9] First, the Respondent is a body established for a local government purpose under s 2.5 of the *Local Government Act 1995* (WA) (**LG Act**).

[10] Second, as of 1 January 2023, a suite of legislative and regulatory changes impacted the Commission's jurisdiction to deal with matters involving Western Australian local government entities.

[11] On 11 February 2022, the *Industrial Relations Legislation Amendment Act 2021* (WA) (**IR Amendment Act**) was proclaimed. It provided a mechanism for local governments in Western Australia to be declared to no longer be a national system employer. Relevantly, the IR Amendment Act amended *the Industrial Relations Act 1979* (WA) by inserting Part 2AA and notably section 80A(2), which provides that regulations may stipulate that certain employers are not a 'national system employer'. The *Industrial Relations (General) Regulations 1997* (WA) (regulation 7) expressly declared that the Respondent (along with other local governments in Western Australia) were not considered to be a national system employer: s 14(2)(b).

[12] The *Industrial Relations (General) Regulations 1997* (WA) at regulation 7 sets out the following:

> **7. Employers declared not to be national system employers (Act s. 80A(2))**
>
> (1) For the purposes of section 80A(2)(a) of the Act, each employer specified in Schedule 4 is declared not to be a national system employer for the purposes of the FW Act.
>
> (2) For the purposes of section 80A(2)(b) of the Act, the day fixed for the purposes of the declaration is 1 January 2023.

[13] Schedule 4 Division 1 of the *Industrial Relations (General) Regulations 1997* (WA) provides that the Shire of Irwin is one such employer.

[14] Third, on 6 December 2022, the Federal Minister for Employment and Workplace Relations endorsed the *Fair Work (State Declarations — employers not to be national system employers) Endorsement 2022 (No. 1)* (the **Endorsement**). The Endorsement sets out that for 'paragraph 14(4)(a) of the Act, a declaration as in force on 1 January 2023 under the *Industrial Relations (General) Regulations 1997* (WA) that an employer mentioned in Schedule 1 is not to be a national system employer for the purposes of the Act, is endorsed'. Schedule 1 lists the Respondent as an employer declared by or under law of Western Australia not to be a national system employer.

[15] On the basis of the matters referred to above, I conclude that the Respondent is not a national system employer. I further observe that both Applicant and Respondent hold the view that the Respondent is not a national system employer and hence the question that arises is whether the Respondent is a constitutionally covered entity.

Constitutionally covered entity

[16] Section 338(1)(a) of the Act provides that Part 3-1 applies to action taken by a constitutionally covered entity. A constitutionally covered entity is defined, relevantly, as including a constitutional corporation.[1] 'Constitutional corporation' is in turn defined in s 12 as 'a corporation to which paragraph 51(xx) of the Constitution applies.' Paragraph 51(xx) of the Constitution provides that the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

[17] The Respondent is a local government body. The general function of a local government body is to provide for the good government of persons in its district.[2] That general function must be performed having regard to certain factors[3] including, but not limited to, the need to promote the economic, social and environmental sustainability of the district.[4] It is accepted that a local government's functions can be legislative or executive,[5] and its general function is to be construed in the context of other functions provided for in the LG Act.[6] A liberal approach is to be taken to the construction of the scope of the general function of a local government.[7]

[18] In accordance with s 2.5 of the LG Act, local government bodies in Western Australia are bodies corporate and have the legal capacity of a natural person.

[19] Subdivision 6 of Division 3 of Part 3 of the LG Act sets out the various executive functions of local governments. Section 3.59 of Subdivision 6 of Division 3 of Part 3 sets out provisions in respect of commercial enterprises by local governments. Section 3.59(1) defines, for example, 'trading undertaking' to mean:

> an activity carried on by a local government with a view to producing profit to it, or any other activity carried on by it that is of a kind prescribed for the purposes of this definition, but does not include anything referred to in paragraph (a) or (b) of the definition of ***land transaction*.**

[20] 'Land transaction' is relevantly defined to mean an agreement, or several agreements for a common purpose under which a local government is to: (a) acquire or dispose of an interest in land' or (b) develop land.[8]

[21] The Applicant submitted that should the Respondent undertake major trading activities it must do so in accordance with s 3.59 of the LG Act which required, amongst other things, the public disclosure of a business plan[9] and an opportunity for the community to comment[10] and in some cases Ministerial approval.[11]

[22] The Applicant further submitted, relying on the decision of *Bonora v Council of the City of Ryde*[12] (**Bonora**), that there is existing authority that the Respondent is not bound by the *Corporations Act 2001* (Cth) or amendable to registration thereunder,[13] and it followed that having regard to the legislative creation of the Respondent and its purpose and objects, it was akin to a municipal corporation rather than a 'trading corporation'.

[23] In *Bonora* one of the questions for determination was whether a local government could be found to be a constitutional corporation despite s 220 of the *Local Government Act 1993* (NSW) declaring it to be a 'body politic'. Unlike the case in *Bonora* and as already traversed, the Respondent is established under s 2.5 of the LG Act with the consequence that it is created as a body corporate, which was not the case in *Bonora*, hence rendering, in this respect *Bonora* distinguishable.

[24] Section 220(2) of the *Local Government Act 1993* (NSW) sets out that a council is not a body corporate (including a corporation). In *Bonora*, the Deputy President detailed the legislative amendment to the *Local Government Act 1993* (NSW) and the Second Reading speech for the amending legislation, which included:

> Local councils and county councils are bodies corporate under the Local Government Act. This corporate status might, in some circumstances, still expose them to the Federal industrial relations system and its regulations.
>
> Quite simply, the New South Wales industrial relations system is fundamentally fairer than WorkChoices.
>
> …
>
> This bill will minimise the risk of New South Wales councils being caught up in the federal system by changing their corporate status.

> Instead of being a body corporate, a council will be constituted as a body politic of the State and will have the legal capacity and powers of an individual.[14]

[25] Having detailed the Second Reading speech to *Local Government Amendment (Legal Status) Act 2008* (NSW), the Deputy President in *Bonora* traversed at paragraphs [20] to [28] the High Court decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail*,[15] (**Queensland Rail**), at paragraph [29] the decision of the Federal Court of Australia in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council*[16] and thereafter judgments by superior courts and further judgements of the Federal Court where the corporate legal status of local councils had been considered, in addition to decisions of the Fair Work Commission.

[26] As detailed by the Deputy President in *Bonora*, in *Queensland Rail*, the *Queensland Rail Transit Authority Act 2013* (Q) (**QRTA Act**) had established the Rail Authority as a distinct legal entity.[17] The Rail Authority essentially provided labour to Queensland Rail - the employment of staff was transferred by statute from Queensland Rail to the Rail Authority. The Rail Authority held 100% of the shares of Queensland Rail Ltd. There was no real suggestion in the case that the Rail Authority was a body politic reflected or recognised in the Constitution. The Deputy President continued:

> [24] The High Court considered the effect of s.6(2) of the QRTA Act and rejected the submission that the legislation could create an artificial legal entity that was distinct from 'corporations' or 'bodies corporate' (at [24]-[27]).
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> [25] In rejecting this argument the plurality qualified its analysis by including in parenthesis a reference to body politics (at [25]):
>
>> "The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (that is not a body politic) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression."
>>
>> [Emphasis added].
>
> [26] One recognised intention of the QRTA Act was to take the Rail Authority outside of the operation of federal industrial law generally and the FW Act specifically. As the plurality said, "a state government cannot determine the limits of federal legislative power" (at [28], see also Gageler J at [62]).
>
> [27] The plurality found that the Rail Authority had the full character of a corporation, despite the terms of s.6(2) of the QRTA Act (at [32]):
>
>> "Like the Federation considered in Williams v Hursey, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons

> who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation".”…

[27] As observed under the LG Act, a local government as well as a regional local government is a ‘body corporate’.

[28] In Division 6 Part 5 of the LG Act, the term ‘corporation’ attracts the following meaning, but such meaning is limited to the operation of that Part:

> any body corporate, whether formed or incorporated within or outside the State and includes any company or foreign company (as those terms are defined in the *Corporations Act 2001* of the Commonwealth) but does not include –
>
> (a) a body corporate that is incorporated within Australia or an external Territory and is a public authority or an instrumentality or agency of the Crown; or
> (b) a corporation sole; or
> (e) an association, society, institution or body incorporated or taken to be incorporated, under the Associations Incorporation Act 2015;

[29] The word ‘corporation’ or reference to ‘bodies corporate’ in the context of the *Corporations Act 2001* (Cth) is made at ss 5.58(2), 5.74, 5.84, and 7.1 of the LG Act. However, whilst in part the LG Act appears to use the word ‘body corporate’ synonymously with ‘corporation’, it also differentiates the two.

[30] In *Bonora*, the Deputy President made the following observation, which I consider relevant for present purposes:

> [50] In Queensland Rail the parties asked the Court to determine whether the Authority is a “corporation” within the meaning of s 51(xx) and, if so, whether it is a “trading corporation” (at [10]). The plurality was troubled by the agreed two step approach of the parties. Ultimately they said at [45] that it was “better to provide no answer” to the first question. The plurality essentially questioned whether it was “useful to direct separate attention to [the question of] what is a ‘corporation’” (at [9]).
>
> [51] Recognising that the terms of s.220 of the LG Act are not definitive, that Ryde Council is a separate legal entity that bears rights and duties, and also that Ryde Council undertakes both community services and other activities that could be described as trading activities, the most useful starting point to resolve this matter is to begin with the conclusion that the nature and the extent or volume of Ryde Council’s trading activities does not justify a description as a trading corporation.

[31] Having considered the materials before me, the LG Act and relevant authorities, I am persuaded, as was the Deputy President in *Bonora*, that the most useful starting point to resolve the matter is to begin with the consideration of whether the Respondent is a ‘trading corporation’ or ‘financial corporation’, rather than directing separate attention to whether the Respondent is a ‘corporation’.

[32] In sum, it is uncontroversial that the Respondent is not a 'financial corporation', however, if the Respondent is a 'trading corporation', then it was of course open to the Applicant to have brought an application under Part 3-1 of the Act.

[33] As noted, s 338(1)(a) of the Act provides that Part 3-1 applies to action taken by a 'constitutionally covered entity'. At paragraph [16] of this decision that term is considered and defined.

[34] As to whether the Respondent is a 'trading corporation', the Western Australian Industrial Appeal Court outlined the principles for assessing 'trading corporation' status in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254 (**ALS**) [68]:

> (a) 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].
>
> (b) 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].
>
> (c) 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].
>
> (d) 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].
>
> (e) 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).
>
> (f) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott*** (589); ***Quickenden*** [52], [l01]; ***Mid Density*** (584).
>
> (g) 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].
>
> (h) 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].

[35] *ALS* has been cited with approval in subsequent appellate court decisions: *Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Another*[18] and *United Firefighters' Union of Australia v Country Fire Authority*.[19]

[36] Within the context of the Commission, the Full Bench in *Gregory James Thurling v Glossodia Community Information and Neighbourhood Centre Inc. T/A*,[20] provided a comprehensive overview of the law on whether a corporation is a 'trading corporation', starting with the summary provided by Steytler P in *ALS* and thereafter citing the Full Bench decision in *Roads and Maritime Services v Leeman*,[21] where the Full Bench again commented on the principles in *ALS*.

[37] It follows that I adopt and apply the principles espoused in *ALS* and further note that other decisions of this Commission have considered whether local councils are 'trading corporations': (a) *Bonora v Council of The City of Ryde*;[22] (b) *Mazza v Council of The City of Ryde*;[23] (c) *Application by Bastakos*;[24] (d) *Applications by Cooper and Bagster*;[25] (e) *Cain v Stuart Downing; Logan Howlett; Lee-Anne Smith; Kevin Allen*;[26] and *Boyd and Theedom v Shire of Yalgoo*.[27]

The parties' contentions

[38] The Respondent, referring to the evidence of its witness, the Respondent's Chief Executive Officer, Shane Ivers, submitted that a number of factors pointed toward the Respondent's trading character.

[39] First, said the Respondent, in the financial year ending 30 June 2024, the Shire generated $2,576,961.71 in revenue from fees and charges. Of this amount, approximately $1,346,313.65 was generated from activities that may properly be characterised as trading and financial activities.[28]

[40] Second, said the Respondent, the vast majority of the Respondent's activities were not engaged in for a benevolent public purpose, but rather with a view to generating a profit.[29] The Respondent explained that while activity may indeed benefit the community, serving the greater public interest is not the driving impetus behind offering the service/engaging in the activity.[30] The Respondent submitted that it had generated a significant profit from leasing multiple residential properties and the recreational centre.

[41] Third, said the Respondent, a majority of the identified trading activities included a trade in services such as the revenue generated by commercial collection, transfer station and private work, which were services that the Shire had opted to offer (as opposed to private contractors) with the sole view of receiving an income.

[42] The Respondent acknowledged that while some of the trading activities broke even or did not generate a profit, as noted in *ALS*, the making of a profit was not an essential prerequisite to 'trade' and, overall, the Respondent generated a profit from its collective trading activities.

[43] The Applicant pressed that the Respondent's total income for the year was $11,017,339.00 and its total expenditure from operating activities was $14,626,603 returning an operating loss of $3,609,264.00.

[44] The Applicant noted that the Respondent's operating loss for the period up until end of June 2023 exceeded the fees and charges by revenue. The Applicant calculated that the fees and charges revenue on a gross analysis represented about 23% of total revenue for the Respondent. However, in respect of the costs of delivery no figures had been provided. The Applicant observed that Mr Ivers had conceded to experiencing losses or breaking even in respect of: (a) commercial collection; (b) transfer station; (c) container deposit scheme; (d) other house/residential; (e) private works income; (f) oval hire; and (g) airstrip leases.

[45] The Applicant concluded that the Respondent's positive revenue for the relevant period was 6% of total revenue ($707,714.79 of $11,017,939.00) which was not substantial.

[46] In response to the Applicant's calculations, the Respondent identified errors which it said, infected the Applicant's argument that the Respondent is not a 'trading corporation' because it does not generate a profit. The Respondent submitted that at paragraph 17 of the Applicant's submissions, the Applicant pressed that the Respondent returned an operating loss of $3,609,264, which was incorrect, as it was a partial calculation that failed to adjust for depreciation in accordance with statutory reporting requirements. Rather, in order to calculate the net operating position of the Respondent, the 'operating activities excluded from the budget' (which amount to $4,460,314) need to be added back in. Once this had been done, the amount attributed to operating activities returned a profit of $851,051.00 which was not indicative of a merely peripheral activity.

[47] The Respondent advanced that its correctly revised figure, in turn, made the Applicant's calculations at paragraph 18 of his submissions redundant (the operating loss exceeding the fees and charges revenue by $1,032,302.00) and that minimal weight should also be placed on paragraph 21 of the Applicant's submissions that positive revenue amounted to 6% of total revenue when compared to $11,017,939.00.

Consideration

[48] Mr Ivers gave the following evidence:

(a) in the 2023-2024 financial year, the Shire generated a total of $11,017,339.00 in revenue from operating activities (Total Revenue);[31]

(b) of the Total Revenue, approximately $2,576,962.00 derived from fees and charges;[32]

(c) excluding Shire rates and charges, a not insubstantial amount of revenue was generated from the Shire's various trading activities;

(d) those activities, the majority of which were for the public benefit, remained trading activities because they were commercial in nature and their primary purpose was to generate a profit, included:

  i. commercial collection – waste disposal services for commercial businesses generating $142,371.23;

  ii. sale of bins - $381.81;

  iii. transfer station – essentially the local tip, the Respondent operates and manages the facility unlike other local governments that outsource the operations, it generated $139,426.82;

iv. container deposit scheme – recycling of bottles and similar items for a nominal amount of 10c brought in revenue of $197,664.84;
v. tourism and other income - $124.55;
vi. tourism centre and sales - $7,194.18;
vii. rental income from two houses - $41,993.09;
viii. other houses – joint venture with Department of Communities resulting in the Respondent owning shared in 39 housing units generating $325,534.27 of revenue;
ix. other housing units – lease to interested parties generating $162,716.80;
x. private works income – the Respondent provides construction or 'handyman' services for a fee, generating $77,962.74;
xi. recreational centre including gym memberships and hire of recreational facilities, generating $189,309.18;
xii. drive-in – generating $21,270.13;
xiii. oval/reserve hire – generating $18,921.56;
xiv. renting coastal squatters shacks – generating $22,454.00 from Main Roads; and
xv. airstrip leases – generating $19,188.45.

[49] Annexure A of Mr Ivers' witness statement detailed the Statement of Financial Activity (**SFA**) for the Respondent for the period ending June 2024. That SFA set out that $11,017,339.00 had been generated as revenue from operating activities as follows:

Revenue from operating activities	**YTD Actual**
Rates	6,839,653
Operating Grants, Subsidies and Contributions	1,064,360
Fee and Charges	2,576,962
Interest Earnings	273,041
Other Revenue	263,324
Profit on Disposal of Assets	0
	11,017,339

[50] The above table extracted from the SFA (see Annexure A to this decision) shows that 62.0% of the Respondent's revenue in 2023-2024, derived from Rates, 9% from Grants, Subsidies and Contributions, and 23% from Fees and Charges. Of the Fees and Charges, the Respondent attributes approximately $1,346,313.65, as being generated from activities that may properly be characterised as trading and financial activities.[33] I accept that some of the activities relied upon by the Respondent can be characterised in this way.

[51] The Respondent undoubtedly provided services to persons within its district. However, the general function of the Respondent is to provide for good government of persons in its district.[34] In doing so and as observed, that general function must be performed having regard to the need to promote the economic, social and environmental sustainability of the district.

[52] It follows that in circumstances where the Respondent, for example, provides sales of bins (profit of $381.81), a transfer station (operated at a loss) and a container deposit scheme (approximately broke even), those activities whilst open to be characterised as trading activities

(albeit only one activity generated a profit, which in real terms was insignificant) do not strike me as 'business activities' in the sense referred to in *ALS* at paragraph [68(3)]. Instead, I consider the activities, when considered against the legislative scheme that establishes the Respondent, are better characterised as activities promoting the environmental sustainability of the district. Their inclusion in the Respondent's functions does not seemingly depend on their profit generating capability –and while it is to be appreciated that profit generation is not the only factor to consider, a 'business' is unlikely to continue the operation of certain activities where such activities run at a loss. Whilst Mr Ivers speculated that such activities may generate future profit, it was mere speculation.

[53] Whilst the ends which a corporation seeks to serve by trading are irrelevant to its description such that activities conducted in the public interest or for public purpose will not necessarily exclude the categorisation of those activities as trade, regard must also be had to the intended purpose of the corporation. When the aforementioned activities are considered in light of principles for assessing 'trading corporation' status and in light of the legislative purpose of a local government under the LG Act, I am not persuaded that these activities support a finding that the Respondent is a 'trading corporation'.

[54] Other activities relied upon by the Respondent included tourism and sales activities (exceed expenditure), a recreational centre (exceeded operational costs), drive-in (broke even) and oval/reserve hire (costs exceeded revenue). I am similarly of the view that rather than constituting business activities, these activities are best characterised as activities required of a local government charged with the function of promoting social sustainability. The same can be said for the Respondent's joint venture with the Department of Communities, resulting in the Respondent owning shares in 39 housing units generating $325,534.27 of revenue, although evidence on this venture was limited.

[55] Concerning the remaining activities of the Respondent, in the absence of evidence to the contrary, I consider the commercial collection (broke even), leasing of houses/units, airstrip and shacks in addition to the private income, to be commercial in nature and not necessarily linked to the general function of a local government.

[56] 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. That is, it will be considered a 'trading corporation'. An important question is whether the Respondent's trading activities, as identified and relied upon by the Respondent, form a sufficiently significant proportion of its overall activities as to merit its description as a 'trading corporation'. When all of the factors to which I have referred are taken together, it cannot be said that what is done by the Respondent has a commercial character. As outlined above, I am not satisfied that all the activities the Respondent relies upon as trading activities are open to be characterised as such. In respect of the remaining activities and the associated trading, I consider that trading a merely peripheral activity to the activities of the Respondent local government.

Conclusion

[57] For the preceding reasons, I find that the Respondent is not a ‘trading corporation’ and is therefore not a ‘constitutionally covered entity’. Therefore, it was not open to the Applicant to bring an application under Part 3-1 of the Act, and it follows the Applicant was not precluded by the operation of s 723 of the Act from bringing an unlawful termination application.

DEPUTY PRESIDENT

Determined on the papers.

Final written submissions:

2 August 2024.

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[1] *Fair Work Act 2009* (Cth) s 338(2)(a).

[2] *Local Government Act 1995* (WA) s 3.1 (**LG Act**).

[3] Ibid s 3.1(1A).

[4] Ibid.

[5] Ibid s 3.4.

[6] Ibid s 3.1(2).

[7] Ibid s 3.1(3).

[8] Ibid s 3.59(1).

[9] Ibid s 3.59(4).

[10] Ibid s 3.59(5).

[11] Ibid 3.59(7).

[12] [2024] FWC 384.

[13] Ibid [35].

[14] Ibid [19].

[15] [2015] HCA 11; (2015) 256 CLR 171.

[16] [2008] FCA 1268.

[17] *Bonora* [2024] FWC 384 [23].

[18] [2010] FCAFC 11, (2010) 182 FCR 483 [48] (**Bankstown**).

[19] [2015] FCAFC 1; (2015) 228 FCR 497 [70] (**UFU**).

[20] [2019] FWCFB 3740 [24].

[21] [2018] FWCFB 5772 [13]–[19].

[22] [2024] FWC 384.

[23] [2024] FWC 580.

[24] [2018] FWC 7650.

[25] [2017] FWC 5974.

[26] [2020] FWC 1914.

[27] [2016] FWC 2190.

[28] Witness Statement of Shane Ivers (**Ivers Statement**) [12].

[29] *ALS* [68]. Cf *Borona v Council of The City of Ryde* [2024] FWC 384 [43].

[30] *ALS* [68].

[31] Ivers Statement [9] and Annexure A.

[32] Ivers Statement [10] and Annexure B.

[33] Ibid [12].

[34] *LG Act* s 3.1.