Case Notes: Harmer v Shoalhaven Community Housing Scheme Limited [2006] NSWIRComm 1165

This decision involves the topical issue of determining whether a nonprofit organization is a constitutional corporation for the purposes of the Workplace Relations Amendment (Work Choices) Act 2005. The nonprofit organization in question, the Shoalhaven Community Housing Scheme Limited (“the SCHS”), terminated the employment of its part-time financial officer, Ms Harmer, on the 10th October, 2006. In return, she attempted to take action against the company under the unfair dismissal provisions of the Industrial Relations Act 1996 (NSW).

Since the Work Choices legislation took effect from late March, 2006, the question then arose as to whether the SCHS’ company status meant it was a trading or financial corporation for the purposes of S.51(xx) of the Commonwealth Constitution. In the event that the SCHS was found to be such a constitutional corporation, Ms Harmer would not be able to proceed under the New South Wales industrial legislation as the Work Choices legislation specifically places employees of all S.51(xx) trading and financial corporations outside State jurisdiction.

From the outset, Commissioner Connor felt that even Ms Harmer’s job description might jeopardize her ability to rely on state legislation. In addition, he pointed out that SCHS’ status as a nonprofit organization did not guarantee it fell outside the ambit of S.51(xx) as the section had been interpreted broadly. He particularly highlighted the decision in R v Judges of the Federal Court of Australia: Western Australian National Football League Inc 1979 143 CLR 190 where the Court adopted an activities approach to determine whether a corporation was a trading corporation. Scrutiny extended beyond the corporation’s principal activities to an examination of whether any trading activities formed a significant proportion of its overall operation. If this test was satisfied, the corporation would be a constitutional corporation. Recently, Commissioner Hall identified 16% to 17% of operating revenue as a significant proportion in the Queensland Industrial Court decision involving Educang Ltd, a joint venture comprising several schools (C/2006/35) although, in this case, no percentages were discussed in the judgment.

Whilst not embracing such a quantitative approach as an analytical tool, Commissioner Connor nevertheless decided that the SCHS did engage in trading activities and that these, in fact, constituted all of its activities. In reaching this decision, he was guided by the determination in Pellow v Umoona Community Council Inc PR973365 [2006] AIRC 426 (19 July 2006) that providing housing services was a trading activity. Therefore, SCHS was a constitutional corporation. Since this meant Ms Harmer’s complaint lay outside State jurisdiction, Commissioner Connor was forced to resolve the matter through conciliation, a course of action which, he reflected, was ultimately very much dependent on the willingness of the employer to co-operate.

The decision may be viewed at: