Kathleen McInnes [2014] FWC 1395 (Fair Work Commission, Commissioner Hampton, 24 March 2014)

This was an application by McInnes (the applicant) under section 789FC of the Fair Work Act 2009 (Cth) (the Act) for an order to stop bullying at work. The application alleged that the applicant was subjected to bullying behaviour over a six year period commencing in November 2007 and ending in May 2013.

A jurisdictional issue had previously been heard by the Full Bench of the Fair Work Commission (the Commission) at [2014] FWCFB 1440. The relevant part of the Act, Part 6-4B, had commenced operation on 1 January 2014. Part 6-4B, consisting of sections 789FA to 789FL, was inserted into the Act by the Fair Work Amendment Act 2013 (Cth). The Full Bench had held that the relevant provisions were not retrospective in nature, but rather prospective, in that they dealt with the stopping of bullying (which had occurred in the past), to prevent it in the future. Therefore, the Commission had jurisdiction to proceed with the hearing.

The relevant provision was section 789FD. Section 789FD deals with the issue of when a worker is ‘bullied at work’ as follows:

(1) A worker is bullied at work if:
   (a) while the worker is at work in a constitutionally covered business:
      (i) an individual; or
      (ii) a group of individuals;
      repeatedly behaves unreasonably towards the worker, or a group of workers of which
      the worker is a member; and
   (b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:
   (a) the person is:
      (i) a constitutional corporation; or
      (ii) the Commonwealth; or
      (iii) a Commonwealth authority; or
      (iv) a body corporate incorporated in a Territory; or
   (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business. (emphasis added)

The respondent to this application was Peninsula Support Services Inc t/as Peninsula Support Services (PSS), an incorporated association located in Victoria. The issue before the Commission was whether the respondent was a constitutionally covered business.

The Commission held that PSS did not fall within the scope of section 789FD(3)(a)(ii), (iii), (iv) or (b). Accordingly, in order to fall within the scope of section 789FD, PSS had to be a constitutional corporation (at [5]).

The term 'constitutional corporation' is defined in section 12 of the Act as: ‘a corporation to which paragraph 51(xx) of the Constitution applies’. The Australian Constitution defines corporations at section 51(xx) as:

Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
PSS was incorporated within the limits of the Commonwealth, and it was agreed by the parties that only the term 'trading corporation' could be applicable to PSS. PSS contended that it was not a trading corporation within the meaning of Act due to its activities and nature, and as a result, the workplace was not conducted by a constitutionally-covered business.

PSS is a community based organisation, which provides support to people with psychiatric disabilities and their carers living within the Southern metropolitan region (Mornington Peninsula, Frankston and parts of Kingston) in Victoria. It is incorporated under the Associations Incorporation Act 1981 (Vic) and registered as a Community Support Service under the Mental Health Act 1986 (Vic). PSS was issued with an ABN in June 2000; it is registered as a charity with the Australian Charities and Not-for-profits Commission, is endorsed by the ATO as an income tax exempt charitable entity, and is registered for GST purposes.

Was PSS a trading corporation? Much of the evidence turned on the provision of government funding to PSS. PSS currently delivers various types of programs that are directed to support people with severe and enduring mental illness. The types of programs and projects include rehabilitation for individuals and groups, home-based outreach support, mental health and homelessness, carer support and intake functions. The services provided by PSS are almost exclusively funded by the Victorian and Commonwealth Governments from:

- the Victorian Department of Health (DoH) under a service agreement for a period of three years commencing in 2012 (the DoH service agreement);
- the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (as it was known at the time) confirmed through formal correspondence and a funding agreement (the DaHCSIA agreement).

Some of this funding (though a minority) is obtained through competitive tendering processes, where the relevant government department invites organisations to bid for funding to undertake services in nominated areas. PSS also operates with a small surplus of income over expenditure.

McInnes contended that PSS was a trading corporation because of its funding arrangements, its operating surplus and because the sale of services for grant money is a commercial transaction and represents a significant trading activity for PSS. PSS replied that is was not a trading corporation because it was a nonprofit service provider which did not obtain the majority of its funds from competitive tenders. It provided its services free of charge to clients, and did not engage in any major trading activity. Moreover, its small surplus and the ‘miniscule’ interest earned on its bank account were not indicative of any trading activity.

There was a good deal of case law on what is a trading corporation. This had resulted in the following principles being identified, summarised in Aboriginal Legal Service (WA) Inc v Lawrence (No 2.) (2008) 252 ALR 136 at par [68]:

1. A corporation may be a trading corporation even though trading is not its predominant activity;
2. However, trading must be a substantial and not merely a peripheral activity;
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;
4. The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant;
5. The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as ‘trade’;
(6) 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;

(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;

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.

In addition, there was case law on the effect of government funding, mostly to the effect that funding to service providers did not result in trading activity where there was no fee for service component.

It was common ground that PSS was not established to trade or to make profits. The Commission said (at [40], [43]):

However, this is not relevant to the characterisation of its activities and only indirectly relevant to its overall characterisation....

This matter in essence rests upon the characterisation of the activities associated with the government grants received by PSS. These services are in the nature of community welfare, however this is not of itself relevant. The services are also significant in both relative and absolute terms and if the whole, or a reasonable part, of those grants were considered to be trading activities, this would inevitably lead to the conclusion that PSS was a trading corporation.

Organisations such as PSS do not engage in competitive tendering processes for funding where the government pays them for the provision of the service directly. This might be trading. But PSS was in the alternative category where governments subsidise the services provided by the organisation. The Commission said on this point (at [45]):

Typically, these involve the provision of bulk grants that might be linked to performance requirements and benchmarks, but do not involve fee for service in the conventional sense. These services lack the character of buying and selling between the organisation and the funding agency, and are often provided gratuitously to the public and are considered to be an end in themselves. That is, the purpose of the service is not to generate income but rather, to provide the service itself.

These types of services are not considered to be trading: see *E v Red Cross Society* [1991] FCA 20. The Commission, in looking at the government funding given to PSS, found only one potential fee for service provision, an amount of $2000 from Worksafe Victoria. All the other services offered by PSS were free of charge. The Commission said that (at [50]):

The DaHCSIA agreement and the associated activities fit squarely into the category of non-trading activities. There is no fee for services rendered to the funding body and the application for grant funds was not the equivalent of a competitive tender process. This also applies to the great majority of the DoH service agreement. All of these services and the associated arrangements lack the character of buying and selling, even when considered in the broadest sense.

The funding that was provided through tender processes was relatively minor in the scheme of the whole of the activities of PSS, being about $82,000 (out of $2.8 million) in the 2012–13 financial year. Therefore, the Commission found that (at [58]):
The assessment of the nature of the corporation is one of fact and degree. When assessed in context, the income from trading activities, and those that might be considered to be trading activities, is not significant in either relative or absolute terms. Rather, those activities in the overall circumstances evident at PSS can be categorised as being insignificant, peripheral and incidental in the sense contemplated by the authorities.

This being so, PSS was not a trading corporation. Since it was not a trading corporation, it did not fall within the relevant provisions of the Act, and the Commission had no jurisdiction to deal with the bullying matter before it.

The case may be viewed at:

Implications of this case

The main point of this case was to determine whether PSS, as a nonprofit incorporated association, fell within the provisions of the *Fair Work Act 2009* (Cth) as to bullying: see Part 6-4B. It did not, since it was not a **constitutionally covered business** within the meaning of section 789FD of the Act. To fit within the section, it would have to have been a **constitutional corporation** (see section 789FD (3)(a)(i)) within the meaning of section 51(xx) of the Australian Constitution, and only a **trading corporation** could have been applicable. However, this case found that the PSS was not a trading corporation, because it essentially provided services to clients for free, under a government subsidy – it did not operate on a fee for service basis. The Act did not apply. The Commission said that, as a result, the bullying issue would have to be dealt with ‘in the context of the party’s ongoing employment relationship’ (at [61]).