

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	ERIC BELL	<b>APPLICANT</b>
	-v-	
	SHIRE OF DALWALLINU	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER J H SMITH	
<b>HEARD</b>	WEDNESDAY, 18 JUNE 2008	
<b>DELIVERED</b>	THURSDAY, 14 AUGUST 2008	
<b>FILE NO.</b>	U 48 OF 2008	
<b>CITATION NO.</b>	2008 WAIRC 01269	

**CatchWords** Termination of employment – Harsh, oppressive and unfair dismissal claim – Whether Commission has jurisdiction to hear and determine the applicant's claim – Trading activities of the respondent considered – Respondent a constitutional corporation – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 4, s 6, s 16 and s 16(1); *Australian Constitution* (Cth) s 51(xx) and s 109.

**Result** Application dismissed

**Representation**

**Applicant** Mr L Edmonds (of counsel)

**Respondent** Mr S White (as agent)

*Reasons for Decision*

- 1 Eric Bell (the applicant) filed an application in the Western Australian Industrial Relations Commission on 17 April 2008, under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the IR Act). The applicant was employed as a driver/plant operator by the respondent from on or around 3 March 1998 and claims that he had been oppressively or unfairly dismissed on 27 March 2008 by the Shire of Dalwallinu (the respondent).
- 2 The respondent says in its notice of answer and counter-proposal that the Commission does not have jurisdiction to hear and determine the applicant's claim as the respondent is a constitutional corporation as defined in s 4 of the *Workplace Relations Act 1996* (Cth) (the WR Act). Under s 4 of the WR Act, a constitutional corporation is defined as a corporation to which s 51(xx) of the *Australian Constitution* applies. Section 51(xx) of the *Australian*

*Constitution* defines a constitutional corporation among others as a trading and financial corporation formed within the limits of the Commonwealth. The respondent says in its notice of answer and counter-proposal that among other trading operations, the respondent operates a large medical centre and estimates over a third of its revenue is from trading activities.

- 3 If a corporation is a "trading corporation" by virtue of s 4, s 6 and s 16 of the WR Act the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 16(1) of the WR Act and s 109 of the *Australian Constitution (Crown Scientific Pty Ltd v Clarke (2007) 87 WAIG 598) (Clarke)*. Whether a corporation is a trading corporation is ultimately a question of fact and degree (*R v The Judges of the Federal Court of Australia and Another; Ex parte The Western Australian National Football League (Inc) and Another (1979) 143 CLR 190 (Adamson)*) applied by the Full Bench in *Clarke* and in *Aboriginal Legal Service of Western Australia Incorporated v Lawrence (2007) 87 WAIG 856* at [207], [235] and [322](b) (*Lawrence*).

### **The Evidence**

- 4 In support of its contention that the respondent is a trading corporation, the respondent called Peter Crispin, the Deputy Chief Executive Officer of the Shire to give evidence. Mr Crispin has been employed by the respondent for almost 14 years and has held his current position since 13 September 2004. Mr Crispin gave his evidence in part in a written witness statement. He also gave evidence orally.
- 5 The Shire is located 254 kilometres from Perth and covers 7,187 square kilometres and has approximately 1,368 residents. There are five towns located within the Shire. The town of Dalwallinu has approximately 650 residents. Kalannie has 150 residents. Wubin has about 80 residents. Buntine has a small population of about 25 and Pithara has about 40. Mr Crispin testified that within the Town of Dalwallinu there are industries producing plastic tanks and equipment for the mining industry including dongers and service units. Kalannie has a large shed builder. Outside the five towns the only industry is sheep and grain farming.
- 6 The respondent employs approximately forty people. Approximately ten employees are employed as administration staff. Approximately twenty are employed as outside employees including a swimming pool manager, two caravan park managers and four people employed at the medical centre. The respondent also employs cleaners, a project officer and a tourism officer.
- 7 Mr Crispin states in his written witness statement that the Shire operates several trading activities in addition to its statutory functions. Mr Crispin produced information about what the respondent says are trading activities and the income received by the respondent for each activity. The information is derived from the respondent's financial analysis reports for the financial year 1 July 2006 to 30 June 2007. In his written witness statement Mr Crispin concludes that trading activities comprised 41.65% of revenue generated in the 2006/2007 financial year. He says this activity is significant to the organisation both in monetary value and importance as the respondent is a small local government organisation. The figure of 41.65% was calculated on the basis that the total operating revenue of the Shire was \$3,595,740.71 during the 2006/2007 financial year and \$1,497,802.29 of the forementioned amount was assessed as trading activity. However, it emerged during the hearing that the figure of \$3,595,740.71 was incorrect and that the total operating revenue for the 2006/2007 financial year was in fact \$6,541,558.93. When this amount is applied, the respondent contends that the percentage of trading activities of the total operating revenue during the 2006/2007 financial year was 22.9%. The respondent accepts that income received from rate

notices and the provision of statutory services such garbage collection services do not constitute trading activity (see *Bysterveld v Shire of Cue* (2007) 87 WAIG 2462 at [62]-[66] (*Bysterveld*)).

- 8 Attached to Mr Bell's witness statement is a schedule setting out the Shire's operating accounts for 2006/2007 which is said to be income received from trading activities. This document states as follows:

Item	Operating Section	Particular	Trading Income
1.1	General Purpose Funding	Rate Inquiry Fees	\$2,940.00
2.1	Governance	Sale of Council Minutes	\$395.82
2.2	Governance	Sale of Ties & Brooches	\$15.00
2.3	Governance	Commissions (Licencing, BRB and BCITF)	\$36,214.71
2.4	Governance	Photocopying Charges	\$245.70
2.5	Governance	Other Minor Income (\$1937)	\$815.00
2.6	Governance	Housing Rental	\$15,890.00
2.7	Governance	Special Licence Plates	\$700.00
3.1	Law Order & Public Safety	FESA Levy Contribution	\$22,226.00
3.2	Law Order & Public Safety	Grant - EMA - ECC Power Up	\$21,818.18
3.3	Law Order & Public Safety	Rural Street Addressing Income	\$1,000.00
4.1	Health	Dalwallinu Medical Centre Income	\$651,925.93
4.2	Health	Rental - Medical Centre	\$1,050.00
4.3	Health	Medical Centre Income (Including GST)	\$49,806.15
5.1	Housing	Rental - Non Employees Housing	\$16,185.00
5.2	Housing	Rental - Aged Persons Residences	\$21,674.38
5.3	Housing	Rental - GEHA	\$11,460.20
5.4	Housing	Rental - Joint Venture Housing	\$28,574.75
6.1	Community Amenities	Drum Muster - Reimbursements	\$8,353.76
6.2	Community Amenities	Rebate for Recycling	\$535.69
6.3	Community Amenities	Refuse Collection Commercial Charges	\$15,813.20
6.4	Community Amenities	Recycling Charges	\$0.00
6.5	Community Amenities	Asbestos Disposal Charges	\$400.00
6.6	Community Amenities	Bulk Recycling Charges	\$1,099.98
6.7	Community Amenities	Collection of Metal from Rubbish Sites	\$13,578.30
6.8	Community Amenities	Lease Wubin Effluent Site	\$90.91
6.9	Community Amenities	Sewerage Maintenance Charge	\$99,180.66
6.10	Community Amenities	Septic Tank Cleaning Fees	\$8,063.50
6.11	Community Amenities	Cemetery Fees	\$2,050.00
6.12	Recreation & Culture	Buntine Hall Hire Fees	\$660.00
6.13	Recreation & Culture	Dalwallinu Hall Hire Fees	\$1,738.50
6.14	Recreation & Culture	Kalannie Hall Hire Fees	\$244.00
6.15	Recreation & Culture	Pithara Hall Hire Fees	\$120.00
6.16	Recreation & Culture	Wubin Hall Hire Fees	\$20.00
6.17	Recreation & Culture	Swimming Pool Entrance Fees	\$12,280.86
6.18	Recreation & Culture	Dalwallinu Recreation Centre Hire Fees	\$9,007.46
6.19	Recreation & Culture	Reserve Hire Fees	\$862.00
6.20	Recreation & Culture	Kalannie Recreation Centre Hire Fees	\$1,260.00
7.1	Transport	Street Lighting Contribution - MRWA	\$1,923.92
7.2	Transport	Rental - Staff Housing	\$14,410.00

Item	Operating Section	Particular	Trading Income
7.3	Economic Services	Sale of Waybill Books	\$11.82
7.4	Economic Services	Sale of 5 Graves in Dalwallinu	\$240.00
7.5	Economic Services	Sales of Wajarri Wisdom	\$136.35
7.6	Economic Services	Housing Rental	\$560.00
7.7	Economic Services	Dalwallinu Caravan Park Fees	\$28,943.33
7.8	Economic Services	Kalannie Caravan Park Fees	\$3,068.64
7.9	Economic Services	Dalwallinu Caravan Park On Site Van Fees	\$5,425.83
7.10	Economic Services	Kalannie Caravan Park On Site Van Fees	\$100.00
7.11	Economic Services	Dalwallinu Caravan Park Unit Fees	\$13,296.51
7.12	Economic Services	Dalwallinu Caravan Park Unit Fees - Long Term	\$1,872.00
7.13	Economic Services	Dalwallinu Caravan Park Coke Machine	\$397.17
7.14	Economic Services	Dalwallinu Caravan Park Washing/Dryer	\$488.20
7.15	Economic Services	Standpipe Water Fees	\$1,320.60
7.16	Economic Services	Leased Building Rental Income	\$2,052.00
7.17	Economic Services	FESA Co-location Building Income	\$47,634.28
8.1	Other Property & Services	Private Works Income	\$317,178.73
8.2	Other Property & Services	Sale of Scrap	\$447.27
	<b>Total</b>		<b>\$1,497802.29</b>

- 9 In respect of general purpose funding, Mr Crispin testified that half of the respondent's income is collected through rates and grants and the only proportion within general purpose funding that is derived from trading activities is through rate enquiries fees. In particular \$2,940.00 was raised through charges for conducting enquiries when a property transfers ownership (Item 1.1).
- 10 In respect to governance Mr Crispin testified the sale of Council Minutes, ties and brochures generates a minimal amount of trading income (Items 2.1 and 2.2). However, agency arrangements conducted by the Shire on behalf of other organisations for vehicle licensing and building registration raises a greater amount of income on a commission basis. These items totalled \$36,214.71 (Item 2.3). Mr Crispin explained that they run agencies for three different entities. They run a licensing centre for the Department of Planning and Infrastructure for which they are paid a commission. Commission payments are made by the Department of Planning and Infrastructure for each transaction and the commission paid is variable. They also receive commission for collections of BCITF and Building Registration Board fees. The BCITF and the Building Registration Board pay a commission on each application.
- 11 They also receive a commission from Fire and Emergency Services (FESA) each year for collecting the emergency services levy. The emergency services levy is charged to ratepayers as part of the shire rates. Mr Crispin explained that the FESA commission is straightforward, that FESA pay a flat amount and it does not matter how much money the respondent collects. The respondent forwards the entire levy to FESA who make a budget allocation back to the respondent for the respondent to run a fire and emergency service. Fire and emergency services through the bushfire service are provided to the community by the respondent on behalf of FESA. The respondent received \$22,226.00 (Item 3.1) from FESA to provide this service which was money returned to them from monies collected as the emergency services levy. The respondent says that this amount is trading income as the services are a State Government responsibility which would not be carried out by the respondent if payment was

not made. Mr Crispin explained the respondent maintains bushfire trucks, buys uniforms for the volunteers and provides training. The fire fighters are not paid, they are all volunteers. No other income is received for the delivery of the bushfire service.

- 12 The respondent owns twenty-six houses. Thirteen of these houses are rented to employees of the Shire at a subsidised rent. The Shire received \$15,890.00 (Item 2.6) for rent from administration employees who rent a house at a subsidised rate, as part of their terms and conditions of employment. Rental income of \$14,410.00 was also received from outside staff (Item 7.2). The respondent also rents or leases houses to external bodies. These include eight houses for aged persons, one for a teacher and one for a policeman. The remainder are rented to external people who are charged the full fee. The rent received from these properties totalled \$77,894.33 (Items 5.1, 5.2, 5.3 and 5.4). The respondent manages all properties. They collect the rents, they carry out maintenance and pay the upkeep on the houses.
- 13 Other minor trading income for governance is obtained through photocopying charges for members of the public (\$245.70) (Item 2.4) and the sale of special Shire of Dalwallinu vehicle licence plates (\$700.00) (Item 2.7). \$815.00 was received for the hire of a projector, room hire and a Freedom of Information Act search fee (Item 2.5).
- 14 During the 2006/2007 financial year the respondent received an amount of \$21,818.18 from Emergency Management Australia as a one-off grant for an emergency generator to allow the Shire administration building to become the command centre during emergencies (Item 3.2). To obtain the funding, the respondent had to provide an emergency management plan and make a submission to set up a control centre. The generator was installed to run twenty-four hours per day without power because the respondent has a lot of power outages. In Mr Crispin's witness statement he said that this grant is considered trading activity as the contract was payment as part of the service contract. However, when cross-examined about this issue he said that it was a social contract rather than a commercial contract in the nature of a social obligation to the community.
- 15 In Mr Crispin's witness statement it is noted that the respondent received \$1,000.00 for rural street addressing in 2006/2007 (Item 3.3). When asked to explain this item by the Commission, he said that the Government had a rural street addressing program which was an initiative to provide numbers for all rural farming properties to make it easier for emergency management services to find houses in emergencies. The \$1,000.00 was received from a State Government department to buy the plaques which the respondent put up.
- 16 The Dalwallinu Medical Centre is the largest source of trading income which is received by the respondent. The medical centre opened in 1997 and employs four people including one medical practitioner. Income received from the centre and rent totalled \$702,782.08 (Items 4.1, 4.2 and 4.3). Mr Crispin testified that the respondent made a decision to operate a medical centre some years ago because it found itself unable to find a doctor to service the community. They obtained a provider number and employed an overseas doctor who is not a resident of Australia and who cannot run a business. The first overseas doctor stayed long enough to become a permanent resident. The doctor took the business over and ran the business for a number of years but left, so the respondent recruited another overseas doctor to provide medical services. Mr Crispin said that they hope that the current doctor will want to take on the business but they do not know whether that will occur. The respondent owns the building which houses the medical centre and all equipment used in the medical centre. When asked whether the medical centre runs at a profit he said that it did. In 2006/2007 it made a profit of about \$30,000.00. The respondent does not receive any grants from the government for the

medical centre. Patients are charged a fee for the services provided at the medical centre. Mr Crispin said that if the respondent did not provide a medical centre and a doctor that residents of the Shire would have to travel at least an hour to private clinics in Moora or Wongan Hills.

- 17 The respondent runs a plastic drum muster service. To inspect the drums the respondent either uses their qualified employees, or a contractor. The drums have to be inspected to make sure they have been triple washed prior to shredding. The respondent engages a company to shred the washed drums and they (the respondent) recover the cost from a Commonwealth Government department. This service generated \$8,353.76 in income (Item 6.1). The respondent does not charge members of the public for the service.
- 18 The respondent also receives money from the State Government for materials recycled by them. The money is from an incentive rebate scheme which is based on the weight of materials which are recycled. In 2006/2007, \$535.69 (Item 6.2) was paid to the respondent from the State Government. When asked how this amount was calculated Mr Crispin said the materials from the local community are sent for recycling, the total volume of material across the state is weighed and the government pays an incentive based on the amount that has been recycled. When asked whether the respondent receives money from the materials that are recycled Mr Crispin said no, a contractor collects the recycling and charges the respondent for taking the material away. Residents are charged for the recycling service as part of annual rates levied on ratepayers which is part of the rubbish collection fee. Consequently the recycling charges have not been included as trading income.
- 19 The respondent does not contend that funds received from domestic refuse collection is a trading activity but it says that it runs a commercial refuse collection as an optional service which is considered trading activity. The amount of \$15,813.20 (Item 6.3) was received as fees for this service. Mr Crispin explained that the respondent provides a twice weekly collection of rubbish for commercial entities. The second collection is an additional service. It is not part of the statutory rubbish collection which is funded by rates paid by ratepayers.
- 20 The respondent sells scrap metal it collects from rubbish sites to Sims Metal. Mr Crispin explained that the respondent operates two rubbish sites from which every two or three years they collect and sell all the scrap metal to one of the scrap metal companies. They received \$13,578.30 for selling scrap metal in 2006/2007 (Item 6.7). It also receives income from asbestos disposal and bulk recycling charges (Items 6.5 and 6.6). The respondent also sells scrap which raised a small amount of revenue of \$447.27 (Item 8.2).
- 21 Mr Crispin testified that \$99,180.66 was received in 2006/2007 from the Water Corporation for maintaining a sewerage treatment scheme under licence which are funds received as trading income (Item 6.9). Mr Crispin explained that the sewerage scheme has been operated by the respondent for over fifty years. Initially it was subsidised by the Water Authority as it ran at a loss but in the past six years it has run at a profit. However, when questioned about these funds in cross examination, Mr Crispin said the funds are monies received from the local residents as part of the rates paid by the ratepayers. He conceded that the funds are from charges for making the service available and are not necessarily a charge on those who use the service as the respondent charges all people who are in the prescribed sewerage area of the Shire.
- 22 In Mr Crispin's witness statement he also states that \$90.91 was received for the lease held at the Wubin effluent site (Item 6.8).

- 23 The respondent received \$8,063.50 (Item 6.10) for fees charged for the cleaning of septic tanks by Shire employees. This amount is a yearly fee for the services of cleaning or pumping out of septic tanks.
- 24 For cemetery fees for burials performed by Shire employees the respondent received \$2,050.00 (Item 6.11).
- 25 The respondent also received a minor level of income for the hiring of halls at Buntine, Dalwallinu, Kalannie, Pithara and Wubin. These amounts totalled \$2,782.50 (Items 6.12 to 6.16). The respondent also received \$12,280.86 for entry fees to the Dalwallinu swimming pool which it owns (Item 6.17). In addition, income was received from the hire of recreational centres at Dalwallinu and Kalannie (Item 6.18, 6.19 and 6.20).
- 26 Mr Crispin testified that \$1,923.92 was paid by Main Roads WA to the respondent for the cost of lighting on roads owned by Main Roads WA (Item 7.1). When cross-examined Mr Crispin conceded the \$1,923.92 was not received as income for electricity the respondent purchased and resold to Main Roads WA, but simply monies reimbursed by the Main Roads WA for cost incurred by the respondent for the lighting of the roads owned by Main Roads WA.
- 27 The respondent received \$388.17 for the sale of waybill books, a book called Wajarri Wisdom and a book called "5 Graves in Dalwallinu" (Items 7.3, 7.4 and 7.5), along with \$560.00 housing rental income (Item 7.6).
- 28 The respondent owns and operates two caravan parks. One is in Dalwallinu and the other is in Kalannie. The amount of \$53,591.68 was received from visitors' fees, Coke machines, washing machines and dryers at those parks (Items 7.7 to 7.14).
- 29 The respondent charges \$1.65 a kilolitre for the sale of bulk water. The respondent sold standpipe water for which they received an amount of \$1,320.60 (Item 7.15).
- 30 During 2006/2007 the respondent partially built a new building for FESA by supplying fill and organising some of the construction for this work. FESA was charged \$47,634.28 by the respondent which covered materials and service costs (Item 7.17).
- 31 The respondent also carries out a number of private works each year. In the 2006/2007 financial year the amount generated was \$317,178.73 (Item 8.1). The main part of these funds came from construction of a truck bay for Main Roads WA at Wubin. Mr Crispin expressed a view that in the 2006/2007 financial year private works was down on the previous year although trading activity in general was very similar from one year to the next.
- 32 Mr Crispin says that although the income received from trading activities is consistent from year to year, the total operating revenue may increase or decrease as business needs change. Notwithstanding this fact, trading activities have not substantially changed over the past six years and nor does he expect them to do so in the future.
- 33 Mr Crispin says that several trading activities that the respondent provides are vital to the community and to the Shire. In addition, he is of the opinion that the medical centre, private works and the caravan park are significant activities carried out by the respondent.
- 34 Mr Crispin was asked by the Commission to describe what are the functions carried out by the respondent that were not trading activities. In response he explained that the outside crew are kept busy carrying out road maintenance and road building as the respondent has 1,900 kilometres of roads. The respondent also builds and maintains airstrips. The outside crew also creates and maintains parks and gardens and two ovals. In addition, the outside crew carries

out street cleaning and maintenance of road signs. Other activities includes providing administration such as dog licensing, operation of the council, preparing meetings and agendas and arranging functions. The respondent is also involved in administration of law and order, in particular dealing with dogs and impounding cars. In relation to education and welfare they maintain a pre-school building for playgroups. They also provide a school bus subsidy to outlying towns to bring children into swimming pool lessons. The respondent makes a contribution towards chaplaincy at one of the schools and provides scholarships each year for primary school students and provides money for a youth group and some rural counselling services. In relation to community amenities most of those activities consist of rubbish collection, town planning, running of the cemetery and town scaping for beautifying the towns. The respondent also operates tourism services and provide some rural services such as noxious weed and vermin control and make contributions to catchment councils that operate in the area. They also provide a building maintenance service that approves all buildings. The respondent also maintains and fuels all their own plant. The largest source of the respondent's income is from rates and from grants assistance.

### Submissions

- 35 The respondent submits that a corporation is to be regarded as a trading corporation if a substantial portion of its current activities are trading activities. It is well established in that it does not matter that the same corporation is engaged at the same time in activities other than trading activities (*Bysterveld, Lawrence and Pellow v Umoona Community Council Inc* PR 973365 (*Pellow*)).
- 36 The respondent says in *Lawrence* the following matters are particularly relevant to the Commission's determination of this application:
- "3.1 Whether the respondent is a trading corporation involves questions of fact, to be determined upon the evidence before the Commission.
  - 3.2 The primary focus is on what the respondent does. This determines what its activities are.
  - 3.3 The respondent is a trading corporation if its [sic] substantially engages in trading activity. This necessitates a close analysis of what the appellant [sic] does, and whether this in whole or part constitutes trading. If all of its activities are trading, it is a trading corporation. If a portion of its activities are trading then it is necessary to consider whether that portion is a substantial or significant portion of its overall activities. If so it is a trading corporation.
  - 3.4 It is immaterial if a corporation has a non-profit, benevolent or charitable object; if its trading activities are nevertheless substantial then it will be a trading corporation."
- 37 The respondent says that *Bysterveld* primarily along with *Pellow* are relevant as they deal with the test of establishing a constitutional corporation post the WorkChoices amendments to the WR Act.
- 38 The respondent contends that, in relation to the agency arrangements conducted by the respondent on behalf of other organisations for vehicle licensing and building registrations, the payment made by the public for the product or service is a matter between those organisations and their customer, and the respondent receives trading income through facilitating and processing the payment.



- 39 The respondent is of the view that all rent charged for housing owned by the respondent should be included as trading activity. It says the discounting of rent for employees is a separate employment matter and does not alter the fact that the payments are in return for housing.
- 40 As to the medical centre, the respondent points out that when a member of the public wishes to seek the services of a doctor they may visit the Dalwallinu Medical Centre. There is no requirement that they use this service and there are no restrictions on who may use the service. The clients of the medical centre pay market rates for receiving medical advice. It is run as a commercial enterprise and the respondent generates a profit. The respondent argues that it is irrelevant that in the future the respondent may decide to sell the medical centre as it does not alter the nature of the activity which is trading in nature.
- 41 The respondent acknowledges that domestic refuse collection may not be considered trading income but says that as commercial enterprises have the choice of buying an additional refuse collection service, this additional service is trading activity.
- 42 The respondent points out that the selling of scrap metals from rubbish sites to Sims Metal is not a gratuitous community service.
- 43 In relation to the sewerage treatment operation conducted on behalf of the Water Corporation, the respondent submits that this is not a gratuitous public welfare service as a fee is charged for the provision of the service, members of the public may use this service and the service is now running at a profit.
- 44 The respondent says that it is irrelevant when determining whether an activity is a trading activity, to consider whether products or services are provided as a community service, as this is not the test applied by the Commission and it is possible to classify almost any activity by any organisation as a community service.
- 45 The Dalwallinu swimming pool is a facility which can be used by any member of the public if they pay an entry fee to use it. Members of the public who stay at and use the services of the Dalwallinu and Kalannie caravan parks are charged at market rates for these services and should be considered trading activity.
- 46 The respondent says that Mr Crispin provided evidence that the private works carried out by the respondent on behalf of the external organisations are charged at market rates and are performed for individuals and organisations inside and outside the local government area.
- 47 The respondent points out that the percentage of trading activity of the respondent is four times that of in *Pellow*. In *Pellow*, 10.64% was sufficient for the Umoona Community Council to be determined a trading corporation. The respondent also points out that Mr Crispin outlined in his evidence that the total income received from trading activities is reasonably consistent from year to year although there are fluctuations as business needs change. The respondent says it is a trading corporation both in the significance and the scope of its trading activities and the Commission should make a decision that it lacks jurisdiction to hear this matter.
- 48 The applicant concedes that a corporation may be considered a trading corporation if it substantially engages in trading activity. It also agrees that the decisions in *Bysterveld* and *Lawrence* are relevant to the determination of this matter.
- 49 The applicant says the respondent's submissions appear to advance the argument that the test that ought to be applied by the Commission is to assess the percentage of the respondent's operating revenue derived from trading activities as a percentage of the total operating revenue and then apply a simple threshold test. That is, if the operating revenue derived from trading

activities reaches a certain threshold percentage then the corporation ought to be considered a trading corporation. The applicant says that, with respect, this test should be rejected and submits that the authorities do not support this approach. The applicant contends that whilst it is relevant for the Commission to consider the relative percentage of operating revenue derived from trading activities as a proportion of total operating revenue, this test is only determinative of the jurisdictional question where all of the operating revenue is derived from trading activities (*Lawrence* at [232]). Otherwise, the applicant says it is relevant for the Commission to consider the relative percentage of revenue derived from trading activities only to determine whether the trading activities are significant. Once the trading activities can be considered to be significant, it is then necessary to make a "*qualitative assessment of the respondent's activities*" to determine if they are substantial enough to enable the corporation to be considered a trading corporation (*Bysterveld* at [78] and *Lawrence* at [240], [277] and [329]).

- 50 The applicant points out that Mr Crispin gave evidence about a number of categories of revenue. The first category to be considered is that of "general purpose funding" which generates income through rate inquiry fees. The applicant rejects any characterisation of this money as trading income and says that it is incidental and peripheral to the levying of a statutory charge on residents. In relation to the category of 'governance', the applicant submits that revenue derived in this category is largely insubstantial. The only substantial revenue in this category is commissions received from statutory bodies for collecting fees on their behalf and the revenue received from staff housing. The applicant submits that neither of these activities should be considered trading activities as the commissions are in return for statutory charges levied on ratepayers and housing rental is peripheral to the employment of staff neither of which is substantial enough to allow a characterisation of the respondent as a trading corporation.
- 51 The applicant says the category of "law, order and public safety" contains no elements that ought to be properly considered as trading income in accordance with the Commission's view of these matters in *Bysterveld*.
- 52 The applicant concedes that income derived in the category of "health" may be considered trading income. However, the applicant says the Commission needs to make a qualitative assessment of this activity to determine if it imposes the character of a trading corporation on the respondent. The applicant says the Commission can conclude from the evidence that the respondent is only engaged in this activity under sufferance in order to ensure medical services are available to enable the community to be sustained and that the respondent would prefer not to be involved in this business. The applicant submits that in these circumstances the activity is not sufficient to impose the character of a trading corporation.
- 53 The applicant submits that some of the income generated by the provision of housing may be trading income in character but it is provided as a community service in order to allow older residents to continue to live in the town or to allow employees of the respondent or State Government employees to live in the town. The applicant submits that in these circumstances the activity is not sufficient to impose the character of a trading corporation.
- 54 The applicant contends that the income derived under the category of "community amenities" ought not to be characterised as trading income. The majority of income received in this category arises from or is incidental to the provision of rubbish collection services for which a statutory charge is levied and as such ought not to be characterised as trading income. The applicant points out that the provision of the sewerage services is conducted under licence from

the Water Corporation and is a community service subject to a statutory charge and that in those circumstances should not be considered trading income.

- 55 The provision of services in the category of "recreation and culture" may result in the generation of some trading income but the applicant submits that in accordance with the Commission's view in *Bysterveld* they are peripheral to the provision of community services and as such are not sufficient to impose the character of a trading corporation.
- 56 In relation to income generated in the category of "transport", the applicant says this income should not be considered trading income. The contribution towards street lighting by Main Roads WA cannot be properly characterised as trading income as it is simply the reimbursement of an expense not an exchange for value.
- 57 As to the category of "economic services", the applicant concedes some of these services may be characterised as trading but submits that the purpose of the activity in connection with the caravan parks is to foster tourism in a small community and in accordance with *Bysterveld*, is not sufficient to impose the character of a trading corporation. The applicant also contends that the payment made by FESA to meet the expense of a building in which FESA will co-locate with the community and council services should also be in this category.
- 58 The applicant concedes that income derived in the category of "other property and services" may be considered trading income but submits that this activity is incidental and peripheral to the provision of community works and as such is not sufficient to impose the character of a trading corporation.
- 59 In conclusion the applicant submits that while it may be open to conclude that the income derived from trading activities is significant, the character of the trading activities undertaken by the respondent are not sufficient to impose character of a trading corporation on the respondent and as such the Commission has jurisdiction to hear and determine this matter.

### Legal Principles

- 60 In relation to what constitutes "trading" in *Lawrence* the Full Bench at [286] observed:
- "A summary of points about '*trading*' emerging from the authorities, together with our observations about them is as follows:-
- (a) The word is of wide import (Murphy J in *Adamson* at 239; Deane J in *Ku-ring-gai* at 648-649; The Full Federal Court in *Bevanere* at 330).
  - (b) Although '*buying and selling*' may be the clearest example of trading, it is not restricted to this (Stephen J in *St George County Council* at 569-570; Barwick CJ in *Adamson* at 209; Mason J in *Fontana Films* at 203; Toohey J in *Hughes* principle 7 at 20 (FCR), 672 (ALR); Carr J in *Quickenden* at [101]; Deane J in *Ku-ring-gai* at 649; Dixon J in *Bank of NSW* at 381). The appellant's counsel's submissions, tended to focus on clauses of the contract that referred to '*purchase*' and '*sale*'. We did not however take his submissions to be to the effect that it was for only this reason that the entering into and performance under the contract was trading. Nor on the authorities, would so restrictive an approach be required.
  - (c) Although the desire to earn profit may ordinarily be part or an element of trading, trading does not always require the attainment of profit (Barwick CJ in *St George County Council* at 539; Stephen J in *St George County Council* at 569;

O'Callaghan SDP in *Pellow* at [28]; Deane J in *Ku-ring-gai* at 649). For example, a person who sells his or her shares at a loss, is nevertheless engaging in trading.

- (d) In our opinion, with respect, the most apt general description of trading is that succinctly stated in principle 7 at 20 (FCR), 672 (ALR) by Toohey J in *Hughes*: the activity of providing, for reward, goods or services. This does not mean we regard this as an all encompassing definition. To so describe what Toohey J has said would ignore point (a) above. The description of Toohey J is supported by Bowen CJ in *Ku-Ring-gai* at 625, as cited with approval by the Full Federal Court in *Bevanere* at 330. It is also consistent with the Macquarie Dictionary, 4<sup>th</sup> edition, 2005 definition of trading as '*exchange for reward*'. The word '*reward*' in this context means '*something given or received in return or recompense ...*'. (Macquarie Dictionary, 4<sup>th</sup> edition, 2005). In the present context an appropriate synonym would be '*for value*'. Therefore broadly speaking in our opinion trading generally involves an exchange, or the provision of goods or services, for value. Both the provider and the receiver of the goods or services will, when this occurs, be trading. Barter, referred to earlier, could therefore be trading. There is an exchange of goods where the '*value*' is represented by the receipt of the goods from the other.
- (e) Some of the authorities refer to '*commerciality*'. (Barwick CJ in *Adamson* at 209; Bowen CJ in *Ku-ring-gai* at 625 and the Full Federal Court in *Bevanere* at 330). Carr J in *Quickenden* at [101] referred to the earning of '*revenue*' and O'Callaghan SDP in *Pellow* at [28] to the earning of '*income*'. We have considered whether commerciality is a separate requirement for trading to occur. In our opinion it is not. This stems from a consideration of what was precisely said in the High Court and Federal Court authorities just cited, the relevant passages of which were earlier quoted. (We have deliberately excluded *Pellow* from this because of our respectful opinion about the weaknesses in the analysis). Also, in our opinion, if there is an exchange of goods or services for value this is in itself trading without the necessity of considering if there is an independent element of commerciality about the transaction. For example, a private purchase and sale of a car advertised in a newspaper is trading even though it is essentially a domestic arrangement. There is an exchange of personal property for value. The requirement of an exchange for value of itself supplies any requirement for commerciality in the arrangement for it to constitute trading.
- (f) Wilcox J in *Australian Red Cross* and O'Callaghan SDP in *Pellow* suggest that the gratuitous provision of a public welfare service, where the money to engage in the service is supplied by government funding, is not trading. In our opinion, and with respect, so broad a proposition is not supported by the decisions of the High Court or the other authorities cited above which discuss the meaning of '*trade*' or '*trading*'. In a situation where there is in effect, a tripartite arrangement involving the government it is necessary to look at the basis on which the money is received to provide services to ascertain if any or all of this constitutes trading. This approach is not inconsistent with the authorities, which establish the relevant principles. There is no reason in principle why a tripartite arrangement may not constitute trading. The fact that government funds are used for a public welfare service, does not necessarily have the effect that the means by which the funds were received, or the arrangement overall, is not trading. The correct approach in our opinion is to

carefully consider, on a fact specific basis, the means by which the government funds are provided to a corporation, to see if it is trading. Accordingly, the provision of funds by government to a corporation may or may not constitute trading. Furthermore, as we will explain more fully later, even if it is trading this does not necessarily mean the corporation is a trading corporation. In our view, to determine if it is, a holistic appraisal must be made of the activities of the corporation. This will allow a conclusion to be made about whether the trading component of its activities are sufficient to lead to characterisation as a trading corporation."

61 In *Bysterveld* at [59] I observed about this passage in *Lawrence* that:

"[W]hen careful regard is had to the authorities referred to by the Full Bench that inherent in the concept of 'trading' or 'trade' in the authorities referred to by the Full Bench is a transaction or dealing between persons whether in person or through a corporate entity. Such a transaction or dealing would include a sale, an exchange of goods or services (such as barter) or a tripartite arrangement whereby A agrees to pay B to provide a service to C."

62 The Commission must make a qualitative assessment of the respondent's activities to assess whether its trading activities are substantial to merit its description as a trading corporation. As I observed in *Bysterveld* at [78]:

"Whilst the percentage values of trading activities are relevant to the question whether it can be said that the trading activities of the Respondent are significant, it is not of assistance to simply analyse these activities only on the basis of comparative dollars of trading activities to the total of operating revenue received from rates and grants and other items that are not trading activities (see *Lawrence* at [240], [277] and [329])."

63 At [85] in *Bysterveld* I also relevantly observed:

"In ascertaining whether an incorporated body engages in trading activities which are to be regarded as a sufficiently significant proportion of its overall activities, as set out above may not simply be a matter of assessing percentages of trading income. In *Hughes Toohey J* considered whether the Western Australian Cricket Association (Inc) ('WACA') and a number of associated incorporated cricket clubs were trading corporations. At 674 *Toohey J* adopted a 'three-stage test' suggested by counsel for the respondents to determine whether an incorporated body was a trading corporation. This test:

'... involved identifying the totality of the activities of the corporation, identifying those activities properly characterised as trading activities and then evaluating the extent of the trading activities against the totality of activities.'

64 As set out above in *Lawrence* at [317], trading involves an exchange, or the provision of goods or services, for value. Profit is not always a part of trading, nor is commerciality. In my opinion the correct approach is to examine each activity to ascertain whether the activity constitutes trading and then to look at all of the respondent's activities to ascertain whether the trading activities as a whole are so significant to characterise the respondent as a trading corporation.

#### **Are all the "trading activities" identified by the respondent trading activities?**

65 Having heard the evidence of Mr Crispin, I am satisfied that all of the categories of the operating accounts which he sets out in his statement constitute income from trading activities with the exception of Items 3.2, 6.1, 6.2, 6.9 and 7.1. The reason why I have reached this

conclusion is that it is clear from Mr Crispin's evidence that the income received in respect of the items (with the exception of Items 3.2, 6.1, 6.2, 6.9 and 7.1) is income received as an exchange for the provision of services such as the extra commercial refuse collection, the sale of metal, the hire of the facilities, leasing of premises for rent, fees for entry to premises and commissions received for processing applications for government agencies. It is apparent from the nature of these transactions that these are trading activities at law.

- 66 In respect of Item 3.2, there is insufficient evidence about the terms of the grant received from Emergency Management Australia to make a finding whether the transaction between the respondent and Emergency Management Australia was an exchange for the provision of a service or goods. Similarly, in relation to Item 6.1 there is insufficient evidence before me to establish that the funds received from a Commonwealth government department to cover the cost incurred by the respondent for the drum muster program can be characterised as trading as how those funds are claimed has not been disclosed to the Commission. The same consideration applies to Item 6.2 the rebate received from the Western Australian government for recycling.
- 67 As to Item 6.9 (sewerage maintenance charges), these are charges levied on ratepayers as part of rates and are paid irrespective of whether a ratepayer uses a sewerage service. I am not satisfied that the income received from this activity can be characterised as a trading activity.
- 68 I am not satisfied that income received from Main Roads WA for reimbursement of part of an electricity account paid by the respondent (Item 7.1) is trading as no exchange of a service is apparent between the respondent and Main Roads WA. Whilst the respondent claims from Main Roads WA the cost of lighting main roads within the Shire, the respondent does not provide the lighting and there is no evidence that this activity can be said to be a tripartite arrangement whereby A agrees to pay B to provide a service to C.
- 69 When Items 3.2, 6.1, 6.2, 6.9 and 7.1 are excluded it can be said that during 2006/2007 the respondent received \$1,365,990.30 from trading activities which was 20.88% of the respondent's total operating revenue for that financial year.

## Conclusion

- 70 To ascertain whether a corporate body is a trading corporation, the enquiry must not be confined to only looking at trading activities. The corporate persona of the body itself must be examined *The Commonwealth v Tasmania* (1983) 158 CLR 1 Mason J at 157.
- 71 In *Adamson* the majority of the members of the court preferred the reasoning of the minority in *R v Trade Practices Tribunal; Ex parte St George County Council* (*St George County Council*) (1974) 130 CLR 533 and overruled the majority in *St George County Council*. Barwick CJ, a member of the majority in *Adamson* (and a member of the minority in *St George County Council*) observed at 208 in *Adamson*:

"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."

72 Mason J at 233 (with whom Jacobs J agreed at 237) in *Adamson* remarked:

"For my part, I prefer the minority view as expressed in the *St. George County Council Case*, in particular the remarks of Barwick CJ, when his Honour said that to fall within s 51(xx) 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'.

'Trading corporation' is not and never has been a term of art or one having a special legal meaning. Nor, as the Chief Justice pointed out, was there a generally accepted definition of the expression in the nineteenth century. 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."

73 At 234 Mason J then went on to observe:

"Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz religion or education in the case of a church or school, that it could not be described as a trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is very much a question of fact and degree."

74 Murphy J at 239 said:

"Even though trading is not the major part of its activities, the description, 'trading corporation' does not mean a corporation which trades and does nothing else or in which trading is the dominant activity. A trading corporation may also be a sporting, religious, or governmental body. 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. For example, a very large corporation may engage in trading which though incidental to its non-trading activities, and small in relation to those, is nevertheless substantial and perhaps exceeds or is of the same order in amount as the trading of a person who clearly is a trader."

75 These passages in *Adamson* were cited with approval by Mason, Murphy and Deane JJ in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303 and their Honours observed at 304 that if there were any difference in the comments made by the majority in *Adamson* it was one of emphasis only.

76 The majority of trading activities the respondent engages in are to support the local community such as the provision of two caravan parks. In respect of some trading activities, such as the provision of a medical centre, the respondent engages in those activities as there is no one in the Shire who is able to undertake those activities or those facilities are otherwise unavailable. The fact that they engage in these activities to support the local community or that many of these activities are incidental or peripheral to the respondent's statutory functions does not prevent a finding that the respondent is a trading corporation.

77 Many of the trading activities are activities which would be run as commercial enterprises by private business in other larger communities such as the medical centre, rental of accommodation and the caravan parks. It is apparent from the range of trading activities that many of the respondent's employees work on these activities. Some of these employees would only engage in these activities occasionally, such as the selling of scrap, some more regularly

such as the swimming pool manager. The principal activities of the respondent are to provide statutory local government services which are not trading activities. Many of the trading activities carried out by the respondent, are incidental to statutory services such as the sale of council minutes, photocopying charges and hiring of Shire premises. They also carry out functions of other statutory government agencies by collecting the fire services levy, processing vehicle licensing applications and collecting BCITF and BRB fees. The respondent is paid commissions from government agencies to carry out this work and collect those fees. Whilst these activities can be said to be carried out to benefit the community (which is part of the principal activities of the respondent), given the total amount collected for these trading activities (Item 2.3 \$36,214.71) it cannot be inferred that it would take an insignificant amount of time of the respondent's employees to administer the processing of the applications and collection of the fees for the other government agencies.

- 78 The respondent also receives income from FESA to run a bushfire service (Item 3.1). The income it receives appears to clearly constitute trading as the income received from FESA is in exchange for a service the respondent provides to the community which can be characterised as a tripartite trade arrangement.
- 79 It is also apparent from Items 7.17 and 8.1 that the respondent engages in carrying out private works which raised \$364,813.01 in 2006/2007. Whilst no information was provided to the Commission about the number of employees who engaged in these works or the time it took the respondent's employees to complete the works, the amount received as income from these works cannot be said to be insignificant.
- 80 In my opinion, when all of the trading activities are considered collectively it is plain that these activities form a substantial element of what the respondent does even though these activities are not predominantly what the respondent does and some of these activities are peripheral to the respondent's principal activities. Consequently I find that the respondent's activities in 2006/2007 were substantial. It is accepted, however, that the trading activities engaged in by the respondent in 2006/2007 reflected in general the level of trading activities engaged in by the respondent when the applicant's employment was terminated.
- 81 For the reasons set out above I am of the view that presently the respondent is a trading corporation, and as such is a constitutional corporation as defined by s 4 of the WR Act. In light of this finding I will make an order that the application be dismissed.