FEDERAL COURT OF AUSTRALIA

Bankstown Handicapped Children's Centre Association Inc v Hillman

[2010] FCAFC 11

Citation:	Bankstown Handicapped Children's Centre Association Inc v Hillman [2010] FCAFC 11
Appeal from:	Hillman v Bankstown Handicapped Children's Centre Association Incorporated [2008] NSWIRComm 64
Parties:	**BANKSTOWN HANDICAPPED CHILDREN'S CENTRE ASSOCIATION INC and CHERYL MOORE v JONATHAN HILLMAN, ATTORNEY GENERAL OF NEW SOUTH WALES and MINISTER FOR INDUSTRIAL RELATIONS, NEW SOUTH WALES**
File number(s):	NSD 1560 of 2008
Judges:	**MOORE, MANSFIELD AND PERRAM JJ**
Date of judgment:	25 February 2010
Catchwords:	**INDUSTRIAL LAW –** whether the Industrial Court of New South Wales had jurisdiction to hear and determine the application – whether the substantial activities of the Association should be characterised as "trading" and whether it is therefore a "trading corporation" to which the *Workplace Relations Act 1996* (Cth) applies so as to exclude the application of the *Industrial Relations Act 1996* (NSW) – the application of paragraph 51(xx) of the Constitution – the time at which the activities of the Association are to be assessed.
Legislation:	*Associations Incorporation Act 1984* (NSW) ss 4, 66 *Charitable Fundraising Act 1991* (NSW) *Children and Young Persons (Care and Protection Act 1998* (NSW) s 135 *Conciliation and Arbitration Act 1904* (Cth) *Disability Services Act 1993* (NSW) *Industrial Relations Act 1996* (NSW) s 106 *Workplace Relations Act 1996* (Cth) ss 4 (1), 16(1), 853 *The Constitution* ss 51(xx), 76, 77(i), 109
Cases cited:	*Aboriginal Legal Service of Western Australia (Inc) v*

Lawrence (No 2) (2008) 37 WAR 450
British American Tobacco Australia Ltd v Western Australia (2003) 217 CLR 30
Collins v Charles Marshall Pty Ltd (1955) 92 CLR 529
Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (2007) 157 FCR 260
E v Australian Red Cross Society (1991) 27 FCR 310
Felton v Mulligan (1971) 124 CLR 367
Fisher v Madden (2002) 54 NSWLR 179
LNC Industries Ltd v BMW (Australia) Ltd (1983) 151 CLR 575
Quickenden v O'Connor (2001) 109 FCR 243
Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134
R v Spicer; Ex parte Truth and Sportsman Ltd (1957) 98 CLR 48
R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533
Re McJannet; Ex parte Australian Workers' Union of Employees (Qld) (No 2) (1997) 189 CLR 654
Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission (NSW) (No 2) (2007) 159 FCR 274

Date of hearing:	11 - 12 August 2009
Place:	Sydney
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	57
Counsel for the Appellants:	P M Kite SC with G M Boyce
Solicitor for the Appellants:	Greg Duff, Solicitor
Counsel for the First Respondent:	M Gibian
Solicitor for the First Respondent:	Turner Freeman
Counsel for the Second and Third Respondents:	M G Sexton SC with I Taylor and J McDonald
Solicitor for the Second and Third Respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **NSD 1560 of 2008**

ON APPEAL FROM THE INDUSTRIAL COURT OF NEW SOUTH WALES

BETWEEN:	**BANKSTOWN HANDICAPPED CHILDREN'S CENTRE ASSOCIATION INC** **First Appellant** **CHERYL MOORE** **Second Appellant**
AND:	**JONATHAN HILLMAN** **First Respondent** **ATTORNEY GENERAL OF NEW SOUTH WALES** **Second Respondent** **MINISTER FOR INDUSTRIAL RELATIONS, NEW SOUTH WALES** **Third Respondent**

JUDGES:	**MOORE, MANSFIELD AND PERRAM JJ**
DATE OF ORDER:	**25 FEBRUARY 2010**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The order of the Industrial Court of New South Wales of 16 September 2008 dismissing the appellant's notice of motion of 20 July 2007 be set aside.

3. The application of the first respondent of 16 November 2006 be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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BETWEEN:	**BANKSTOWN HANDICAPPED CHILDREN'S CENTRE ASSOCIATION INC** **First Appellant** **CHERYL MOORE** **Second Appellant**
AND:	**JONATHAN HILLMAN** **First Respondent** **ATTORNEY GENERAL OF NEW SOUTH WALES** **Second Respondent** **MINISTER FOR INDUSTRIAL RELATIONS, NEW SOUTH WALES** **Third Respondent**
JUDGES:	**MOORE, MANSFIELD AND PERRAM JJ**
DATE:	**25 FEBRUARY 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT

Introduction

1 Mr Hillman, the first respondent, sought relief under the *Industrial Relations Act 1996* (NSW) ("NSW IR Act") in proceedings against his former employer, Bankstown Handicapped Children's Centre Association Inc ("the Association"), the first appellant in these proceedings and its Chief Executive Officer, Ms Cheryl Moore, the second appellant. The Association and Ms Moore put in issue the jurisdiction of the Industrial Court of New South Wales to hear and determine Mr Hillman's application. A Full Bench of the Industrial Court held it had jurisdiction in a judgment given on 16 September 2008. The Association and Ms Moore have appealed against that judgment in this Court under s 854 of the *Workplace Relations*

Act 1996 (Cth) ("WR Act"), though the competency of the appeal is challenged by Mr Hillman, a challenge supported by the second and third respondents (collectively "the State of New South Wales" or "the State").

2 The Association's jurisdictional challenge in the Industrial Court turned on whether the Association was a "constitutional corporation", as defined in s 4(1) of the WR Act, being a corporation to which paragraph 51(xx) of the *Constitution* applies and, in particular, whether it was a trading corporation. If it was then s 16 of the WR Act denied the Industrial Court jurisdiction by rendering applicable the WR Act to the exclusion of the NSW IR Act in relation to Mr Hillman's employment.

The facts in overview

3 There was no significant dispute between the parties as to the primary facts. At this point, it is convenient to provide an overview of them. The Association is a corporation which provides welfare and support services for people with disabilities, children and young people and provides support for their families and carers. It was incorporated under the *Associations Incorporation Act* 1984 (NSW) ("the Associations Incorporation Act") on 11 August 1988. The Association operates in the disability services and childcare sectors providing accommodation and support services and a preschool. The objects of the Association in its present Constitution include:

> To provide high quality, individualised services that make a real difference to the lives, independence and social integration of people with any disability, as well as children, and young people, regardless of background;

4 The source of funds, as provided by rule 36 of the Constitution:

> …are to be derived from entrance fees and annual subscriptions of members, donations, government funding, grants and sponsorships and, subject to any resolution passed by the Association in a general meeting, such other sources as the Committee determines;

5 The New South Wales Department of Ageing, Disability and Home Care ("DADHC") provides funds to the Association under a funding agreement. The funds are to provide accommodation for adults with a disability through the operation of group homes, support programs for people with disabilities, community access

programs for people with disabilities, including day programs and respite care for families and carers of people with disabilities. Fees are also paid directly to the Association by participants in most of these programs, although the payments from DADHC represent a substantially higher percentage of the funds supporting these programs.

6 The New South Wales Department of Community Services ("DOCS") also provides funds to the Association to assist in the protection and care of children and young people and to support their families. The funds paid to the Association are for Out-of-Home Care ("OOHC") for children and young people and to provide a child care service, Bankstown Occasional Care. The funding is governed by a header agreement which contains a price list for particular services. The Association also receives reimbursement for contingency items from DOCS.

7 The Bankstown Occasional Care service is funded not only by DOCS under a service agreement but also by the fees paid by parents. Bankstown City Council provides free accommodation for the child care centre.

The competency of the appeal

8 Before considering the facts in further detail and the ultimate legal issue about whether the Association was a trading corporation, it is convenient to determine whether the appeal is competent. In the proceedings in the Industrial Court, Mr Hillman sought relief under s 106 of the NSW IR Act. In particular, he sought a declaration that his contract of employment was an unfair contract, an order declaring void in whole or in part the contract, an order, in the alternative, varying the contract and the payment of money and interest. The initiating process was a summons for relief which identified not only the relief sought but also the legal and factual foundations for it in a summary way. The respondents were the Association and Ms Moore. The Association and Ms Moore filed a responsive pleading in the form of a reply. It contained the following paragraph ([52]):

> The Respondent denies paragraph B-52 of the Summons in its entirety. Further, the Respondent is a constitutional corporation falling within the jurisdiction of the Workplace Relations Act, 1966 (Cth). Accordingly, the Applicant does not have jurisdiction to make a claim under s 106 of the Industrial Relations Act, 1966 (NSW).

The defence is curiously expressed. On one view, the defence raises for consideration the jurisdiction of the Industrial Court to hear and determine the application on its merits and, if appropriate, grant the relief sought. On another view, it raises more directly for consideration the anterior but related question of whether Mr Hillman had a statutory right to apply for the relief though ultimately these are distinctions of no relevant consequence for reasons which emerge later in this judgment.

9 This defence led to a notice of motion of 20 July 2007 by the Association and Ms Moore which, in terms, challenged the jurisdiction of the Industrial Court. It sought, in the alternative, an order that the summons for relief be set aside or a declaration that the Industrial Court had no jurisdiction "in respect of the subject matter of the proceedings". In the judgment of 16 September 2008, the Industrial Court ordered that the notice of motion be dismissed. That order constitutes the judgment against which this appeal is brought.

10 In order to understand the basis on which the competency of the appeal is challenged, reference should be made to two provisions of the WR Act. Section 16(1) provides:

> This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
> (a) a State or Territory industrial law;
> (b) a law that applies to employment generally and deals with leave other than long service leaver;
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> …

11 Section 853 (1) provides:

> An appeal lies to the [Federal] Court from a judgment of a court of a State or Territory in a matter arising under this Act
>
> …

12 In issue is whether the matter arising from the application for relief under s 106 of the NSW IR Act (made under s 108 of that Act) constituted a matter arising under the WR Act so as to result in a right to appeal to this Court under s 853 because the judgment of the Industrial Court was a judgment in such a matter.

13 Mr Hillman, and the State in support, referred to a number of authorities concerning what is comprehended by the expression "matter arising under [a federal law]" or other statutory formulations which raised a similar question. Those authorities included *Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission (NSW) (No 2)* (2007) 159 FCR 274; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529*; Quickenden v O'Connor* (2001) 109 FCR 243*; Felton v Mulligan* (1971) 124 CLR 367*;* and *Re McJannet; Ex parte Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654. With one qualification, it is unnecessary to analyse these various authorities because there is clear binding authority of the High Court which answers the argument put by Mr Hillman. It is sufficient to note that the question, in this appeal, is not whether the appeal is a matter arising under the WR Act which, by analogy, is the issue in cases concerning whether there is any limit on a Court's power to award costs because of s 824 or its statutory predecessor (such as *Tristar, Quickenden* and *McJannet*). Rather the question posed by s 853(1) is whether the proceedings in the Industrial Court gave rise to a judgment in a matter arising under the WR Act. That is not to say, however, that the appeal itself need not be a matter arising under a federal law or otherwise comprehended by s 76 of the *Constitution* which is a more fundamental question concerning the reach of s 77(i) of the *Constitution*. However if the proceedings in the Industrial Court concerned a matter arising under the WR Act there would be little reason to doubt, in a case such as the present, that an appeal would similarly be such a matter.

14 The answer to the question of whether the proceedings in the Industrial Court gave rise to a judgment in a matter arising under the WR Act is, in our opinion, plainly yes. We say that because the Association and Ms Moore raised as a defence in the proceedings in the Industrial Court the legal effect of a provision in the WR Act which (together with s 109 of the Constitution) either denied the Industrial Court jurisdiction to hear and determine Mr Hillman's application on its merits and grant the

relief he sought or denied Mr Hillman statutory right to make the application or both. In a joint judgment of six Justices of the High Court (with the seventh Justice, Murphy J, concurring) in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, the following is said (at 581):

> The conclusion reached by Latham CJ in that case [*R v Commonwealth Court of Conciliation and Arbitration; ex parte Barrett* (1945) 70 CLR 141], and stated in a passage that has often been cited with approval, is "that a matter may properly be said to arise under a federal law if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law". Equally, there is a matter arising under a federal law if the source of a defence which asserts that the defendant is immune from the liability or obligation alleged against him is a law of the Commonwealth: *Felton v Mulligan*.

The conclusory statement in the last sentence appears to us to apply to the proceedings in the Industrial Court. As already discussed, the Association asserted an immunity from liability (on two possible bases referred to earlier) in its defence in those proceedings and the WR Act was the source of the defence. Accordingly those proceedings involve a matter arising under a federal law, the WR Act. The order of 16 September 2008 was a judgment in such a matter and no party suggested it was not, relevantly, a judgment.

15 It might be thought that observations of the High Court in *Collins v Charles Marshall Pty Ltd* indicated that a matter did not arise under a federal law in proceedings in a state court in which the applicant or plaintiff was seeking to enforce a right conferred by a state law simply because a defence was raised that a federal law was inconsistent with the state law rendering that latter law invalid because of s 109 of the Constitution. That case was unusual in that the High Court addressed the validity of a provision in the *Conciliation and Arbitration Act 1904* (Cth) purporting to confer a right of appeal from a state court to the Commonwealth Court of Conciliation and Arbitration which, on one view, denied a right of appeal to the High Court. No party in those proceedings submitted that the legislation had this effect. We do not understand this case to have established such a broad proposition as set out at the beginning of this paragraph. First it is a proposition inconsistent with the widely expressed proposition in *LNC Industries Ltd* which remains good law: see, for example, its comparatively recent application in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [39]. Secondly the High Court was

concerned with a statutory provision referring to "proceedings arising under [the federal industrial law]" and not matters arising under such a law. Thirdly the collision creating alleged inconsistency was between an award and the state law and not simply between the federal law itself and the state law, as is the case in this appeal.

16 Our conclusion that the appeal is competent accords with what we perceive to be the purpose of s 853, namely to confer on this Court appellate jurisdiction in matters involving federal industrial law whether determined at trial by a State court or in this Court or the Federal Magistrates Court; see generally the observations of Dixon CJ in *R v Spicer; Ex parte Truth and Sportsman Ltd* (1957) 98 CLR 48 at 53. Similar appellate jurisdiction from judgments of State courts is specifically conferred on this Court under s 131B of the *Copyright Act 1968* (Cth), s 158 of the *Patents Act 1990* (Cth), s 87 of the *Designs Act 2003* (Cth), s 195 of the *Trade Marks Act 1995* (Cth) and s 41 of the *Circuit Layouts Act 1989* (Cth).

The facts in detail

17 As noted earlier, the facts were generally uncontroversial. A convenient way of describing the facts is to repeat, with some editing, the account given by the Industrial Court in its reasons for judgment (paragraphs [18] to [32] following). In a limited number of respects, the parties (mainly the Association) challenged either some of the findings of the Industrial Court or factual conclusions the Court reached at a level of generality (or its failure to make particular findings or reach particular conclusions). We will later address the more significant of those matters and express our own view about what the evidence established.

18 Some facts were expressly agreed:

(a) On 11 August 1988, the Association incorporated under the *Associations Incorporation Act* 1984;

(b) The Association is an organisation operating in the disability services and childcare sectors which provides accommodation and support services and operates a preschool;

(c) According to its 2005-2006 annual report the Association's purpose is to provide high quality, individualised services that make a real difference to the lives,

independence and social integration of people with any disability and children and young people regardless of background and also to provide support to their families and carers;

(d) The Association has various operational divisions, such as the adult disability accommodation program, the ASPIRE Out-of-Home-Care service, the Occasional Care Centre, the Day Program, Respite Programs and Clinical Support Services;

(e) It provides services to over 250 people, from 0 to 65 years of age, many with a disability;

(f) At 30 June 2006, the Association used 20 group homes, of which three were owned by the government and the remainder were rented on the open property market;

(g) In 2006, the Association employed 234 full time, part-time and casual employees;

(h) A significant component of the Association's staff were agency employees;

(i) The Association has an 'Authority to Fundraise for Charitable Purposes' under the *Charitable Fundraising Act 1991* (NSW);

(j) The Constitution of the Association was adopted in its current form on 15 November 2006. An earlier constitution applied until that date;

(k) The former Constitution's Objects were as follows:

> Objects: The objects of the Association shall be:
>
> a) To facilitate the provision of services and support for children and young people with special needs - and their families - in the local community;
> b) To evaluate community needs in respect of such families and develop appropriate progress to respond to those needs;
> c) To foster and encourage:
> i) community participation in the program;
> ii) self determination and self-help attitudes in families with handicapped members;
> iii) social interaction and inter-family support between families involved in the Centre's programs.
> d) To provide an information service to assist families in obtaining appropriate professional services and community support in respect of their special needs;
> e) To provide, in the Bankstown Handicapped Children's Centre Incorporated at 80 Restwell St., Bankstown, appropriate facilities and accommodation for such services and programs as are deemed necessary for the pursuance of the preceding objectives;
> f) To receive information from and to liaise with Bankstown City Council and ensure that the programs provided at the Bankstown Handicapped Children's Centre Incorporated cater appropriately for the needs of typical-young people in the Bankstown City Council area.
>
> ...

(l) The current Constitution's Objects are as follows:

The objects of the Association shall be:

- To provide high quality, individualised services that make a real difference to the lives, independence and social integration of people with any disability, as well as children, and young people, regardless of background;
- To provide support to families, carers and individuals;
- To provide welfare assistance, aid and support to members of the public;
- To operate, make available, and provide housing and accommodation and to acquire houses, dwellings, buildings, and premises for that purpose;
- To provide counselling and referral services;
- To liaise with various government and non-government agencies and facilities;
- To employ such officers, staff and personnel for such tasks and functions and on such terms and conditions as shall be deemed to be appropriate from time to time;
- To operate an office and to provide administrative and managerial services for the benefit of the Association and its members;
- To form or participate in the formation of a body corporate pursuant to the provisions of the Associations Incorporation Act and to comply with the legal obligations and requirements of the Act;
- To operate bank accounts and to arrange for the deposit and withdrawal of monies;
- To attend to the payment of debts, accounts, and expenses and the meeting of liabilities, costs and outgoings of the Association;
- To attend to and carry out the conduct, business affairs, operation and management of the Association;
- To adopt and implement the Rules of the Association and to apply the Rules in relation to the conduct, operation, and management of the Association;
- To understand the needs of the community and provide services which contribute to meeting those needs and which benefit the community and its members;
- To enter into such arrangements, to conduct such businesses and enterprises, to provide such services and to acquire such goods or objects as may be necessary or desirable in a manner consistent with the objectives of the Association;
- To work in close partnership with the community and government, ensuring that resources required to achieve these objects are acquired managed, distributed and used effectively and efficiently;
- To engage in any other activity and to provide any other service to members of the public as may be deemed to be appropriate from time to time and as is consistent with the objects and activities as set out herein.

...

(m) Rule 36 of the Association's Constitution is in the following terms:

36. Funds – Source

a. The funds of the Association are to be derived from entrance fees and annual subscriptions of members, donations, government funding, grants and sponsorships and, subject to any resolution passed by the Association in a

general meeting, such other sources as the Committee determines;

b. All money received by the Association must be deposited as soon as practicable and without deduction to the credit of the Association's bank account;

c. The Association, must as soon as practicable after receiving any money, issue an appropriate receipt.

(n) In 2005-06 the total income of the Association was $9,799,694. In 2006-2007 total income was $10,191,741;

(o) A provider of funds to the Association is DADHC. DADHC provides services directly to older people, people with disabilities and their carers and provides funds to almost 900 government and non-government organisations and service providers to deliver services on behalf of DADHC. Those services include accommodation through group homes, respite care and other programs that help people with disabilities. Under s 10(1) of the *Disability Services Act 1993* (NSW) the Minister may approve the provision of "financial assistance" to a person or eligible organisation providing direct support or designated services to person in a target group. Section 10(2) of the Disability Services Act provides:

> Approval for the provision of financial assistance may not be given unless the Minister is satisfied on reasonable grounds that providing the assistance would conform with the objects of this Act and the principles and applications of principles set out in Schedule 1.

(p) DADHC funding is provided pursuant to a funding agreement. The funding agreement describes the terms and conditions under which DADHC provides funding to service providers. The schedule of the funding agreement specifies how grant money is allocated. It covers two types of funding, recurrent funding and non-recurrent funding;

(q) The funding agreement makes clear that the various types of funding are provided by DADHC in order to fulfil government policy and provide appropriate services to the community. The funding agreement indicates:

> The primary goal of the Department is to create, promote and sustain opportunities and services which allow people with disabilities, older people and their carers to participate in the wider community and to have a better quality of life.

(r) The funding agreement also provides:

(i) a definition of 'funding' as all financial assistance provided to the service provider by the Department (clause 1.1.1);

(ii) the service provider is required to provide the services set out in the schedule (clause 2.1);

(iii) the service provider is responsible for compliance with DADHC policies and guidelines (clause 2.2 and 5.1.6);

(iv) funds will be utilised for the specific item for which they are provided unless reallocation is permitted (clause 6.4);

(v) the service provider must return to the Department all unexpended funds unless approval is given by the Department (clause 7.1);

(vi) the Department will monitor the performance of the service provider and the service provider must comply with accountability and reporting requirements (clause 13.3);

(vii) the Minister retains equity in all property acquired wholly or partly using the funding (clause 14.4).

(s) Another provider of funds to the Association is DOCS. DOCS is the leading New South Wales government agency responsible for community services. Some of DOCS' core activities are to help protect and care for children and young people and support their families and to provide and fund accommodation and support services for children and young people who need to live away from their families. In order to meet its statutory obligations, DOCS provides funds to external service providers which are predominantly non-government organisations;

(t) The Act governing most of the activities of DOCS is the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The legislation makes detailed provision for the circumstances in which a young person can be placed in care, standards of care, accreditation of services and provides a model for the organisation of out of home care services.

19 There was agreement as to the services provided by the Association and to the source of its funds. What follows is a description of the services provided by the Association with a description of the nature of its funding.

20 First we describe the Association's activities supported by funding from DADHC pursuant to a funding agreement. The activities involve:

(i) **Accommodation for adults with a disability through the operation of 'group homes':**

- The Association manages group homes, where between 4 and 6 people are housed in the community, usually with 24 hour support provided by residential support workers;

- In 2005-06 and 2006-07 the Association was funded by DADHC to provide group home accommodation to adults with a disability on both a long term basis and on an interim basis;

- The Association received money in order to provide accommodation for adults with a disability in this respect from two sources:

  a) Funding from DADHC pursuant to a funding agreement and

  b) Fees paid directly by the resident.

- DADHC funding is provided to the Association for both permanent placements (‘recurrent funding’) and interim accommodation (‘non-recurrent funding’). In both cases such funding is governed by the terms of the funding agreement. The funding agreement is an agreement between the Association and DADHC which runs for a period of up to three years. Funding agreements applied for 2002-2006 and for 2006-2009. The funding agreement describes the terms and conditions under which DADHC provides funding to service providers;

- The funding agreement requires, inter alia:

  a) The provision of defined services to the defined ‘target group’;

  b) The provision of the services in compliance with defined output and outcome measures;

  c) An acquittals process to be followed and the return of unexpended funds.

- Pursuant to the funding agreement, DADHC exerts considerable control and supervision over the provision of the defined services and there are non-compliance notices and show cause procedures;

- Access to DADHC funded places is determined by DADHC, not the Association;

- The Association also receives a fee from the residents who use its accommodation services. This fee is recorded in some of the financial records of the first respondent, as ‘client board and lodgings’. Alternatively, it is recorded as ‘fees’;

- Where a resident is funded by DADHC, DADHC expects, and assumes when determining the funding to be allocated to a particular service provider, that the resident will be charged no more than 75 percent of the full Commonwealth disability support pension and rent assistance, less the pharmaceutical allowance, together with some portion of the resident’s mobility allowance. This is the same amount which DADHC charges residents who are accommodated in DADHC operated facilities. These fees, known as 'residency fees' are paid as a contribution to the costs of rent (if any), food, utilities such as phone, electricity, gas, and water, and motor vehicle running costs, but do not cover the full cost of these items;

- According to DADHC on average the operational cost of a group home for four to five people with a disability, including staffing costs, is between $400,000 and $500,000 per annum, whereas the amount recouped from the residents is usually between $50,000 - $62,000;

- The Association received on average about 48.2 percent of its total income from DADHC for the provision of this service, being $4,546,486 in 2005-2006 and $5,054,171 in 2006-2007; while on average about 5.1 percent of its total income was received in 'fees' or 'other income';

(ii) **Community support programs for people with disabilities:**

- According to DADHC records, the Association provides or has provided, one community support program, namely a “Behaviour Intervention Service”;

- Funding for a "Behaviour Intervention Service" is provided by DADHC to enable the Association to deliver behaviour support services to specified clients with challenging behaviour living in the Association's group homes in order to ensure that risks posed by the clients’ behaviour are minimised. Funding is governed by the funding agreement. It is DADHC’s expectation that funding provided should cover the costs of this service delivery and, accordingly, that it be provided free of charge to the residents;

- In 2005-06 and 2006-07 for providing community support programs the Association received, on average, 0.7 percent of its total income from DADHC for the provision of this service. There is no other income recorded in this category.

(iii) **Community access programs for people with disabilities, including day programs:**

- The Association receives money in order to provide community access programs, namely day programs, a peer support program and a youth program, from two sources:

  a) Funding from DADHC pursuant to the funding agreement; and

  b) Fees paid directly by the attendees.

- Access to DADHC funded community access programs may be determined by DADHC or the Association, but the Association must ensure that the attendee is in the ‘target group’ as defined in the funding agreement and generally the terms of the funding agreement must be complied with by the Association. DADHC monitors the provision of funded community access programs and ensures that the terms of the funding agreement are met;

- Day programs provide people with a disability with meaningful day activities, usually from 9am to 3pm, which promote learning, skill development and support access, participation and integration in their local community;

- Day programs operated by DADHC itself are provided free of charge, however, expenses incurred in running a particular activity may be passed on to the attendee, for example, paints for painting. Any amounts charged are to recoup the costs of the goods or services purchased for the activity. There is no profit component in the amount charged;

- So far as DADHC is aware, day programs run by non-government organisations such as the Association funded by DADHC operate on the same basis, that is, the program is provided to the client free of charge, save for activity fees to cover expenses;

- It appears that all of the Association's day programs are provided at "Edgar Street". The Association's Profit and Loss Statements by Class for 2005-06 do not record the receipt of any income other than the funds received from DADHC under the category "Edgar Street"; in 2006-07 an amount of $18,916.30 is recorded under this category as "Other Income". Ms Moore's evidence was that this amount represented "fees that a person (private client) [had] paid for services purchased from the [Association]". There was no evidence that this was other than a one-off occurrence;

- Funding for "Peer Support" is provided by DADHC to enable the Association to provide a Saturday morning program to young people (aged 13-18) who have a disability to help them learn about the community through excursions, activities, and events. The program focuses on supporting young people to integrate into the local community and extend their social networks;

- It is DADHC’s expectation that funding provided should cover the cost of this service delivery and that the only additional charge to the users of the service is the cost of particular activities, for instance entry fees;

- Funding for a "Youth Program" is provided by DADHC to enable the Association to provide a Saturday morning program to children (aged 6-12) who have a disability to help them learn about the community through excursions, activities, and events. The program is essentially the same as the "Peer Support" program, but is designed for children;

- It is DADHC's expectation that funding provided should cover the cost of this service delivery and that the only additional charge to the users of the service is the cost of particular activities, for instance entry fees;

- The Association received, on average about 3.8 percent of its total income from DADHC for the provision of community access programs. It received on average 0.1 percent of its total income from 'excursion fees' or 'other income' through the provision of these services;

(iv) **Respite care for families and carers of people with disabilities:**

- Respite care involves caring for a person with a disability for a short time, in order to give that person's family or other unpaid carer a break;

- The Association runs four respite care services: Bankslink, Roselink, Arablink and Vietlink;

- The Association is paid for the provision of respite care from two sources:

  a) Funding from DADHC pursuant to the funding agreement, and

  b) Fees paid directly by the attendees or their families/carers.

- DADHC does not charge children for the provision of respite care. There is, however, no sector wide policy for the charging of respite fees;

- Bankslink is a respite care service for children. The service provides either community based respite, where the client attends organised community activities and events, with carer support or family-based respite, where the client

is cared for by a host family in the client's own home or in the host family's home;

- Bankslink was originally funded by DOCS, however, in December 2005 responsibility for funding this service was transferred to DADHC. The service is funded completely by DADHC (previously by DOCS), as shown on the 'Profit and Loss by Class Statements' for 2005-06 and 2006-07;

- Roselink is an 'in-home' respite care service for adults with a disability who live at home. The service is funded completely by DADHC, as shown on the 'Profit and Loss by Class Statements' for 2005-06 and 2006-07;

- Arablink is a respite program very similar to the Bankslink program. The main focus of this program is the support of people with a disability from Arabic communities, who reside in the Bankstown and Auburn local government areas. The service is funded by DADHC, however, the 'Profit and Loss by Class Statements' record a very small amount of 'Other Income' as having been received in relation to the provision of this service;

- Vietlink is a respite program provided to people from the Vietnamese community with disabilities and their families. It does not receive DADHC funding and is run using volunteers. A very small amount of 'Other Income' is recorded in the 'Profit and Loss by Class Statements' as having been received in relation to the provision of this service;

- The Association received, on average, about 5.4 percent of its total income from DADHC/DOCS for the provision of respite care. It received less than 0.007 percent of its total income by way of 'other income' through the provision of these services. It is not clear if it is, in fact, income, or merely a contribution by those using the service to meeting a cost.

21 Second, we detail activities supported by DOCS funding.

(i) **out-of-home care for children and young people:**

- 'Out-of-Home Care' ("OOHC") is a term defined in s 135 of the *Children and Young Persons (Care and Protection) Act* 1998 (NSW). In summary, OOHC is any residential care and control of a child or young person in any place other than the usual home, by any person other than a parent or relative for any period over 28 days (or 14 days, if subject of a Court order);

- The Association provides accommodation for children requiring OOHC under DOCS' direct supervision. DOCS retains all parental responsibility and case management functions for the children and young people placed with the first respondent;

- The Association is paid for the provision of OOHC by DOCS. A very small amount of 'Fees' and 'Other Income' is recorded in the 'Profit and Loss by Class Statements' as having been received in relation to the provision of this service;

- The Association is not required to acquit unexpended funds received pursuant to this agreement;

- Funding received by the Association from DOCS is governed by a header agreement which is a pre-contractual statement of the terms and conditions on which the Association will provide OOHC services to DOCS and on which DOCS will pay for such services; and by an 'Individual Client Agreement' ("ICA"), being a contract for the provision of the services listed in the ICA to an individual child or young person requiring OOHC. Once an ICA is entered into, the services contracted for are to be provided in accordance with the overarching terms of the header agreement;

- The header agreement contains a service price list, which details the service types that the Association will provide for DOCS and its respective fee for doing so. The Association determines the actual prices for the services it will provide, however, DOCS requires the service price list to be set out according to a certain template, to allow ease of reference by DOCS staff. Clause 6.9 of the header agreement provides:

> You must not charge or require any payment from the child/young person or

> a member of their family for the provision of any service provided in the ICA during the term of the ICA or Interim ICA, unless agreed to by DOCS in writing. For example, this may relate to young people over the age of 15 who receive a Centrelink payment.

- No fee is charged to the child or young person or their family for the provision of OOHC services;

- The header agreement does not commit DOCS to obtaining any services from the Association. Nor is the Association committed to supplying any services to DOCS. However, a header agreement must be signed before any agreement can be made about the services to be provided on behalf of DOCS to an individual child or young person;

- The decision to use the OOHC services offered by a service provider with a header agreement in place is made after a determination of the placement type required, the placements available and by an assessment of the needs and interests of the individual child or young person. Factors affecting the decision include the potential length of the placement, the child's age, any physical and/or intellectual disabilities and the location of the child's family and of any siblings that are or are not in OOHC. The price of the service is not considered a relevant factor when placing a child (a service provider's prices for services having been determined at the stage when a header agreement is entered into);

- In addition to the fee for OOHC services paid by DOCS pursuant to the service price list annexed to the header agreement, the Association also receives reimbursement from DOCS for contingency items purchased for a child or young person, for example clothes, medical appointments, sporting fees and medications. These amounts are reimbursed at cost price. Pursuant to the terms of the header agreement, approval must be sought from DOCS before the expenditure is incurred if the Association wants to be assured of reimbursement;

- The income the Association received in 2005-06 and 2006-07 for providing OOHC services, including amounts received as reimbursement for contingency items (identified as 'support funding' in some of the Association's financial documents), was $3,525,343.90 and $3,578,223.52. The Association received, on

average, about 35.7 percent of its total income from DOCS for the provision of OOHC services. Despite the prohibition on charging for the provision of OOHC services contained in the header agreement, in 2005-06 $8 in 'fees' and $50 in 'other income' is recorded in the Association's 'Profit and Loss by Class Statements' against the category "OOHC". In 2006-07, $500 in 'fees' is recorded in the first respondent's 'Profit and Loss by Class Statements' against the category "OOHC". These amounts represent, on average, less than 0.003 percent of the first respondent's total income over the two years 2005-2007.

(ii) **Child care services:**

- The Association operates a child care service called "Bankstown Occasional Care";
- The Association receives money in order to provide occasional child care services from two sources:

  a) Funding from DOCS, pursuant to a 'Service Agreement' between the first respondent and DOCS; and

  b) Fees paid directly by parents.

- The Association also receives free accommodation for a child care centre, supplied by the Bankstown City Council;
- Funding from DOCS is provided to subsidise the cost of child care services. DOCS' funding is provided to the first respondent on the basis that it is a not-for-profit organisation. DOCS does not provide funding to private for-profit child care providers;
- Funding from DOCS is governed by the terms of a Service Agreement. The Service Agreement requires, *inter alia*:

  a) The provision of defined services in accordance with a "Service Specification";

  b) Rigorous financial reporting; and

c) The return of unexpended funds.

- Pursuant to the Service Agreement, DOCS exerts considerable control and supervision over the provision of the defined services, through extensive performance monitoring and review procedures, including visiting the premises of the funded project, accessing the service provider’s records, conducting audits and collecting information to assess and improve performance;

- While DOCS has no control over the fees the first respondent charges parents for the provision of occasional child care, the funding provided by DOCS is conditional upon the Association providing the number and type of child care places listed in the Service Agreement, for the aggregate amount of time specified. Each year, the Association is required to submit a report to DOCS reporting on, inter alia, the average number of children who attended the centre each day and their ages; the fees the first respondent charged per hour and the total fees they charged per year; and the number of children who attended by the income levels of their parents for whom fees were reduced;

- In 2005-06 and 2006-07 the Association received, on average about 0.3 percent of its total income from DOCS for the provision of child care. It received on average about 0.6 percent of its total income by way of 'child care fees' including 'excursion fees' associated with child care.

22 The following table is a comprehensive breakdown of the Association's income. The columns headed "DADHC/DOCS" show the amount of money the Association received, for the service listed, according to the records of those Departments. The columns headed "BHCC" show the amount of money the Association received from either DADHC or DOCS for the service listed according to the Association's records, specifically the Association's Profit and Loss Statements by Class. The total income shown on the table is taken from the Association's Profit and Loss Statements. In 2005-06 total income was $9,799,694. In 2006-2007 total income was $10,191,741.

	2005-2006				2006-2007			
Services	DADHC/DOCS	Percent of Total Income	BHCC	Percent of Total Income	DADHC/DOCS	Percent of Total Income	BHCC	Percent of Total Income
DADHC Funding for Accommodation	$4,546,486	46.4 percent	$4,640,505	47.4 percent	$5,054,171	49.6 percent	$5,034,215	49.4 percent
Fees for Accommodation	-	-	$460,202	4.7 percent	-	-	$550,184	5.4 percent
'Other Income' received for Accommodation	-	-	$1,384	0.01 percent	-	-	$7,200	0.07 percent
DADHC Funding for Community Support	$64,860	0.7 percent	$64,860	0.7 percent	$67,000	0.7 percent	$72,553	0.7 percent
DADHC Funding for Community Access	$468,625	4.8 percent	$474,475	4.8 percent	$216,742	2.1 percent	$341,221	3.5 percent
'Other Income' and "Excursion Fees' received for Community Access	-	-	$475	0.005 percent	-	-	$21,698	0.2 percent
DOCS/DADHC Funding for Respite Care (Including DVA Funding)	$553,207	5.6 percent	$454,015	4.6 percent	$683,334	6.7 percent	$460,620	4.5 percent
'Other Income' received for Respite Care	-	-	$795	0.008 percent	-	-	$550	0.005 percent
DOCS Funding for OOHC including 'Support Funding'	$3,525,344	36 percent	$3,577,121	36.5 percent	$3,578,223	35.1 percent	$3,571,125	3.5 percent
'Fees' or 'Other Income' received for OOHC	-	-	$58	0.0006 percent	-	-	$500	0.005 percent
DOCS Funding of Child Care	$32,754	0.3 percent	$29,613	0.3 percent	$33,835	0.3 percent	$33,835	0.3 percent
'Child Care' Fees	-	-	$60,875	0.6 percent	-	-	$52,578	0.5 percent
'Excursion Fees' associated with Child Care	-	-	$1933	0.02 percent	-	-	$0	0 percent
Membership Fees	-	-	$115	0.001 percent	-	-	$50	0.0005 percent
Interest	-	-	$28,089	0.3 percent	-	-	$32,121	0.3 percent
Donations	-	-	$5020	0.05 percent	-	-	$0	0 percent
'Other Income' – not allocated to a particular service	-	-	$159	0.002 percent	-	-	$13,291	0.1 percent
Total	$9,191,275.90	94 percent	$9,799,694.00	100 percent	$9,633,305.00	94.5 percent	$10,191,741.00	100 percent

23 Based on the information in the table, the following emerges by averaging the Department's and Association's income figures for the years 2005-06 and 2006-07.

(i) Accommodation for adults with a disability through the operation of group homes, comprised of the Association's income approximately (from DADHC) 48.2 percent, (from fees and other income) 5.1 percent.

(ii) Community support programs for people with disabilities, comprised of the Association's income, approximately (from DADHC) 0.7 percent.

(iii) Community access programs for people with disabilities, including day programs, comprised of the Association's income, approximately, (from DADHC) 3.8 percent, (from fees) 0.1 percent.

(iv) Respite care for families and carers of people with disabilities comprised of the Association's income approximately (from DADHC/DOCS) 5.4 percent, (from other income) 0.007 percent.

(v) Out-of-home care for children and young people, (income from DOCS), comprised of the Association's income, approximately 35.7 percent.

(vi) Child care services, comprised of the Association's income approximately (from DOCS) 0.3 percent, (from fees) 0.6 percent.

24 These detailed facts can be summarised in the following way. In accordance with its objects, the Association provides welfare in the form of accommodation and support services for the benefit of the disabled and young people. In order to discharge those functions, the Association received funds from a variety of sources. Two are Commonwealth pension contributions from adult residents of group homes and child care fees paid by parents. The sum of these monies comprises only approximately 5.5 percent of Association's income.

25 The majority of the monies received by the Association in connection with its activities are, in fact, provided in accordance with contractual arrangements with DADHC and DOCS. The monies are provided on a non-acquitted and an acquitted basis. Acquitted funds consist of monies that, if they are not expended on an activity, must be returned to the government department. Non-acquitted income is not subject to those requirements and becomes the property of the Association once it is received, though that it is required to be allocated to a specific end. The Association performs different activities using acquitted and non-acquitted funds, which are briefly described below. The funds are for the year 2006-2007.

26 Acquitted funds are provided from DADHC for accommodation for adults with a disability through the operation of 'group homes', (this income includes monies

received from DADHC as recurrent income in advance ($4,497,293.25) and non-recurrent income in arrears ($803,031)) as well as community support programs for people with disabilities and community access programs for people with disabilities, which include day programs and respite care for families and carers of people with disabilities. The funding consists of $134,370 for Bankslink, $81,596 for Arablink, $244,654 for Roselink, $54,657 for Peer Support and $93,007 for Youth Group. These monies are received pursuant to the DADHC funding agreement, and are funded on a progressive basis. Under the terms of this funding agreement, a service provider is required to, amongst other things: provide the agreed program or service, return to DADHC any unexpended funds (see Clause 7 of funding agreement), comply with DADHC's monitoring, evaluation, reporting and record keeping requirements (see Clauses 13.3, 13.4 and 13.7 of funding agreement); and comply with various policies and procedures set out by DADHC.

27 In respect of the accommodation and support services purchased by DADHC from the first respondent, the first respondent provides DADHC with an 'Accommodation and Support Plan & Budget Proposal' which outlines the costs of providing the service. This proposal, if approved, then links back into the funding agreement and the services and monies provided become subject to it.

28 Acquitted funds are also provided from DOCS for child care services (the income includes $33,835 for the Association's preschool). This activity is funded pursuant to a service agreement with DOCS and is an acquitted activity because DOCS requires the funds be returned to the extent they are not expended. Under the terms of the 'service agreement' the first respondent is required to, amongst other things: provide the services in Schedule A1 to the service agreement; return to DOCS any unexpended funds (see Clause 7.5 of Service Agreement); and comply with DOCS' monitoring, financial reporting and record keeping requirements (see Clauses 5-7 of the Service Agreement).

29 Non-acquitted funds are provided from DOCS for OOHC for children and young people. The received income is $3,571,125.35. This activity sees monies provided in accordance with a header agreement. Under the terms of the header agreement, where DOCS and the Association agree for services to be provided to a

specific client, only those services set out in the service price list to the header agreement are to be provided by the first respondent pursuant to a individual client agreement ('ICA') (see Clauses 1.1, 1.2, 2.1 and 2.2 of header agreement). Although a documented ICA is not always entered into, the Association is required to provide DOCS with a tax invoice for the services it renders under the header agreement (see Clause 6.5 of header agreement). The Association is not required to return to DOCS any unexpended funds.

30 DADHC acquitted activities are funded by way of a government grant pursuant to a funding agreement. The activities are funded because they serve DADHC policies and obligations in relation to disabled persons. The funding agreement is made prospectively and the majority of the funds are paid prospectively. The Association is contracted to provide defined services to defined target groups. Access to some activities such as accommodation is determined by DADHC. For other activities access is determined both by DADHC and the Association. The arrangement represents an exclusive relationship between DADHC and the Association, and it is not subject to external competition. It is clear that, through the funding agreement, DADHC exerts control and supervision over the activities it funds. In its account of the facts, the Industrial Court said the Association does not make a profit out of these activities because the Association must remit to DADHC any unexpended funds. The Association took issue with this finding. It pointed to evidence that in a budget proposal submitted in November 2003, provision was made for a management fee of $29,847 though no direct evidence was given about what this meant. Even assuming that this sum was intended to be a profit, at least in the sense of an amount exceeding the likely cost of providing the service, it really does not diminish the finding of the Industrial Court as a general proposition.

31 The non-acquitted activities are also of a public welfare nature. Funds are provided by DOCS to ensure government policies and departmental obligations in relation to young people are realised. The young people to whom the services are provided under the header agreement are referred to the first respondent by DOCS. The funds are provided by DOCS for the provision of specified activities on an estimated basis according to a service price list. The service price is negotiated prospectively. The payments are made retrospectively. The Association, as part of the

activity, also receives reimbursement at cost-price for expenditure on contingency items. To have those monies paid out by DOCS, the Association must first have the expenditure approved by DOCS.

32 These factors suggest that the non-acquitted activities of the first respondent have the same broad characteristics in common with the acquitted activities. They are also welfare activities, this time provided to specific target persons. The costs are funded by DOCS. DOCS makes funds available according to the price the Association sets and that price is at a level that appears to be at or near a cost recovery basis or with a negligible margin representing a difference between the actual costs of the service and monies paid by DOCS. If there is a margin factored into the service price list it goes towards costs associated with repairing damage and with providing ongoing administration, management and infrastructure to enable the organisation to discharge its functions. The Association sought, in these proceedings, to suggest, as we understood its submission, that the prices it offered did not necessarily reflect its anticipated costs and that there might be am margin which could be characterised as a profit. The evidence of Ms Moore was that the prices it offered might exceed the anticipated cost of providing the services. However it was tolerably clear that this margin was intended to cover expenses otherwise not recovered. In our opinion, there was an insufficiently firm evidentiary foundation to characterise this excess or margin as a profit.

Consideration

33 The essential complaint of the Association about the conclusion of the Industrial Court was that it failed to consider the nature of the dealings between it and the State, particularly in relation to its dealings with DOCS, and more particularly in relation to OOHC. The Association contended that the Industrial Court had placed too much focus, and indeed an almost exclusive focus, on the role of the Association as a welfare organisation, very largely funded by income from the State notwithstanding that that Court recognised that such a focus was not determinative. It contended that its dealings with DOCS, and more particularly in relation to OOHC, involved it effectively offering its services at prices determined by it which the Department was free to accept or reject. In determining whether to accept the prices

proposed, DOCS had recourse to prices charged by other organisations offering similar services. When the services were delivered, the Association invoiced DOCS who then paid for the services. The header agreement spoke of the purchase of services by DOCS. In the 2005/2006 financial year the Association incurred costs in providing certain services to DOCS which exceeded the prices paid, or at least it asserted it did. It unsuccessfully sought the reimbursement from DOCS of $115,350 per child in care though the schedule of service charges was increased from 1 July 2006 to remove the risk that this would occur again.

34 We accept that these matters are established by the evidence. It is appropriate to have recourse to the primary documents which establish the nature of the arrangements between the Association and DOCS in relation to OOHC and to see how one might characterise the activities the Association undertakes in furtherance of those arrangements. They received limited detailed attention in the discussion of the facts by the Industrial Court. For reasons which we explain later, we focus on 2006.

35 DOCS entered the header agreement operating in 2006 with the Association in circumstances where there was a Departmental policy in place, reflected in a document entitled "Renewing Header Agreements 2005 - 2006", which was last updated in May 2005. That document commenced by noting that a header agreement was a contractual document between an agency and DOCS which assisted with the purchase of services to children and young people in OOHC. It also noted that the agreement would contain a service price list which detailed the service types, and their respective costs, that the agency would provide for DOCS. It noted that the header agreement alone would not commit DOCS to purchasing any service from an agency and, in effect, that would be achieved by the creation of an ICA for any specified child or young person.

36 The 2005 -2006 header agreement was signed on behalf of the Association in May 2005 and DOCS in October 2005. It commenced with a preliminary statement that the agreement did not commit DOCS to purchasing services from the Association though the agreement needed to be signed before any agreement could be made about the provision of services on behalf of DOCS to any individual client. It then explained the role of the agreement. It then set out the detailed contractual terms to

which the Association had agreed, which commenced with a provision stating that the Association had agreed to provide services in an ICA as agreed from time to time. The next term recorded the Association's agreement that it would provide only the services set out in the price list, attached to the agreement, which identified the maximum amount which would be changed by the Association. The next term obliged the Association to engage trained staff and contractors to provide services under an ICA, which would be retained under an approved recruitment process. The remaining terms dealt, in more detail, with how the Association would provide those services. One such term was that, if the Association had been offered and accepted the opportunity to provide services under an ICA, it must indicate within 24 hours whether they will be provided in accordance with the ICA.

37 The second part of the header agreement identified what DOCS had agreed. The first term noted that if DOCS was considering whether the Association was to provide services to a particular child or young person, it would consult with the Association. It noted that the consultation was to be about whether the Association could provide the services, and at what cost, and further noted that the service types and costs would be consistent with the annexed service price list. The remaining terms in this part, in substance, fleshed out the procedures concerning how an ICA was created and implemented. The third part of the agreement also dealt with this topic.

38 The fourth part of the agreement addressed the conclusion of service delivery and the fifth with approval processes. The sixth part dealt with payment which required the Association to be registered for the purposes of GST and also required, as a precondition of payment, the submission of a tax invoice. It required that the invoice outline the dates and prices of the specified services provided to the nominated child or young person and, in relation to services or items purchased by the Association, a receipt had to be provided. It required invoices to be submitted no more frequently than once a fortnight and no less frequently than once a month. A term in this part was to the effect that DOCS would make payment within 28 days. The seventh part of the agreement dealt with occupational health and safety and the eighth part was an indemnity given by the Association in relation to any claim which might arise as a result of any breach by the Association of the Agreement as well as

terms relating to workers compensation. The ninth part dealt with accreditation of the Association and the tenth with dispute resolution. The eleventh part dealt with general contractual terms including when the agreement expired and determination and variation of the agreement. The annexed price list detailed the cost of providing some services described fairly generally such as intensive support residential care for youths between 12 and 18 years (with an identified annual monthly and weekly cost inclusive and exclusive of GST) and also some services described with some particularity such as mediation and counselling at what appears to be an hourly rate.

39 In evidence were several examples of purchase order advices from the last few months of 2006 from DOCS to the Association identifying an individual to whom the Association would provide the service, the nature of the service (and the period over which it would be provided) the quantity of the service (expressed in units) and the price described as a "unit amount" excluding GST and identifying where, in due course, the invoice should be sent. Also in evidence were several examples of invoices submitted to DOCS for services provided in late 2006.

40 Also in evidence was a service agreement between the Association and DOCS executed in July 2006 in which the Association agreed to provide specified services namely an education and development program for 10 places per day for very young children and 5 places per day for preschool children. It contained a range of clauses broadly similar to those just discussed in relation to the header agreement though it did not include a process of invoicing the payment.

41 As to other evidence, the Association pointed to the fact that DOCS engaged many organisations, some of which were for profit organisations, to provide services similar to the type provided by the Association and that the provision of the services provided by the Association might be secured through a tendering process. However during the period in which the Association has provided fee-for-service services to DOCS under a header agreement (2003 to 2008) it has not had to tender, in a competitive tender, for the provision of services but rather has had to negotiate the fees payable to it for those services and, in one instance, an amendment to the header agreement itself. It appears that between 2003 and 2009 the services were provided to DOCS on the basis of individual quotations for which invoices were sent. We infer

probably after the services were provided though the evidence on this point was fairly obscure.

42 In 2008, as part of DOCS moving from a fee-for-service delivery model for the OOHC services to a program funding model (monies are paid in advance for a program on a quarterly basis in a sum specified in an annual agreement), the Association tendered for the provision of OOHC in the sense that it lodged an expression of interest. It was unsuccessful.

43 Two matters of detail should be mentioned before assessing whether, on the evidence, the Association should be characterised as a trading corporation. The first concerns the incorporation of the Association. As noted earlier, the Association is incorporated under the Associations Incorporation Act. Section 66 of that Act provides that an incorporated association shall not trade though s 4 identifies certain circumstances where an association is deemed not to trade by reason only of doing specified things. One is where the association is itself making a pecuniary gain, unless that pecuniary gain or any part of it is divided amongst or received by the members of the association. We note, parenthetically, that there was no evidence of who the members of the Association are in this matter. In our view, the combined effect of these provisions is to prevent an association registered under the Act trading for the profit of its members. The Act does not prohibit trading per se. The effect of the Act is much the same as the associations incorporation legislation considered in *R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League Inc (Adamson)* (1979) 143 CLR 190 (see the observations of Barwick CJ at 198 - 199).

44 In any event, whether or not the Association "trades" in the sense that word is used in the Associations Incorporation Act, the critical issue was whether it is a corporation to which the WR Act applies, so as to exclude the application of the NSW IR Act to its activities at the relevant time. As explained in [2] above, that in turn depends in this matter on whether it is a trade corporation to which paragraph 51(xx) of the Constitution applies: see the remarks of Wilcox J in *E v Australian Red Cross Society* (1991) 27 FCR 310 at 345 ("Red Cross"). Our conclusion on that question involves rejection of the matter sought to be raised by the second and third

respondents by notice of contention dated 12 August 2009 and handed up during the hearing. It is therefore not necessary to consider whether, having regard to the lateness of that notice, leave to make that contention should be given.

45 The second matter concerns the time at which the activities of the Association are to be assessed to determine whether it is or was a trading corporation. Mr Hillman made a submission in this appeal that the relevant time was when the Industrial Court came to exercise its jurisdiction by granting him final relief or otherwise disposing of his application. Thus the occasion had not yet arisen to make the assessment. A similar submission was made to the Industrial Court and, while not expressly addressed in its reasons for judgment, it must be taken to have rejected it because it was prepared to adjudicate on the notice of motion challenging its jurisdiction. The essence of the argument is that s 106 confers a power on the Court to create rights and no rights are created merely upon application. Section 16 of the WR Act (together with s 109 of the Constitution) invalidated the IR Act by rendering it inapplicable to constitutional corporations and their employees. However the WR Act's invalidating effect operates only for so long as there is an inconsistency: *Commonwealth v Western Australia* (1999) 196 CLR 392 at [62]. Absent inconsistency, the IR Act had full force and effect. Even if the Association was a trading corporation now or was when the appellant's notice of motion was heard by the Industrial Court in early 2008, its character is changing and the only relevant jurisdictional question is whether it is a trading corporation when the Industrial Court comes to make final orders.

46 In our opinion, this argument should be rejected. In his submissions Mr Hillman noted s 16 came into effect on 27 March 2006. This appears to be correct and our attention was not drawn to any of the comparatively complex transitional provisions (as to which see, for example, *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2007) 157 FCR 260 at [28], and following) which suggested s 16 applied to ss 106 and 108 of the IR Act from some later date in relation to proceedings that had not then been commenced. Mr Hillman filed his application under s 108 of the IR Act seeking relief under s 106 on 22 November 2006.

47 It has been said, correctly, that the IR Act confers a statutory right to apply for an order under s 106: *Fisher v Madden* (2001) 54 NSWLR 179 at 184. If, on 26 November 2006, the Association was a trading corporation then Mr Hillman had no statutory right to make an application and thereby purport to invoke the statutory jurisdiction of the Industrial Court. Absent a statutory right to do so, filing the application did not engage the Industrial Court's jurisdiction other than, as a superior court of record, to determine it had no jurisdiction. Accordingly the question of whether the Association was a trading corporation falls to be considered at the time the application was made. If, on this assumption, the Association later ceased to be a trading corporation then, subject to statutory time limits, Mr Hillman could then exercise a then subsisting statutory right to make an application which had previously been extinguished for a period by s 16.

48 The notion of what is a trading corporation for the purposes of paragraph 51(xx) of the Constitution has evolved and expanded in the last three decades. The applicable principles were conveniently and helpfully summarised by Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* (2008) 37 WAR 450, 252 ALR 136 in the following passage at [68]:

> (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* at CLR 239; ALR 473; *State Superannuation Board* at CLR 303-4; ALR 14-15; *Tasmanian Dam case* (at CLR 156, 240, 293; ALR 625, 789, 833); *Quickenden* at [49]-[51], [101]; *Hardeman* at [18].
>
> (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* at CLR 208, 234, 239; ALR 473, 478, 542-3; *State Superannuation Board* at CLR 303-4; ALR 14-15; *Hughes v Western Australian Cricket Assn Inc* (1986) 19 FCR 10 at 20 ; 69 ALR 660 at 671 (*Hughes*); *Fencott* at CLR 622; ALR 49; *Tasmanian Dam case* at CLR 156, 240, 293; ALR 625, 789, 833; *Mid Density* at FCR 584; *Hardeman* at [22].
>
> (3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* at ALR 624, 644; FLR 139, 159-60; *Adamson* at CLR 235; ALR 474; *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184-5 and 203 ; 40 ALR 609 at 618 and 635; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 at 330 ; 59 ALR 334 at 339 ; 4 IPR 467 at 472; *Quickenden* at [101].
>
> (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* at CLR 539, 563, 569; ALR 372, 375, 379; *Ku-ring-gai* at ALR 625, 645; FLR 140, 167; *Adamson* at CLR 219; ALR 461; *E* at FCR 343, 345; ALR 633, 635; *Pellow* at [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* at CLR 543; ALR 377; *Ku-ring-gai* at ALR 643; FLR 160; *State Superannuation Board* at CLR 304-6; ALR 15; *E* at FCR 343; ALR 633. 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* at CLR 543; ALR 377 per Barwick CJ; *Tasmanian Dam case* at CLR 156; ALR 625 per Mason J.

(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: *Adamson* at CLR 234; ALR 473 per Mason J; *State Superannuation Board* at CLR 304; ALR 15; *Fencott* at CLR 589; ALR 52; *Quickenden* at [52], [101]; *Mid Density* at FCR 584.

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* at CLR 294-5, 304; ALR 7, 15; *Fencott* at CLR 588-9, 602, 611, 622-4; ALR 52, 70, 74, 80; *Hughes* at FCR 20; ALR 671; *Quickenden* at [101]; *E* at FCR 344; ALR 636; *Hardeman* at [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* at CLR 209, 211; ALR 453, 455; *Ku-ring-gai* at ALR 624, 627-8, 643, 648; FLR 139, 142, 160, 167; *Bevanere* at FCR 330; ALR 339; IPR 472; *Hughes* at FCR 19-20; ALR 671; *E* at FCR 343; ALR 633; *Fowler*; *Hardeman* at [26].

49 The only suggestion by the parties in these proceedings that this summary does not represent the law as it presently stands, was a submission by the Association that the observation in (4) that making a profit is a usual concomitant to trade was not correct. Plainly actually making a profit could not be a usual concomitant other than perhaps over the longer term. A person or organisation engaged in trade may, for a period, do so with limited commercial success and trade at a loss. The statement that profit-making is a usual concomitant of trading appears to be founded on observations of Barwick CJ to that effect in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 which is the first authority noted by Steytler P. The Chief Justice was dealing with an argument that the statute under which the county council was established contained a direction that county councils supply electricity as cheaply as possible to residents of the county district. In effect, Barwick CJ was noting that making as large a profit as possible was effectively precluded by the legislation, but the direction did not prevent a Council making a profit and the county council in question had, in fact, been highly profitable. The Chief Justice

observed that profit-making was perhaps not of the essence of trading, but it was a usual concomitant.

50 In the second authority mentioned, *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134, the first passage referred to was from the judgment of Bowen CJ though appears to be a passage in which the Chief Justice was summarising the argument of counsel and the second passage is a reference to the judgment of Deane J who did no more than indicate that he was inclined to think that the two building societies (which were mutual societies not trading for a profit) were not trading corporations. The reference to the third authority, *Adamson*, is to a passage in the dissenting judgment of Stephen J and, with respect, can be disregarded. The fourth authority was *Red Cross*, but the passage referred to involved a discussion by Wilcox J of the commercial activities of the Red Cross which generated considerable income though his Honour noted that those trading activities were not motivated by the hope of the private gain but purely to earn revenue which the relevant Division of Red Cross needed for its charitable activities. However, in one sense, this question of whether making a profit is a usual concomitant to trade is a barren one because the authorities, as noted in (8) of Steylter P's list of applicable principles, establish that the commercial nature of the corporation's activities are indicative of trading.

51 Many activities and services which have historically been provided mainly or exclusively by government are now carried on by companies which undertake those activities or provide those services with the objective of making a profit. Examples are legion and included prison services, electricity generation and distribution, potable water collection or production and distribution and the construction and maintenance of roadways. There can be little doubt that, at least in the ordinary course, companies which undertake those activities or provide those services can be characterised as trading corporations. Does the fact that a corporation likewise provides such services but on effectively a cost recovery basis only, render it inappropriate to characterise that corporation as a trading corporation?

52 There is no bright line delineating what is or is not a trading corporation. That is exemplified by the division of opinion in *Aboriginal Legal Service of Western Australia (Inc)* where a minority of the Court characterised the Service's activities as

that of a trading corporation but the majority did not. As Black CJ and French J observed in *Quickenden* at [52] "....the characterisation of a body corporate as a trading corporation is a matter of fact and degree" repeating similar observations of Mason J in *St George* at 234.

53 In the present case we, as the parties did, focus on the services provided by the Association under the arrangements it had with DOCS and particularly the provision of OOHC services. As noted earlier, we review the position in 2006. Plainly those activities were a substantial part of its activities and not a peripheral activity. During 2005/06 these arrangements generated a substantial part of the income of the Association. In 2005/2006, the fees received from DOCS for welfare services agreed to be provided by the Association were in excess of $3.3m. In that year, that income was some 35 per cent of the income as disclosed in the profit and loss statement of the Association. The profit and loss statement reported a surplus or deficit of income over expenditure of some significance, after allowing for all expenses, including what are conventionally called the indirect expenses, including depreciation, management fees and the like.

54 If those substantial activities can be characterised as trading, then the Association can likewise be characterised as a trading corporation. So much is apparent from the authorities including, in this Court, the judgment of the Full Court in *Quickenden* (at [51]). The Association undoubtedly provided services to the State and was remunerated for doing so. It is, in our opinion, a proper characterisation of the Association's activities to describe them as selling those services to the State and, correspondingly, the State purchasing them. Indeed that was the language used in the header agreement which governed the contractual arrangements between the Association and DOCS. The provision of a given service under the header agreement resulted in an invoice from the Association to DOCS which it then paid. The prices at which the services were provided were negotiated between the parties having regard to the price at which others provide similar services. The Association employed personnel and acquired rental property to equip it for the task of providing those services. At least in its then manifestation (entailing its size, activities, property and personnel), its continued existence depended on its success in placing itself in a

position in which it would continue to be remunerated by continuing to provide those services.

55 All these matters appear to us to point to a relationship between the Association and DOCS as having been a commercial one involving trade in services. It is, of course, true that it is possible to characterise, as the Industrial Court did, the Association's activities as the provision of public welfare services. However the fact that the acquisition of these services by DOCS was for this purpose does not appear to us to detract from the essentially commercial nature of the relationship. It is properly so described. There may be many incorporated charitable bodies in Australia which are nevertheless trading corporations for the purposes of paragraph 51(xx) of the Constitution. As we have noted above, the terms of the header agreements were negotiated, as were the terms of the renewal header agreement. Ultimately by that process, further negotiation as to price was not then undertaken. Thereafter, DOCS did not have to use the services of the Association at all, and the Association for its part did not have to accept any offer or request by DOCS to provide such services. On the evidence, DOCS selected those entities which it wished to provide services, once the header agreements were negotiated, on the basis of the quality of the service to be provided, but the Association (or others) did not have to agree to provide them. It is distracting to note that the services which the Association and others contracted with DOCS to provide were in the "welfare sector" of the economy, to use an expression used by the Solicitor-General.

56 In our opinion, the Association was a trading corporation in November 2006. The Industrial Court had no jurisdiction to hear and determine Mr Hillman's application filed in November 2006 because he then had no statutory right to make such an application.

57 The appeal should be allowed. The order of the Industrial Court dismissing the Association's notice of motion should be set aside. In lieu, an order should be made dismissing Mr Hillman's application. Because of s 824, no order should be made as to costs.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Moore, Mansfield and Perram.

Associate:

Dated: 25 February 2010