

**UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00090

CORAM : COMMISSIONER T EMMANUEL

HEARD : ON THE PAPERS - FRIDAY 12 FEBRUARY 2021

DELIVERED : TUESDAY, 30 MARCH 2021

FILE NO. : U 2 OF 2021

BETWEEN : KATRINA MASON
Applicant

AND

WESTERN AUSTRALIAN POLICE UNION OF WORKERS
Respondent

CatchWords : Unfair dismissal – Jurisdiction – whether the WA Police Union is a trading corporation – Receiving membership fees is not a trading activity

Legislation : Section 29(1)(b)(i) & s 60 of the *Industrial Relations Act 1979* (WA)

Section 12 & s 14 of the *Fair Work Act 2009* (Cth)

Result : *Jurisdictional objection dismissed*

Representation:

Applicant : Mr D Rafferty (of counsel)

Respondent : Mr C Fordham (of counsel)

Cases referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) [2008] WASCA 254

ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) v Transport Workers' Union of Australia [2020] FCAFC 231

Bankstown Handicapped Children's Centre Association Inc & another v Hillman & others [2010] FCAFC 11; (2010) 182 FCR 483

Browne v Dunn (1894) 6 R 67

Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389

Everett & Anor v Australian Services Union [2007] FMCA 1665

Guide v Toll Ipec Pty Ltd & Anor (Civil Claims) [2010] VCAT 539

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; 166 IR 196

Jones v Dunkel (1959) 101 CLR 298

The State of Western Australia v Edwards [No 7] [2020] WASC 339

Nation v Albany Community Radio Inc [2020] WAIRC 00938

WA Meat Commission v Australasian Meat Industry Employees Union, Industrial Union of Workers, WA Branch (Unreported, Matter No. 890 of 1993, 5 August 1993)

Reasons for Decision

- 1 Ms Mason has made an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (**IR Act**). She says that she was unfairly dismissed by the Western Australian Police Union of Workers (**Union**).
- 2 The Union objects to the Commission hearing and determining Ms Mason's application because it says that the Union is a trading corporation and therefore a national system employer within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**).
- 3 Ms Mason agrees that the Union is incorporated under s 60 of the IR Act, and that the Union engages in some trading activities, but she says those activities are insufficient to justify the Union being characterised as a trading corporation. She says the Union is not a national system employer and its jurisdictional objection should be dismissed.
- 4 It is not in dispute that if the Union is a national system employer, then the Commission will not have jurisdiction to hear and determine Ms Mason's application.

Question to be decided

- 5 The parties agree the Union is incorporated. To resolve the dispute I must decide whether the Union is a trading corporation.

Relevant legislation

- 6 Section 14(1) of the FW Act says:

14. Meaning of national system employer

- (1) A national system employer is:
 - (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
 - (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
 - (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
 - (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
 - (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
 - (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

- 7 A constitutional corporation is defined in s 12 of the FW Act as 'a corporation to which paragraph 51(xx) of the Constitution applies'.
- 8 Paragraph 51(xx) of the Constitution applies to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

Principles

- 9 The parties agree that when deciding whether the Union is a trading corporation, the Commission must apply the test set out in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254 (*ALS v Lawrence*) at [68], which was cited with approval by the Full Court in *Bankstown Handicapped Children's Centre Association Inc & another v Hillman & others* [2010] FCAFC 11; (2010) 182 FCR 483 at [48]:
- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 – 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (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* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 – 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (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* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
 - (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26].
- 10 The parties agree that the effect of *ALS v Lawrence* is that attention should be directed towards 'the purposes and activities of a corporation to determine its character.'

Evidence

- 11 The parties asked the Commission to hear and determine this jurisdictional matter on the papers, on the basis that there are no material facts in dispute.

- 12 The Union filed an affidavit from the Union's Finance Manager (Ms Vitler) that includes two annexures, the 'Income Statement for the period ending 30 June 2020' (**Income Statement**) and the 'Membership Booklet WA Police Union' (**Membership Booklet**).
- 13 The parties agree that this dispute should be determined on the basis of Ms Vitler's affidavit, its annexures and the *Western Australian Police Union of Workers Constitution, Rules & By-Laws* (**Union Rules**).

Union Rules

- 14 The Union Rules deal with a range of matters including membership, governance, powers and duties of the Board of directors and office holders, meetings, finance and property, elections and disciplinary matters.
- 15 Of particular relevance to this matter is the Union's objects, set out in rule 4 of the Union Rules:

4. Objects

The objects of the Union shall be:

- (a) to uphold the rights and to protect and foster the best interests of Members industrially and otherwise;
- (b) to secure the participation and influence of Members in the administration, development and planning of policing;
- (c) to advance, enhance and promote the profession of policing in the best interests of Members;
- (d) to provide means for combined action in matters affecting Members;
- (e) to consider, and if appropriate endeavour to obtain, redress or settlement of any grievances or complaints affecting Members;
- (f) to take the steps necessary to secure satisfactory industrial conditions for Members;
- (g) to encourage esprit-de-corps among members of the Union;
- (h) to raise funds by means of fees, contributions, subscriptions, levies and other forms of income and investment for the purpose of carrying out the Objects of the Union;
- (i) render financial and other assistance in defending and maintaining the interests, privileges and rights of Members; and
- (j) to do all such other things as the Union may from time to time deem incidental or conducive to the attainment of the Objects of the Union.

Ms Vitler's affidavit

- 16 Ms Vitler has been employed by the Union since 2008 and has been Finance Manager since 2010. Rule 7.8 of the Union Rules sets out the scope of her role.
- 17 Ms Vitler's evidence was about the Union's activities. She drew the Commission's attention to rule 4(h) of the Union Rules - 'to raise funds by means of fees, contributions, subscriptions, levies and other forms of income and investment for the purpose of carrying out the Objects of the Union'. Ms Vitler said: 'Generally speaking, the objects contained in rule 4 of the Rules are directed toward protecting and improving the industrial conditions and interests of WAPU members.'

18 Ms Vitler gave evidence that in accordance with rule 4(h), the Union raises funds through ‘a variety of different activities’, which are set out in the Income Statement. This document is attached to Ms Vitler’s affidavit and lists the union’s income for the period ending June 2020 as follows:

- Death levy fund - \$164,030.00
- Membership fees - \$6,145,809.37
- Member insurance bonus rebate - \$1,006,777.21
- Other income:
 - Interest received - \$70,888.62
 - Office rent - \$3,406.00
 - Police news - \$43,235.00
 - Casio watch promotion - \$12,113.83
 - Member gas payments - \$113,054.38
 - Sales member benefits - \$1,522.72
 - Sponsorship - \$22,909.09
 - Grants - \$855.58
 - Dividends on shares - \$200
- Rent (from Albany, Ascot, Busselton, Esperance, Exmouth, Kalbarri, Port Denison and Yallingup) - \$197,420.11

19 The Income Statement says that the Union’s total income in the 2019/2020 financial year was \$7,781,921.71. The Union did not provide any evidence about its expenses.

Death levy fund

20 Ms Vitler’s evidence is that the Union must maintain a death levy fund under rule 11.5.

Membership fees

21 Ms Vitler gave evidence about who is eligible to be a member of the Union. She said there are ordinary members (a person appointed under the *Police Act 1892* (WA) or a police recruit), life members and retired members. Life members and retired members do not have to pay membership fees. Police Auxiliary Officer (Cadets) must pay a membership fee of \$10 per fortnight.

22 Ms Vitler explained that ‘as is the case every year’, the Union’s main source of income is the membership fees charged to the Union’s ordinary members. The cost of the membership fees is set under rule 11.1, which says:

11.1 Subscriptions

(a) Subscriptions for Ordinary Members shall be:

- (1) for members of the Police Force an amount equivalent to 1.35% of the base salary applicable to the rank of a third year Constable rounded up to the next nearest 10 cents;

- (2) for Police Auxiliary Officers an amount equal to 1.35% of the base salary of a band 1AP1.3 Police Auxiliary Officer rounded up to the nearest 10 cents;
 - (i) For Police Auxiliary Officer (Cadets), the fee shall be \$10 per fortnight in lieu of that prescribed at Rule 11.1(a)(2).
- (3) for Aboriginal Police Liaison Officers an amount equivalent to 1.35% of the base salary applicable to the rank of a First Class Aboriginal Police Liaison Officer rounded up to the next nearest 10 cents; and
- (4) for all other Ordinary Members an amount determined by the Board.

- (b) An Ordinary Member who converts to part time employment shall pay an amount determined by the Board.
- (c) For an Ordinary Member (who must inform the Union in writing of their intention to do so) proceeding on maternity leave or absence from duty without pay, normal subscriptions shall not be required to be paid during such leave but the Member shall contribute an amount determined by the Board and will be still entitled to the full privileges of membership.
- (d) For Life Members and Retired Members, subscriptions shall not be required to be paid, whether or not the Life Member or Retired Member is entitled to membership under another classification.
- (e) Subscriptions shall be payable fortnightly or at such other greater intervals as may be determined by the Board from time to time.

23 Ms Vitler's evidence is that 'in return for membership fees that are charged to members, [the Union] provides access to a number of commercial benefits and services.' She says the details of these services are contained in the Membership Booklet.

Member insurance bonus rebate

24 Ms Vitler's evidence is that the income attributed to the 'Member insurance bonus rebate' is a one-off payment made to the Union in the 2020 financial year, arising under an arrangement with the business that provides a group life insurance policy for the Union's members.

Insurance

25 Ms Vitler says at [21] - [24] of her affidavit that:

[A] portion of the membership fees that are charged to [Union] members is used to pay for life insurance premiums. [The Union] has a long-standing arrangement with Hannover Life Re of Australasia Ltd to provide life insurance coverage as an automatic part of membership.

[The Union] provides an additional option for members to choose to pay higher membership fees in order to receive additional life insurance coverage.

The payments made by [the Union's] members for extra insurance coverage are not reflected in [the Union's] profit and loss statements because [the Union] does not make any profit from that particular service. The additional premiums are remitted directly to the insurer.

The membership fees paid by [the Union's] police auxiliary office members also provide automatic insurance cover for personal injury suffered while traveling to and from work.

Other income

26 Ms Vitler says that the Union's other income is listed under 'sundry income' on the Income Statement. She says that although the total amount of income from each subcategory of the

‘sundry income’ section is small, ‘the total collective value of income that is received from these activities is significant’ at \$267,685.02.

Rental accommodation

- 27 The Union ‘has investments in a portfolio of properties’ in Western Australia. The Union rents out these properties. Ms Vitler says ‘as a further service to members, [the Union] offers short term lease arrangements.’
- 28 Ms Vitler says that although the Income Statement says that the income from rent was \$197,420.11 for the period ending June 2020, the usual income from rent is around \$250,000 per year. She says that the COVID-19 pandemic impacted the amount of rent that the Union was paid in 2020.

How the Income Statement should be interpreted

- 29 Ms Mason submits that because the member insurance bonus rebate is a one-off payment, it should be disregarded for the purposes of determining whether the Union is a trading corporation. The Union disagrees and submits that ‘the return payment of \$1,006,777.21 from the [Union]’s insurance business partner’ should not be disregarded for the purpose of assessing whether the [Union] is a trading corporation. Ms Mason says despite disagreeing with her on this point, the Union does not seek to characterise the member insurance bonus rebate as a trading activity, and notes that the Union’s submission on this point was made without leave of the Commission.
- 30 Ms Mason also submits that, based on Ms Vitler’s affidavit, the Commission should decide the matter on the basis that the Union’s income from rent is \$250,000 per year.
- 31 Ms Mason says the Union’s total income for the period ending June 2020 is therefore:

$$\begin{aligned} & \text{Total income} - \text{member insurance bonus rebate} - \text{actual short term rental income} + \text{usual} \\ & \text{short term rental income} \\ & = \$7,781,921.71 - \$1,006,777.21 - \$197,420.11 + \$250,000 \\ & = \$6,827,724.39 \end{aligned}$$

Issues raised about Ms Vitler’s evidence

- 32 Ms Mason raised several issues about Ms Vitler’s affidavit.

Who the Union decided to call to give evidence

- 33 The parties made submissions about whether a *Jones v Dunkel* (1958) 101 CLR 298 inference should be drawn because the Union did not call its President or Secretary to give evidence about the Union’s activities.

Consideration

- 34 In my view, those submissions are a distraction. In circumstances where the Union has raised its objection to jurisdiction, it is up to the parties to put their evidence and arguments. The onus is on the Union to persuade the Commission that it is a trading corporation on the basis of its activities.

Gaps in evidence given

- 35 Another issue Ms Mason raises is that she says there is evidence that was available to Ms Vitler as Finance Manager that she did not give. It is therefore ‘open to the Commission to

draw, and the Commission should draw, adverse inferences that such additional evidence from Vitler would not have assisted [the Union]’s case, and more readily draw inferences favourable to Mason: *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 (Handley JA, with whom Kirby P agreed).’

- 36 One gap that Ms Mason says exists in Ms Vitler’s affidavit is evidence about whether rental income is only received from Union members, or whether it is also received from the wider public. In the absence of evidence, Ms Mason argues that the Commission should infer that ‘the rental income is received by [the Union] from short term leases that are available solely to members on a cost recovery or partial cost recovery basis, and that the leases are a membership benefit peripheral to the overall activities of [the Union]’.
- 37 Another gap Ms Mason draws the Commission’s attention to is the lack of evidence about the provision of life insurance to Union members. For example, she says it is not clear whether the members have a direct insurer/insured relationship with the insurer or whether the members are ‘indirect beneficiaries’ of a policy held by the Union. In the absence of this evidence, Ms Mason says the Commission should infer that the Union performed an intermediary service facilitating insurance for its members, which is altruistic and lacking any commercial character, and is not a trading activity: *ALS v Lawrence* at [74].
- 38 The Union says that the parties agreed that the jurisdictional objection would be heard on the papers, without the need to cross-examine Ms Vitler. The Union says although Ms Mason foreshadowed that she would make submissions about Ms Vitler’s evidence, Ms Mason did not put the Union on notice that she would ‘make assertions to the effect that Ms Vitler was to be disbelieved, or that she did not have the appropriate level of direct knowledge necessary to depose the matters referred to in her affidavit.’
- 39 The Union relies on the discussion in *The State of Western Australia v Edwards [No 7]* [2020] WASC 339 at [209] in relation to the requirements of *Browne v Dunn* (1893) 6 R 67 and says that Ms Vitler was not given an opportunity to answer Ms Mason’s criticisms of her evidence. The Union therefore says that it would be unfair for the Commission to reject Ms Vitler’s evidence for the reasons set out by Ms Mason.
- 40 The Union says that ‘Ms Vitler has deposed evidence which refers to the mechanisms by which the [Union] provides insurance to members which is funded via membership subscription fee payments, and by additional member payments for those who wish to have extra coverage.’ Further, it says Ms Mason had the option to question Ms Vitler.

Consideration

- 41 The Union decided which evidence to put on and the detail of that evidence. Ms Mason has not challenged that evidence. Rather, Ms Mason has highlighted the evidence the Union did not put on.

Is the Union a national system employer?

The Union’s case

- 42 The Union submits that it is a national system employer as defined under s 14 of the FW Act. It is not a statutory body. Rather, the Union is established under a constitution (the Union Rules), which was registered under s 58 of the IR Act. Because of this, the Union says it is essential to consider the Union Rules when determining the Union’s character.

43 The Union's view is that according to rule 4, it is 'a membership organisation which has been formed for the purpose of protecting and promoting the interests of its members'. It says that relevant elements of its rules to consider when determining whether it is a trading corporation are:

- (a) rule 4(h), which requires the Union to 'engage in activities for the purpose of generating income revenue to fund other objects';
- (b) rules 5.4 and 5.7, which mean that a prospective member must apply for membership and pay an ongoing subscription fee;
- (c) rule 7 which provides a governance structure where a Board of Directors oversees and directs financial matters, with specific individuals given duties relating to the management, control and reporting of the Union's finances;
- (d) rule 11 which requires the Union to collect subscription fees and hold wealth in the form of assets, with a ready ability to pay death benefits referred to in rule 11.5; and
- (e) rule 11.6 which allows the Union's wealth to be 'used to render financial and legal assistance to members'.

44 The Union submits 'it is clear' that the Union Rules 'contemplate that trading and financial activities will make up a substantial endeavour and purpose' of the Union.

45 The Union says that its largest source of income, membership fees, 'has the traditional trading character of a fee for service exchange'. It says the Union has invested effort and ongoing resources into formulating and marketing a membership product that has commercial appeal. For example, benefits in the Membership Booklet include: beneficiary status under the WA Police Union Group Life Insurance; access to professional staff who can give advice on issues like industrial relations, occupational health and safety and personal welfare; access to a will service; and 'access to a range of other retail goods and services, some of which are sold directly by the [Union] and others provided through the [Union]'s business partnerships.'

46 The Union submits that it engages in 'conventional types of trading activity' like its long term investments in residential property to store and grow wealth 'which can then translate to future and ongoing benefits to members'. It says it routinely enters into short term lease arrangements to generate rental income on those investment properties. It has 'made business arrangements with third party insurance providers who supply services which are then on-sold by the [Union] to its members.' Finally, the Union directly sells 'other services and products such as advertising space and watches'.

47 The Union says at [20] – [21]:

The primary purpose of the [Union] is to advance the interests of its members. The promotion of that objective necessarily requires the [Union] to engage in substantial commercial activities for the purpose of attracting and retaining fee-paying members, and to source funds from other commercial dealings.

The commercial nature of the Respondent's activities warrant the characterisation as a trading corporation.

48 The Union says that although the 'member insurance bonus rebate' does not reflect the ordinary yearly income of the Union, it does not agree that it should be disregarded when assessing whether the Union is a trading corporation. It says the 'provision of different types of insurance as a form of commercial benefit', including the death benefit referred to in rule 11.5

of the Rules, is in return for membership fees. The Union says the provision of insurance coverage to its members is ‘a material activity that warrants the characterisation of the [Union] as a trading corporation.’

Ms Mason’s case

- 49 Ms Mason says that the Commission should find that the Union did engage in trading activities, but she argues that those trading activities ‘were insubstantial, peripheral, and an insufficiently significant proportion of [the Union]’s overall activities as a trade union providing industrial advocacy, and do not warrant the characterisation of [the Union] as a trading corporation’.
- 50 Ms Mason also relies on the Union Rules. Based on rule 4, the Union’s purpose ‘is to advance the industrial interests of its members, including by upholding and protecting members’ industrial rights, advising and representing members in respect to grievances or complaints affecting members, and securing satisfactory industrial conditions for members through various means’. Ms Mason argues that this is consistent with the ‘whole point of a trade union’ and relies on *ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) v Transport Workers’ Union of Australia* [2020] FCAFC 231 at [58] (**ALDI Foods**). Ms Mason accepts that the Union’s objects require it to raise funds ‘in order to acquit [the Union]’s Purpose.’

Membership fees

- 51 Ms Mason does not agree with the Union that charging membership fees is a trading activity. She relies on Berchardt FM’s (obiter) reasoning in *Everett & Anor v Australian Services Union* [2007] FMCA 1665 at [39] (**Everett**), where he concludes that: ‘the mere membership of a union does not give rise to an enforceable set of contractual obligations on the part of the union to observe each and every one of its objects as a contractual condition in favour of each of its members.’
- 52 Ms Mason relies on the reasoning of Full Court in *ALDI Foods* at [65] and also says that the receiving membership fees is not a trading activity: *Nation v Albany Community Radio Inc* [2020] WAIRC 00938 at [25].
- 53 Ms Mason submits that the payment of a membership fee to the Union cannot be a trading activity because it ‘occurs in an industrial setting, entitles members to nothing more than generic industrial advocacy, and does not create enforceable contractual obligations with any definable content, or at all. See also *Guide v Toll Ipec Pty Ltd & Anor (Civil Claims)* [2010] VCAT 539 at [15] to [18] (Steele DP).’
- 54 If this is the case, then Ms Mason says Ms Vitler’s evidence that in exchange for membership fees, the Union ‘provides access to a number of commercial benefits and services’ cannot be correct. Ms Mason says the reliability of that evidence is also undermined by the content of the Membership Booklet, including the ‘President’s Message’, which does not refer to any commercial benefits or services but emphasises the Union’s purpose of ‘improv[ing] Members’ wages, working conditions, health and welfare, and to ensure policing is a top priority for governments, so that the people who keep our community safe are looked after.’

Other income and investment

- 55 In relation to the income that the Union has generated through renting short term accommodation, Ms Mason concedes this is a trading activity. However, she says that the

income received from the rental payments is ‘insubstantial both in terms of its numerical value and its character’.

- 56 An annual income from rent of approximately \$250,000 is 3.7% of the Union’s annual income, if the one-off member insurance bonus rebate is not taken into account. This is compared to the Union’s income from membership fees, which is approximately 90% of the Union’s usual annual income (or 80% of the Union’s annual income if the one-off member insurance bonus rebate is taken into account).
- 57 Accordingly, Ms Mason says that the Union’s renting of short term accommodation cannot be described as a substantial trading activity.
- 58 In relation to life insurance, Ms Mason says that the Union facilitating insurance for its members is altruistic and lacks any commercial character.
- 59 Ms Mason says there is no evidence of any contractual obligation on the Union to provide life insurance in return for membership fees and the Union has failed to adduce any evidence about whether, even if this is a trading activity, it is a substantial trading activity.
- 60 Ms Mason submits that the Union does not seek to characterise the ‘death levy fund’ as a trading activity and says in any event it is not.
- 61 Ms Mason concedes that providing advertising space for a fee is a trading activity, but says that it is insubstantial and peripheral to the Union’s industrial activities and funding from membership fees. Ms Mason says that the income from the advertising space is 0.63% of the Union’s income.
- 62 Ms Mason says the sale of watches is a trading activity but an insubstantial activity that is peripheral to the Union’s main object of providing industrial advocacy.
- 63 Ms Mason says the other items listed on the Income Statement under ‘sundry items’ should be disregarded because there is no evidence about the nature of those activities, the Union’s involvement or the significance of the trading activities.

Ms Mason’s conclusion

- 64 Ms Mason says that the Union does not engage in substantial trading activities and so it is not a trading corporation. The Union is a registered organisation with the purpose of protecting and furthering the industrial interests of its members. Its income is overwhelmingly from the payment of membership fees, which is not a trading activity. Any of the Union’s other trading activities are not substantial or significant enough for the Union to be characterised as a trading corporation: *Hardeman v Children’s Medical Research Institute* [2007] NSWIRComm 189; (2007) 166 IR 196 at [21]-[35].
- 65 Finally, Ms Mason says, relying on *Everett*, trade unions are not ordinarily, by their nature, trading corporations and the Union has not established that it is an exception. The jurisdictional objection must be dismissed.

Consideration

- 66 As the Full Court in *Bankstown* said, ‘there is no bright line delineating what is or is not a trading corporation.’ [52] Whether trading activities are sufficient to justify categorisation as a trading corporation is a question of fact and degree: *ALS v Lawrence* at point (6) of [68].
- 67 Considering the evidence and applying *ALS v Lawrence* and *ALDI Foods* leads me to find that the Union is not a trading corporation.

- 68 The central weakness in the Union's case is equating the mere receipt of income (mostly in membership fees) and the accumulation of unspecified 'wealth' with the Union being a trading corporation, without adequate explanation or identification of the trading or commercial character of the Union's activities.
- 69 Further, the Union's submissions overstate or merely assert the commercial nature of its activities while underplaying the express non-commercial activities set out in its evidence.

Membership fees

- 70 In the relevant period the Union received \$6,145, 809.37 in membership fees. That is clearly a substantial activity in the context of the Union's overall activities, but I am not persuaded that it is a trading activity. In essence, I do not consider that the relationship between the Union and its members has a commercial or trading character.
- 71 The Union chose to put on very limited evidence, of which the Membership Booklet is a substantial part. While the focus must on be what the Union's activities are, not just as recorded in a promotional booklet, the Membership Booklet is at least an indication of the Union's activities. In my view, that indication is not of trading.
- 72 Ms Vitler's evidence was that generally the objects of the Union are directed toward protecting and improving the industrial conditions and interests of its members. The Membership Booklet says on page 8 that the Union's 'main objectives are to improve Members' wages, working conditions, health and welfare, and to ensure policing is a top priority for governments, so that the people who keep our community safe are looked after.' On the following page the Membership Booklet describes the work done by the Union's Board of Directors as meeting monthly 'to conduct all business including decisions on policy, industrial campaigns on pay and work conditions, legal assistance, ancillary Union services and Member welfare.'
- 73 Page 13 of the Membership Booklet outlines that the Union employs staff to carry out its day to day business, covering the following portfolios: Legal, Industrial Relations, Occupational Safety and Health, Welfare, Media, Advocacy, Research, Administration and Member Services.
- 74 Member benefits are set out from page 14 to 19 of the Membership Booklet. Those benefits include legal assistance, negotiating the industrial agreement, a will service, a members group life insurance scheme (being a \$100,000 death insurance policy, which can be extended at a cost and on application), a personal life insurance cover (death only) for partners of members of between \$10,000 - \$220,000 depending on age, PAO journey cover, a death levy fund that pays specified amounts on the death of a member or his or her partner or children under 18 years, a quarterly Police News magazine, fortnightly newsletters, discounts on goods and services including accommodation, motoring, entertainment, retail, home improvement and travel, 24-hour Emergency Director contact for members who have been involved on duty in critical incidents to access legal advice, welfare or other support, access to the Union app and discounted holiday accommodation.
- 75 The Membership Booklet states that the Union 'strives to achieve improved working conditions and wages for Members' and over the five pages that follow sets out a summary of conditions of employment for members.
- 76 In my view, it is clear from Ms Vitler's evidence, the Union Rules and the Membership Booklet that the Union's core activity is to advance the industrial interests of its members.

77 The relevant facts in this matter are on all fours with those in *ALDI Foods*, where the Full Court considered whether the Transport Workers' Union was a trading corporation. The objects of the union in that case were:

- (1) The general objects of the Union are:
 - (a) to uphold the principle of the combination of labour;
 - (b) to promote, foster and maintain industrial organization of all workers; and
 - (c) to promote, foster and maintain the best industrial interests of all Members.
- (2) Without limiting sub-rule (1), the specific objects of the Union are:
 - (a) to secure for members improved conditions of employment;
 - (b) to secure for members preference in their employment;
 - (c) to obtain for members a greater share of the product of their labour;
 - (d) to afford assistance in cases of industrial oppression;
 - (e) to seek to improve the status, training and educational qualifications of members;
 - (f) to promote and encourage respect within the Union and amongst members for the dignity and worth of the human person and in the equal rights of men and women;
 - (g) to promote and encourage the participation in the Union of all without distinction as to race, sex, language, or religion;
 - (h) to ensure members are provided with a safe and healthy work environment;
 - (i) to assist members in obtaining compensation for injuries sustained in the course of their employment;
 - (j) to assist in obtaining compensation for dependents of members killed in the course of a member's employment; .
 - (k) to establish and maintain a superannuation fund for members;
 - (l) to assist members financially in cases of accident, sickness, death, distress or unemployment; and
 - (m) to provide services to assist members to obtain their own homes.

78 Those objects are sufficiently similar to the Union's objects here. The reasoning in *ALDI Foods*, about whether receiving payment for membership fees is a trading activity, applies.

79 The Full Court in *ALDI Foods* held at [65]:

In our view, the fact that members of the TWU pay membership fees does not convert the TWU's core activities (industrial advocacy) into a commercial or business activity. The advocacy activities of a union cannot be characterised as the supply of a service (advocacy) for reward (membership fees) in a trading or commercial sense because the service (advocacy) lacks a defined content. Such advocacy is incapable of being conceived in a contractual framework which is the foundation and touchstone of trading and commercial activity. That is because the advocacy must respond to the

industrial landscape across numerous businesses which inevitably are subject to constant change. The focus and priorities of the union must respond to those changes. Furthermore, the TWU is subject to democratic control by its members, which means that the focus and priorities of the union will also respond to the governance and direction given by members from time to time. In that context, the description of a service for reward is inapt. That is not to suggest that a union is incapable of conducting a commercial or business activity; for example, a union may provide training or similar services for reward. Our conclusion is limited to the contention advanced by ALDI that the primary activities of the TWU, industrial advocacy, are a commercial or business activity.

- 80 Like the Full Court in *ALDI Foods*, I find that the Union's core activities are advocacy and lobbying to advance the industrial interests of its members through improved wages and conditions. Those are industrial or political (in the broad sense) activities, reflected in the Union's objects and, as found in *ALDI Foods*, 'reflective of the very concept of a trade union.' [58]. That most Union members pay membership fees does not convert those activities into commercial or business activities.
- 81 The core activities cannot be characterised as the supply of a service for reward in a trading or commercial sense. As in *ALDI Foods*, here the industrial advocacy lacks defined content, likely because its nature will change in accordance with the changing industrial landscape and the Union's priorities. Whether any industrial advocacy service is provided at all for a particular member is uncertain. Under the Union Rules it is clear that remains at the sole discretion of the Union's Board.
- 82 While profit is not an essential of trading, it is a usual concomitant: *ALS v Lawrence* at point (4) of [86]. There is no evidence of any relationship between the fee (if any) that is paid for membership and the commercial value of or cost for the Union to provide the benefit (be it advocacy, legal advice or assistance or other support) received. In my view, the sale of memberships lacks a commercial or business character. The sale of memberships is an industrial advocacy activity, carried on with a view to improving the industrial interests of members. It is not a business activity carried on with a view to earning revenue: *ALS v Lawrence* at point (3) of [68].
- 83 I agree with the Full Court in *ALDI Foods* that 'there is a clear distinction between activities which constitute industrial or political (in the broad sense) advocacy by a body on behalf of its members and activities that are trading or commercial': [62] of *ALDI Foods*. But if I am wrong about that, perhaps in some circumstances industrial advocacy could be a trading activity, within a contractual framework with defined content and certainty about the nature of services provided and a member's right to receive them. None of that is present here. Provision of financial and/or legal assistance is at the Board's discretion: rule 11.6(c). There is no right to financial or legal assistance. In those circumstances, the industrial advocacy lacks the necessary commercial or business character.
- 84 I find receiving membership fees is not a trading activity.

Rental accommodation

- 85 It is not apparent whether the Union received rental income from the general public or only from members on a reduced cost basis. The Membership Booklet says 'the Union heavily discounts its Holiday Homes to provide affordable accommodation for members.' Taking the Union's submission at its highest, I find receiving income in exchange for rental accommodation is a trading activity. But whether I consider the \$197,420.11 actually received or \$250,000 usually received in income from rental accommodation, in my view the result is

the same. This trading activity is peripheral and not substantial or significant in the context of the Union's activities overall.

Insurance

- 86 The Union's evidence about its involvement with life and other insurance arrangements to benefit members was limited and vague. In my view, the Union's repeated submission that it 'provides' insurance overstates that evidence before the Commission.
- 87 Ms Vitler's evidence was that a portion of the membership fees is used to pay for life insurance premiums, and that the Union has a long-standing arrangement with Hannover Life Re of Australasia Ltd to provide life insurance coverage as an automatic part of membership. The effect of Ms Vitler's evidence about the member insurance bonus rebate was that the insurer provides the life insurance policy for members, not the Union.
- 88 The Union also submitted that it '[makes] business arrangements with third party insurance providers who supply services which are then on-sold by [the Union] to its members.'
- 89 There is no evidence that the Union is contractually obligated to provide insurance.
- 90 In my view, at most the evidence supports a finding that the Union members pay the Union, the Union pays an insurer, and the insurer provides insurance to the Union members. Such an arrangement, as explained by the Union, particularly in the context of the relationship between the Union and its members, is a further service facilitated by the Union that is consistent with protecting members and advancing their industrial interests. It lacks a commercial or business character and is not a trading activity.

Death levy fund

- 91 According to Ms Vitler, the Union received \$164,030 in payments from members 'which relate to the death levy fund' and are separate to membership fees. While the Union said it 'does not agree with the proposition that the maintenance of the death benefit is not a trading activity', the Union failed to make any real submission about why maintaining a death levy fund is a trading activity. On the evidence I cannot find that it is.

Member insurance bonus rebate

- 92 The evidence about the member insurance bonus rebate was simply that it 'was a one-off payment to [the Union] arising under an arrangement with the business that provides a group life insurance policy for [Union] members.'
- 93 On that basis, I am not satisfied that I could find that receiving the member insurance bonus rebate is a trading activity. But in any event, even if I am wrong about that, I consider that the one-off payment of \$1,006,777.21 is peripheral and not substantial or significant in the context of the Union's activities overall.

Advertising and watches

- 94 Receiving income for advertising and from the sale of watches is clearly a trading activity. Again, I consider that it is peripheral and not substantial or significant in the context of the Union's activities overall.

Other aspects of 'sundry' income

- 95 There was no evidence or submissions made about the other aspects of 'sundry' income on the Income Statement such as member gas payments, sales member benefits, sponsorship or grants. In those circumstances, I cannot find they amount to trading activities.

Conclusion

- 96 In my view, the level of trading is not enough to make the Union a trading corporation.
- 97 Taking all of the Union's trading activities together, even when I include the one-off payment of the member insurance bonus rebate, those trading activities do not form a sufficiently significant proportion of the Union's overall activities to characterise the Union as a trading corporation. I find the Union is not a national system employer.
- 98 The Union's objection to the Commission exercising its jurisdiction is dismissed.