Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Amendment (State Referrals and Other Measures) Bill 2009

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The main object of the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 ('State Referrals Bill') is to give effect to an agreement between the Commonwealth and a number of States as to the demarcation between their workplace laws. Under that agreement, all private sector employers in those States will be subject to the federal *Fair Work Act* 2009, while each referring State will have the option of retaining responsibility for their own agencies, most government business enterprises, and local government employers.

There are a number of reasons to support the creation of a national system of labour regulation for the private sector. Such a system would be simpler, cheaper and more efficient than the present arrangements. It would also have the virtue of setting universal standards that are more likely to be understood and observed.[1]

Perhaps most importantly, however, such an approach would remove the uncertainty that currently applies to a large number of not-for-profit organisations. Since March 2006, many of these organisations have had no reliable way of knowing whether they are subject to federal or State workplace laws. As a result, they are at constant risk of breaching their legal obligations as employers.

The purpose of this submission is to explain why that uncertainty exists, and to highlight some of the practical problems it creates.

I should explain that, besides having academic expertise in this area, my concerns are informed by practical experience. I have helped to provide advice and information on this issue to a wide range of non-profit organisations, either on a pro bono basis or through Piper Alderman, the law firm for which I work as a consultant.

[1] These are views I have previously expressed: see eg A Stewart, 'Labour Market Reform in a Federal System: Making the Best of a Flawed Framework' in Productivity Commission, *Productive Reform in a Federal System*, Productivity Commission, Canberra, 2006, p 175. See also Business Council of Australia, *A Unitary Industrial Relations System: Unfinished Business of the 20th Century?*, Industrial Relations Forum Proceedings, BCA, Melbourne, 2000; G Williams, *Working Together: Inquiry into Options for a New National Industrial Relations System – Final Report*, New South Wales Government, Sydney, 2007, pp 18–30.

How the Problem Arises

Since the Howard Government's 'Work Choices' reforms took effect on 27 March 2006, the coverage of federal and State industrial laws has depended primarily on the nature and status of each employer.

The current position, in all States bar Victoria, is that an employer will be a 'national system employer' if it is a Commonwealth agency, or if it can be classified as a *constitutional corporation* — that is, a corporation formed overseas, or a 'trading' or 'financial' corporation formed in Australia. These are the terms used in section 51(xx) of the Constitution, which empowers the Commonwealth to make laws regulating such corporations.[2]

If an employer falls into one of these categories, then it is subject to the federal Act in relation to the conditions on which it can engage, manage and dismiss its employees. It is not subject to State law, except in relation to certain 'non-excluded' matters, such as workers compensation, training contracts, and occupational health and safety.[3]

Conversely, if it is not a Commonwealth agency or a constitutional corporation, an employer will generally be subject to the relevant State *Industrial Relations Act* or *Fair Work Act*.

The constitutionality of this approach was upheld by the High Court in November 2006, rejecting a challenge to the Commonwealth's use of the corporations power to exclude State and Territory industrial laws from applying to constitutional corporations.[4]

Who is a Trading or Financial Corporation?

For most employers, it should be clear whether they are 'in' or 'out' of the federal system of labour regulation. Any company running a business to make a profit is plainly a trading corporation, and thus a national system employer. A sole trader or partnership, by contrast, is not a corporation and can only be a non-national system employer, at least outside Victoria and the Territories. The same is true for a State government department.

I say that the status of such employers *should* be clear, though I note that a recent survey of small businesses in Western Australia by the Small Business Development Corporation found that over a third were unsure of whether they were covered by the federal or State systems.[5] This underscores the importance of having a clear and well understood demarcation between the federal and State systems.

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[2] See the relevant definitions in ss 12 and 14 of the *Fair Work Act* 2009 (Cth).

[3] *Fair Work Act* 2009 (Cth) ss 26–30.

[4] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[5] See 'Small business "unsure" of their IR coverage: survey' *Workforce*, No 1695, 4 September 2009.

At any event, the situation is different for not-for-profit corporations. Their status depends on the application of an imprecise and unpredictable test.[6] Since 1979, the High Court has interpreted the Constitution to mean that even where an incorporated body has not been formed for the purpose of trading, it can still be a 'trading corporation' *if it engages in trading activities to a 'substantial' or 'significant' extent*. A trading activity is any act of buying or selling that generates income. It can include selling goods, charging a fee for a service, letting out property or investing money.[7]

The same is true of a 'financial' corporation. Any corporation that engages in significant or substantial financial activities can be a financial corporation, whatever the purpose for which it was formed.[8]

Applying this test, many not-for-profit bodies have been found to be trading or financial corporations, on the basis that they engage in trading and/or financial activities to a sufficient degree. The list includes local councils, public universities, private schools, hospitals, charitable bodies and community service organisations.[9]

But — and this is the problem — there is no clear or identifiable basis for determining the point at which an organisation has *enough* of these activities to qualify as a trading or financial corporation. There is not even agreement between the lower courts as to how the question should be posed. Many have been prepared to consider how much income is derived from trading or financial activities. But others have insisted the question has to focus on the 'importance' of the activities to the corporation.[10]

If anything, the problem has got worse since March 2006. The fact that the application of the federal industrial legislation now depends on whether an employer is a constitutional corporation means that the issue is arising more often. But rather than a consistent approach being adopted, the differences are widening. For example, there has been a Federal Court ruling that seems to indicate that *no* local council is a trading corporation.[11] Yet that contradicts a body of other decisions suggesting that while smaller rural councils are unlikely to qualify, their larger metropolitan counterparts may often have enough trading activities to tip them over the line.[12]

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[6] See Williams, above n 1, pp 21–24; N Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2008) 19 *Pub LR* 110.

[7] See *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190.

[8] See *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

[9] See the examples listed in the *Australian Master Workplace Relations Guide*, 4th ed, CCH Australia, Sydney, 2009, p 39.

[10] Compare for instance the approaches adopted in *E v Australian Red Cross Society* (1991) 27 FCR 310, *Hillman v Bankstown Handicapped Children's Association Inc* (2008) 183 IR 376 and *Aboriginal Legal Service of WA Inc v Lawrence (No 2)* (2008) 252 ALR 136.

[11] *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102.

[12] See eg *Burrows v Shire of Esperance* (1998) 86 IR 75; *Bell v Shire of Dalwallinu* (2008) 176 IR 226; *Shire of Ravensthorpe v Galea* [2009] WAIRC 01149. Note that in two States most local councils have

All this has left many not-for-profit bodies in a state of confusion.[13] This is especially true for those who derive much of their funding from government sources or private donations, yet at the same time do engage in a certain amount of trading. Even if they can afford to obtain legal advice, that advice may tell them that they might or might not be trading corporations — depending on who is making the decision, and what approach they decide to adopt.

In the worst possible case, an organisation might have fluctuating levels of trading activities. In theory, therefore, it might at one point be a trading corporation, yet not at another. Such an organisation would effectively flicker in and out of the federal system.

It is possible that at some stage there will be a major test case that resolves some of these difficulties. But it is really only the High Court that can settle the matter, and it may take years before a suitable case reaches that court.

Why it Matters

If a not-for-profit corporation cannot be sure whether it is a national system employer, then it cannot be certain:

- whether it should pay its workers in accordance with federal or State award rates, which currently differ because of contrasting wage decisions by the Australian Fair Pay Commission and the State Industrial Relations Commissions;
- whether it should comply with federal or State leave standards (although similar for the most part, there can be some significant differences in relation to personal leave in particular, and also as to whether certain types of leave can be cashed out);
- whether it should comply with State record-keeping requirements, or the generally more onerous federal rules;
- whether any enterprise agreement it makes should be registered under federal or State laws — which now have very different requirements and procedures;
- whether any worker it dismisses can bring an unfair dismissal claim (the exemptions from such claims differ between federal and State laws).

As can be seen, there is great deal of potential risk for an organisation if it makes an assumption as to its status that turns out to be wrong.

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been 'de-corporatised', thus avoiding any question of whether they can be trading corporations: see *Local Government and Industrial Relations Amendment Act* 2008 (Qld); *Local Government Amendment (Legal Status) Act* 2008 (NSW).

[13] See eg Queensland Council of Social Service, *The Impact of WorkChoices on the Non-Government Health and Community Services Sector Project: Survey Report*, QCOSS, Brisbane, 2007.

The same can apply to a trade union dealing with such an organisation, since again its rights and responsibilities may differ considerably, according to which law applies. And for employees, there is the risk of starting a claim under one law, only to be told that the matter has to be brought under another.

How the State Referrals Bill Will Resolve the Uncertainty

If passed, the State Referrals Bill will help to create a clear and consistent delineation between federal and State industrial laws. At least in referring States, *all* private sector employers will be subject to the federal system, including the great majority of the non-profit organisations I have been discussing. The uncertainty over the status of incorporated local government employers, and certain other incorporated government business enterprises, will also be resolved. Either the power to regulate them will be referred to the Commonwealth, or they will be declared to be 'non-national system employers' under the mechanism set out in proposed s 14(2)–(7) of the *Fair Work Act* 2009.

I appreciate that there are some who believe that the State systems (or at least some of them) are intrinsically superior to their federal counterpart, and that it would be better for many smaller businesses and non-profit organisations to have the option of staying out of the federal system.

But even if that were true, the reality is that there is no immediate prospect of the Commonwealth agreeing to this. The push to have a national system is one that was started under the Howard Government, and has simply been continued under the present Labor government.

If the State Referrals Bill and its State equivalents are not passed, then the status quo seems certain to prevail – that is, a federal system founded primarily on the use of the corporations power. That would in turn mean continuing confusion and difficulty for a large number of not-for-profit corporations.

Conclusion

I strongly support the passage of the State Referrals Bill, as being the most effective solution to the present problems facing a large number of employers.

For completeness, I should add that I see no particular difficulty in those provisions in the Bill which deal with transitional arrangements for employers and employees moving into or (in some cases) out of the federal system.

In particular, there is a good deal of sense in the 12-month grace period provided before State awards applicable to referred employers are supplanted by modern awards under the *Fair Work Act* 2009. I note that even after that period expires, it is likely that the transitional provisions in most modern awards will ensure that those employers do not immediately move to a new set of pay rates and penalty rates.

Rather (and as is the case for employers already in the federal system), I would expect those awards to provide for the new rates to be phased in over a further period of years.[14]

[14] See the model transitional provisions proposed in *Award Modernisation* [2009] AIRCFB 800.