

**SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE**

**2006-2007 BUDGET SENATE ESTIMATES HEARING
29TH AND 30TH MAY 2006
EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO**

QUESTIONS ON NOTICE

Outcome 2: Higher productivity, higher pay workplace

Output Group 2.2: Workplace relations implementation

Output 2.2.3: Workplace relations services

Question Number: W099-07

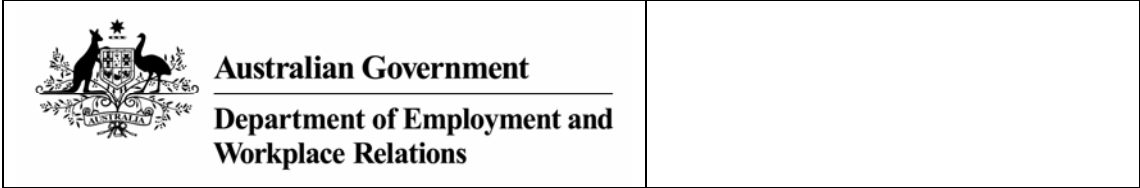
Question:

Senator Wong asked at *Hansard* page 100:

Can the Department provide a copy of the questions used by staff to identify a constitutional corporation?

Answer:

Attached is a script for determining federal award coverage (Attachment A) together with a Guide to Corporations Power (Attachment B). This script is designed to walk clients through a series of questions to ascertain whether the employer is covered by WorkChoices.



WorkChoices Infoline Script

Determining federal award coverage

- Ask questions designed to identify whether the employer is covered by WorkChoices (see below) 3
- Questions that should be asked are: 3
- Ask if the employer or excluded employer is a respondent to an award immediately before reform commencement 4
- Ask if the incidence or coverage clause of the award suffices in covering the employer or excluded employer and each of their employees 4
- Ask if the award been declared a common rule (i.e. covering a specified industry in Victoria, ACT or NT) 4
- Frequently Asked Questions 5
 - Does an employer association have to be federally registered before they can be bound to a federal award? 5
 - Would an employer association and its members continue to be bound by an award if the association ceases to be a registered? 5
 - If an employer association is a respondent to an award and the association changes its name, are they still technically a respondent? 5

Ask questions designed to identify whether the employer is covered by WorkChoices (see below).

For federal awards

Upon the implementation of WorkChoices, a federal award an employer was bound to becomes either a pre-reform award or a transitional award, dependent upon whether the employer is an **employer** as defined by section 6 of Act or an **excluded employer** so far as the definition of employer in section 6 of the Act does not apply.

NB: *For employers (and their employees) not previously in the federal system*

Employers and employees covered by a State award and/or State/Territory industrial legislation immediately before commencement become bound by a "notional agreement preserving state awards" (NAPSA).

Questions that should be asked are:

Q1 Does the employee work in Victoria, ACT, NT, Christmas Island or Cocos (Keeling) Island?

A If yes, the employee is in the federal system.

A If no, move to next question.

Q2 Does the employee work for the Commonwealth or a Commonwealth authority?

A If yes, the employee is in the federal system.

A If no, move to next question.

Q3A Does the employee work for a corporation?

- Sole trader - no.
- Partnership - no.
- 'Ltd' in the name – yes.
- Incorporated association – yes.
- Body corporate created under Commonwealth, State or Territory legislation or overseas law – yes.

A If no, move to question 4.

A If not sure, employee to ask employer for more information.

A If yes, move to next question.

Q3B If yes, is the corporation Australian and involved in trading or financial (investment, lending) activities?

A If yes, the employee is probably in the federal system. If the employer is an Australian company with 'Ltd' in its name, it is very likely that the employee is in the federal system. If still not sure, employee to ask employer for its view.

Q3C If no, is the corporation a foreign corporation (i.e. an entity separate from its members formed overseas)?

A If yes, the employee is likely to be in the federal system. (Some foreign corporations are exempted from the Act in respect of employees working on certain ships in Australian waters.)

Q4 If no, is the employee:

- a pilot, navigator or flight engineer of aircraft;
- a master or pilot of a ship or a seaman;
- employed to load or unload cargo into or from ships;

working in overseas, interstate, inter-Territory or State-Territory trade or commerce?

A If yes, the employee is in the federal system. (If yes, the employee is likely to be an employee of a trading corporation and in the federal system anyway.)

Ask if the employer or excluded employer is a respondent to an award immediately before reform commencement

The employer or excluded employer may be bound by an award because of their membership of an employer association, pre-reform transmission of business or because of a common rule declaration.

Ask if the incidence or coverage clause of the award suffices in covering the employer or excluded employer and each of their employees

If the award is aimed at coverage of a particular industry it may be necessary to determine whether a particular employer or particular employees are within that industry. This may be the case even if an employer was a member of an employer association bound by the award immediately before commencement.

Ask if the award been declared a common rule (i.e. covering a specified industry in Victoria, ACT or NT)

Frequently Asked Questions

Does an employer association have to be federally registered before they can be bound to a federal award?

After commencement the Commission may make an order binding an employer, employee or organisation to an award.

Organisation is defined as meaning an organisation registered under the Registration and Accountability of Organisations Schedule of the WR Act.

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Would an employer association and its members continue to be bound by an award if the association ceases to be a registered?

If a **member of an organisation** was **bound by an award** immediately **before reform commencement** that member would **continue** to be bound by a **pre-reform award** by operation of the transitional provisions.

Prior to the new legislation, an award determining an industrial dispute bound '**all members of organisations bound by an award**', subject to an order of the Commission.

- Organisation means an **organisation registered under the Registration and Accountability of Organisations Schedule**.

Deregistration of an organisation would mean that members of that organisation would no longer be bound, as **deregistration has a cascading effect on all members** that rely on the status of the organisation to be bound.

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If an employer association is a respondent to an award and the association changes its name, are they still technically a respondent?

In these circumstances the employer association (and members of that association) would **continue to be bound by the award**. Provision is made in both the pre/post WorkChoices legislation to amend awards to change the name of persons bound.



Australian Government
**Department of Employment and
Workplace Relations**

Guide to Corporations Power

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Overview

- The legislation is largely based on the corporations power in the Constitution.
- The corporations power of the Australian Constitution allows laws to be made that regulate 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.
- This power is used to regulate employment conditions for employees of constitutional corporations. The corporations power covers up to 85% of employees.
- The laws are also based on the territories power for the ACT and the Northern Territory, the referral power for [Victoria](#), and the external affairs power to support existing arrangements (for example, unlawful termination provisions).

What is a constitutional corporation?

- A constitutional corporation is a business which is incorporated and is covered by section 51 (20) ("the corporations power") of the Australian Constitution.
- If you're an employer and you're not sure whether your business is a constitutional corporation, you may want to seek independent legal advice.
- If you're an employee and you're not sure whether an employer is a constitutional corporation, they should first ask their employer. If they are unsure, the employee may need to seek independent legal advice.

Financial or trading corporation

- If an employer is incorporated under state or federal legislation, it will also need to be a financial or trading corporation to be considered a constitutional corporation.
- The activities of a corporation will determine whether it is a trading or financial corporation.
- The approach of the courts as to what constitutes financial or trading activities is broad. For example, football clubs, a state superannuation board, the Red Cross, a city council and public hospital have all been considered to be financial or trading corporations.

What is not a constitutional corporation?

Employers such as sole traders, sub-contractors, taxi drivers, farmers in family trusts and other unincorporated businesses and some state government departments are not constitutional corporations.

Status of employers – state vs federal

Businesses that are eligible to be covered by the federal workplace relations system include constitutional corporations or businesses operating in Victoria, the ACT or the Northern Territory. These businesses will be automatically covered by the federal system.

Employers that are not constitutional corporations in New South Wales, Western Australia, South Australia, Queensland or Tasmania will be covered by the federal system if they incorporate.

Non-constitutional corporations in New South Wales, Western Australia, South Australia, Queensland and Tasmania will not be covered by the federal system.

Those who are covered by the Federal system

Employers that are not constitutional corporations in NSW, WA, SA, Qld or Tas will be covered by the federal system if they incorporate, and if they are trading or financial corporations.

The legislation covers:

- Trading, financial and foreign corporations (constitutional corporations);
- Employers and employees in the internal territories (the ACT and NT) and Christmas and Cocos Islands;
- The Commonwealth, including its authorities;
- Employers who employ waterside, maritime, and flight crew employers in respect of those employees; and
- Most employers and employees in Victoria (however, the system applies differently to employers and employees in Victoria who are not covered by one of the other categories).

Note: Special arrangements based on the arbitration and conciliation power have been put in place for those employers and employees covered by federal awards or agreements, who will not fall within the new federal system.

Transitional arrangements for businesses that are constitutional corporations

- Constitutional corporation employers, and employees entering the Federal system for the first time (**from state systems**), will have a **maximum three year transitional period**.
- State agreements and awards that were **previously under the state system** will become transitional federal agreements. The terms and conditions of the state awards **will not change**, unless the conditions in the Australian Fair Pay and Conditions Standard are more generous. In this instance the more generous terms and conditions will apply.
- Former state agreements will operate under federal legislation as preserved state agreements (in a similar way to federal agreements). The nominal expiry date of an agreement will continue to operate (to a maximum of 3 years), and the preserved state agreement will operate until terminated or replaced by a new workplace agreement.
- Some content in former state agreements will be prohibited.

Transitional arrangements in place for businesses covered by the pre-WorkChoices system, but not covered by the new system

- Employers **formerly in the federal system** that are **moving to the state system** (i.e. they are not constitutional corporations) will have a **transitional period of five years**. These businesses can leave the federal system at any time by negotiating a State agreement, provided the nominal expiry date of any certified agreement covering them has passed.
- The above arrangement applies if the business is in a **State other than Victoria**. In Victoria, employers and employees can cease being covered by a transitional award if they make a Workplace Agreement.
- In **States other than Victoria**, if at the end of the five year period such a business has not negotiated a State agreement, the business will revert to coverage by the relevant State award. Current agreements and awards that apply to these employers will continue to apply for up to a five year transitional period.
- Current federal collective agreements **created to settle an industrial dispute** continue to operate for up to five years.
- In **States other than Victoria**, non-constitutional corporations that are part of the transitional system **will not be able to negotiate new agreements**. There will be some scope to amend awards covering these employers to allow for wage related conditions increases.
- In **States other than Victoria**, non-constitutional corporations that are part of the transitional system will not be covered by the Australian Fair Pay and Conditions Standard. However, the Standard will apply to employers and employees in Victoria that are covered by transitional

awards – in this instance a ‘more generous’ test will apply. This means that if the terms and conditions of the Australian Fair Pay and Conditions Standard are more generous than those in the award, then the more generous conditions will apply.

Can non-constitutional corporations create a dispute for the purpose of awards and agreement making during the 5 year transitional phase? (under the arbitration and conciliation powers)

- **No new awards may be made during the transitional period**, and **additional parties may not become bound** to a transitional award (other than by transmission of business between transitional employers). The AIRC retains the power to vary ‘monetary entitlements’ in existing transitional awards.
- During the transitional period, unincorporated businesses in States other than Victoria may enter into a state agreement or revert to the state system.
- However, the parties may apply to the AIRC to be released from the federal system in the case that they:
 - (a) are genuinely not able to conclude a state agreement; or
 - (b) have an industrial dispute that is not able to be resolved within the limits of the AIRC’s powers.
- The AIRC should then make an order for the employees to be released from the federal system. **In States other than Victoria**, the AIRC must grant such an order. **In Victoria**, where the AIRC is unable to resolve an industrial dispute, it has discretion whether to grant such an order. (This is because there is no state system for parties to revert to in Victoria, as there is in other States.)