Thomson Playford Cutlers

Workplace Relations Alert
October 2008

A busy few weeks in Industrial Relations...

It has been a busy few weeks in the industrial relations arena:

Award modernisation

> the AIRC released exposure drafts of the first 14 'modernised' awards plus a further timetable for the award modernisation process

New Victorian legislation

> new legislation came into operation in Victoria relating to flexible work arrangements for employees with carer's responsibilities

What is a 'constitutional corporation'?

> the debate over whether an employer is a 'constitutional corporation', and so governed by the federal industrial relations system, continued.

Award modernisation

On 12 September 2008, the Australian Industrial Relations Commission (**AIRC**) published a Statement about the award modernisation process and exposure drafts of its 14 priority 'modernised' awards. These awards are intended to cover: clerks, higher education, hospitality, manufacturing, mining (with a separate award for coal mining), racing (with separate awards for training, clubs events and ground maintenance), rail, retail, security services, and textile, clothing and footwear.

Significant features of the Statement and drafts include:

> only one award each for the retail, hospitality and manufacturing sectors

> a general 25% loading for casuals rather than the 20% under the National Employment Standards (**NES**)

> reintroduction of award obligations on employers to notify employees and their representatives of significant workplace change and to discuss the change

> a model redundancy clause for small business, even though the NES excludes small business from redundancy obligations, and

> that the awards are not binding on either named employers or organisations. Where possible, awards will be binding on employers which are constitutional corporations in a defined industry, but will not be binding on employers who are party to enterprise awards under the *Workplace Relations Act* 1996 (Cth).

The AIRC's Statement about the award modernisation process can be accessed at: **http://www.airc.gov.au/awardmod/databases/general/decisions/2008aircfb717.htm** which also includes a link to the draft awards.

Please let us know if you would like us to assist in analysing the impact of a particular draft award on your business.

The AIRC has also released a timetable for the further stages of the award modernisation process. Modern awards in the priority industries (stage 1) should be finalised by December 2008. The timetable for the further stages of the process is set out in the table over the page.

	Stage 2	Stage 3	Stage 4
Written submissions and draft awards from parties	31.10.08	06.03.09	10.07.09
Pre-drafting consultations commence	24.11.08	23.03.09	04.08.09
Publishing of exposure drafts	24.01.09	22.05.09	29.09.09
Further submissions and consultations with parties	23.02.09	29.06.09	26.10.09
Publishing of final awards	03.04.09	04.09.09	04.12.09

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The AIRC has also released a list outlining what industries fall within which stage of the award modernisation process, which can be accessed at: **http://www.airc.gov.au/awardmod/databases/general/decisions/statement_030908.htm**

Even though the final awards in the various 'stages' will be published by the AIRC at various times, all modern awards will come into effect on 1 January 2010.

Flexible work arrangements legislation

The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic) (**EOA Act**) commenced operation in Victoria on 1 September. It is now unlawful for employers, contracting organisations and partnerships in Victoria to unreasonably refuse an employee's (or contractor's or partner's) request for flexible work arrangements to accommodate the person's responsibilities as a parent or carer. For example, an employee (etc) might request:

- the ability to work from home, either regularly or on an ad-hoc basis
- part–time or job share arrangements
- different working hours or start/ finish times, or
- extended leave arrangements.

Employers are not bound to agree to every request for flexible work arrangements. However, agreement must not be unreasonably withheld. The EOA Act requires consideration of all the circumstances when determining if an employer has unreasonably refused to accommodate a person's responsibilities, including:

- the person's circumstances, including the nature of his or her responsibilities as a parent or carer
- the nature of the person's role
- the nature of the arrangements required to accommodate those responsibilities
- the financial circumstances of the employer
- the size and nature of the workplace and the employer's business
- the effect on the workplace and the employer's business of accommodating those responsibilities, including:
  - the financial impact of doing so
  - the number of persons who would benefit from or be disadvantaged by doing so
  - the impact on efficiency and productivity and, if applicable, on customer service of doing so
- the consequences for the employer of making such accommodation, and
- the consequences for the person of not making such accommodation.

This legislation brings Victoria in line with other states, including NSW, where employers are already obliged to avoid discrimination against employees with parental or carer's responsibilities by agreeing to flexible work arrangements. However, the Victorian legislation is worded somewhat differently, and it remains to be seen whether the obligation will be interpreted as being the same as elsewhere.

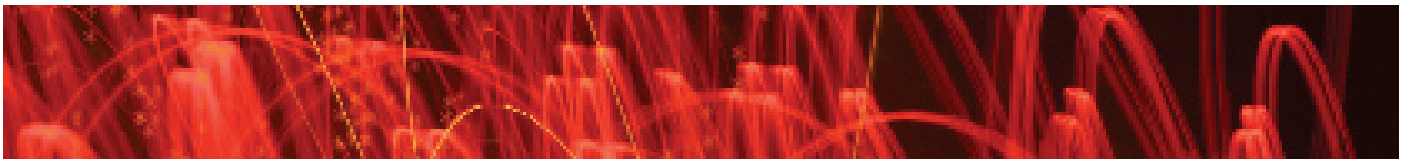
Constitutional corporations

Three recent cases have explored the issue of what makes an employer a 'constitutional corporation' for the purposes of the federal industrial relations system. Two have considered the status of local councils, and the third related to an incorporated association that predominately provides welfare and support services for young people with disabilities.

In a recent Western Australian case, *Bell v Shire of Dalwallinu* 2008 WAIRC 01236 (14 August 2008), Senior Commissioner Smith of the Western Australian Industrial Relations Commission applied the 'Adamson' test, which requires reviewing the current activities of the corporation. This included the breakdown of the sources of the council's income. SC Smith held that Shire of Dalwallinu was a constitutional corporation as it derived just over 20% of its income from activities that were trading activities and which she considered to be significant and substantial elements of its operations. This was the case even though these activities were not 'predominantly' what the council did, and some were peripheral to its principal activities.

This decision can be contrasted to SC Smith's decision last year in the case of *Jacqueline Ann Bysterveld v Shire of Cue 2007* WAIRC 00941 (20 July 2007), in which she held that the Shire of Cue was not a constitutional corporation as its trading activities as a whole did not give it the characteristics of a trading corporation. In that case, approximately 10% of the council's income could be said to be derived from trading activities.

A different approach was taken only weeks later by Justice Spender of the Federal Court in the case of *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268 (20 August 2008). Although Spender J did consider the Adamson test and the evidence of trading activities of the council, he considered that the proper test was whether 'the predominant and characteristic activity' of the council was either trading or finance. His Honour noted the council's extensive legislative and executive functions in the local government area, and appeared to accept that these



were the council's 'fundamental functions'. He concluded that the trading activities lacked the essential quality of trade: almost all ran at a loss; they were directed to public benefit objectives within the Shire; and their scale (including in monetary terms) was inconsequential and incidental to the primary activity and function of the council.

If Justice Spender's approach is correct, most local councils would not be considered to be trading corporations. The effect would be that employment in the local government sector would fall within the state system, except in Victoria where all industrial relations is governed by Commonwealth law.

Before the Etheridge Shire Council decision was handed down, the Queensland State government enacted legislation which had the effect that employees employed in the local government sector would fall within the Queensland industrial relations system. Most recently, a Full Bench of the Industrial Relations Court of New South Wales considered the trading nature of the activities of an incorporated association that provided welfare and support services to disabled youths and their families and received over 90% of its income from government grants.

Bankstown Handicapped Children's Centre Association Incorporated (**BHCC**) argued that the government funding it received was a result of services it provided for reward and should be characterised as 'trading activities'. The Court held that the activities engaged in by BHCC for which it received government funding did not occur in a commercial market setting. BHCC received payment for the services in circumstances where BHCC was not subject to competition and the price or cost of providing the services was not a consideration for the receipt of funding. The Court went on to consider whether other income of BHCC could be considered to be derived from trading activities but ultimately found that even if they could be considered trading activities they did not constitute a sufficiently significant proportion of BHCC's activities. Accordingly, the state industrial relations system applied to BHCC.

What is clear from these cases is that a tribunal or court, when considering whether a corporation (including an incorporated not-for-profit organisation) is a trading or financial corporation, must consider the individual circumstances of the corporation.

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