A Briefing Paper

THE REGULATION OF CHURCH EMPLOYMENT UNDER "WORK CHOICES": WHAT ARE CONSTITUTIONAL CORPORTATIONS?

ACCER
AUSTRALIAN CATHOLIC COMMISSION FOR EMPLOYMENT RELATIONS

JANUARY 2006

BRIEFING PAPER

THE REGULATION OF CHURCH EMPLOYMENT UNDER "WORK CHOICES": WHAT ARE CONSTITUTIONAL CORPORATIONS?

Introduction

The purpose of this paper is to provide advice to Catholic employers about the potential impact of the recently enacted amendments to the Commonwealth's *Workplace Relations Act 1996*. Those changes were made by amending legislation that has often been referred to as the *Work Choices* legislation. The amended legislation ('the amended Act") will come into operation in early 2006.

A major feature of the *Work Choices* legislation is its reliance on the "corporations power" in the Australian Constitution to support its various provisions. There are other constitutional powers that have been invoked in support of the legislation, but they are of more limited scope. The "territories power" enables the making of employment laws in the Australian Capital Territory and the Northern Territory. Because Victoria has referred most of its industrial powers to the Commonwealth, the legislation applies to nearly all Victorian employees. This will continue unless Victoria withdraws its reference. There are some other constitutional powers that are relied on, but they are limited in scope.

Another major feature of the legislation is that the "conciliation and arbitration power" in the Constitution is not relied upon to support the new system, save for its use to support some transitional provisions. This constitutional power, which deals with the resolution of interstate industrial disputes, has been the principal basis for Commonwealth legislation for the past century. There are many employers who are presently covered by federal awards made under the conciliation and arbitration power but who would not fall into one or more of the categories of coverage under the new scheme. The use of the conciliation and arbitration power for transitional purposes enables current federally regulated employers and employees to continue under Federal legislation and not be "transferred" to State regulation.

Constitutional corporations

The legislation simply defines a constitutional corporation as "a corporation to which paragraph 51(xx) of the Constitution applies". Section 51 of the Constitution sets out various powers conferred on the Commonwealth. Paragraph (xx) enables the Commonwealth to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Usually there will be no doubt about whether or not a corporation is a constitutional corporation. The terms "trading" and "financial" can be readily applied to most businesses. However, the characterization of a corporation outside the "business" sector may be difficult. We will return to this aspect later.

The Transitional Arrangements

The transitional provisions establish the basis upon which employers and employers will start in the new system. It is important to understand the kinds of transitional arrangements of the amended legislation in order to know whether a particular area of employment will be regulated under the new system and how it may be varied in the future.

Current Federal Coverage

In general terms, employers and employees who are presently covered by a Federal award or Federal employment agreement will continue to be regulated by the amended Act. Employers and employees who are within the invoked constitutional powers (other than the conciliation and arbitration power) and who are covered by an AWA or a certified agreement will be regulated by the transitional provisions in Schedule 14 of the amended Act. If they are not covered by either of these kinds of employment agreements and are only covered by a Federal award, Schedule 4 of the amending Act provides that they will continue to be covered by the same terms and conditions of employment, under what is known as a "pre-reform award". However, if an employer is not a constitutional corporation and is not otherwise within the invoked powers, the transitional provisions in Schedule 13 of the amended Act apply. Schedule 13 provides that the employer and the employees will continue to be covered by the pre-existing awards.

Current State Coverage

Employers and employees in the States other than Victoria are presently covered by awards and State employment agreements. If they come under the newly invoked constitutional powers (essentially, if the employer is a constitutional corporation) the regulation of most of the terms of employment will be by the amended Act. The way in which this is done is by the deeming of new federal agreements, based on the terms of the current State award or State agreement. These transitional provisions are found in Schedule 15 of the amended Act. State regulated employers and employees who are not covered by the operation of the new provisions will continue in the State systems.

It is understood that there will be a High Court challenge by the States to various aspects of the Work Choices legislation, particularly the Commonwealth's reliance on the corporations power.

Issues for Church employers

Church employment may be regulated by Federal or State laws. Most employers will be in no doubt about their present industrial coverage: it will be Federal or State and industrial disputes and awards will be determined by either the Australian Industrial Relations Commission or by a State industrial tribunal. The location of the regulation has not depended on the corporate identity (if any) of a particular employer. In most cases it has depended upon whether or not the employer has been a party to an interstate industrial dispute that has resulted in the making of a Federal award.

Church employment takes place under the auspices of a variety of bodies or individuals. Many Catholic employers (but not all) have a corporate identity. If they are financial or trading corporations they will be covered by the Commonwealth's legislation.

For some Church employers the corporations issue is not relevant. For example, parish priests employing parish staff will not be covered (unless they are in Victoria, the ACT or the NT.)

Incorporated Church employers (who may not be constitutional corporations) in Victoria, the ACT and the NT will also be covered by the federal jurisdiction.

For most incorporated Catholic employers, however, the real question is whether they and their employees are going to be affected by the Commonwealth's reliance on the corporations power. There is no standard answer to this question because Church employment varies.

Many Church employers will need to determine if they are constitutional corporations. This may be a difficult exercise, particularly when there can be no finality on the issue short of having a finding on that question by a court of law. A corporation cannot simply decide it is a constitutional corporation. For example, a dispute in a State tribunal about whether a Church agency is a constitutional corporation cannot be decided simply by the agency saying it is one.

The question of whether a particular incorporated employer is a constitutional corporation is a matter that does not require an early decision. Because of the transitional provisions there is no need for a speedy decision.

Who is the employer?

Before considering the corporations question it will be necessary to be clear about the identity of the employer. Unless the incorporated body is a constitutional corporation and employs labour, it will not be an "employer" under the amended Act. The constitutional corporation must be the employer of employees.

There is sometimes confusion about the identity of the employer because an employee might work within an organization and not be employed by it. An employee may be paid by an organization, but not be employed by it. If there is any doubt, consider the following questions:

1. Who is the 'official' employer of employees in the organization?

2. Does the organization have a contract of employment with any of its employees?

3. If so, who is named as the employer in that contract of employment?

4. If there is no written contract of employment was an offer of employment made and, if so, who made the offer or on whose behalf was the offer made?

5. What is the name of the employer in any industrial agreements entered into with groups of employees, organizations or unions representing such employees?

6. Does any body or do any bodies act as the agent or agents of the employer?

7. Who is liable for any legal obligations or matters?

8. In which State or Territory is the employer located?

9. For group tax purposes, who is named as the employer?

10. For workers compensation purposes, who is named as the employer?

The law on constitutional corporations

The question of whether a Church corporation is a constitutional corporation will usually depend on if it can be characterized as a trading corporation. The essence of trade is the buying and selling of goods and services.

A corporation's public purposes or charitable purpose does not determine whether it is a trading corporation. The character of a corporation is not determined by its purpose as stated in its memorandum of association. If trading activities are a substantial part, or a sufficiently significant proportion, of the overall activities of the corporation, it may be described as a trading corporation.

Trading does not have to be the sole, predominant or principal activity. In *R v Judges of the Federal Court and Adamson; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190, Mason J said:

> "Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, namely religion or education in the case of a church or school, that it could not be described as a trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is very much a question of fact and degree."

In *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dams Case*) it was held that as long as the trading activities of a corporation are a "substantial" part of the corporation's activities, the fact that a corporation performs functions of a greater degree "in the public interest" will not mean that it does not have the character of a trading corporation.

In *E v Australian Red Cross Society* (1991) 27 FCR 310 the Australian Red Cross was held to be a trading corporation, even though about 95% of its income came from governments. What was critical was that about 5% of its income came from a range of activities, including raffles, lotteries, social functions, sporting events, revenue from kiosks and shops and various investments. Because the supply of blood to the public was gratuitous, the supply of blood was not a trading activity. The second respondent in that case was the Royal Prince Alfred Hospital, a State entity. The hospital was also found to be a trading corporation because of the size of its trading receipts, even though they were small in relative terms. An entity incorporated under a State Act of Parliament is just as capable as being a trading or financial corporation as one incorporated under a Commonwealth Act.

In *Quickenden v O'Connor* (1999) 91 FCR 597 a major issue was whether the University of Western Australia was a trading corporation. The trading activities were found to amount to 18% of the total operating revenues, sufficient to characterize it as a trading corporation.

The finding in *Quickenden v O'Connor* was upheld on appeal; [2001] FCA 303. A matter on which one of the appeal judges commented was the proper identification of "trading" activities, particularly in the light of the operation of the Higher Education Contribution Scheme. This emphasizes the need to carefully scrutinize activities to determine whether they may be regarded as trading. According to the High Court in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, "trading" should not be given a narrow meaning.

Is the employer a 'constitutional corporation'?

Unfortunately, there is no template to produce an instant answer to this question. There are criteria which will give guidance as to whether it is likely that the body in question comes within the class of a constitutional corporation. The following list of questions to assist Church organisations in this task of identifying whether they are constitutional corporations *and* the employer:

The nature of the organisation

1. Is the employer an incorporated body?
2. If so, under which legislative instrument?
3. Is the body for profit or not for profit?
4. What does the constitution of the body say about the purpose for which the body was formed?
5. What is the function of the corporation?
6. Does the corporation (including any associated bodies) engage in any and, if so, what trading or financial activities?
7. How does the corporation "obtain" its work?
8. How is the corporation funded and what are its sources of revenue or funding?
9. Does the corporation compete or tender for any of its revenue or funding?
10. Does the body charge a fee for service or engage in other financial type transactions such as buying or selling?
11. What goods or services does the corporation provide?
12. As a percentage of revenue, to what extent does the body undertake trading or financial activities?

Conclusion

We have canvassed a number of the issues that will arise in the early stages of the new industrial relations system. For most incorporated employers, the question of whether it is a constitutional corporation will be the critical question in determining whether the Federal or one of the State systems applies to its engagement of employees.

It is important for Church employers to carefully work their way through these issues. As we have explained, these are not matters of such urgency that a proper resolution of the issues should be compromised.