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UNLAWFUL DISMISSAL CHANGES

A few editions ago we raised the problems facing unions when they make unlawful dismissal claims on behalf of members. In the matter that brought the issue out into the open, the employer was seeking to have the application thrown out because it claimed the union could not be an applicant in the Federal Magistrates Court action.

We brought the problem to the attention of the AIRC to sort out a quick-fix for that matter. Also we had the issue taken to the AIRC Rules Committee to get the problem fixed for all cases.

The AIRC has now fixed the problem permanently by reinstating a form for unions to use when making applications on behalf members. The new form (R27A) clearly differentiates between the union and the member, hopefully avoiding the scope for technical hurdles to be raised by the employer once an unlawful dismissal application goes from the AIRC to the Federal Magistrates Court.

Despite the big changes that are afoot for the AIRC with the establishment of Fair Work Australia, it is good to know that at least the AIRC is listening.

Sean Reidy
Partner

WHAT MAKES A TRADING CORPORATION?

In the last few months, John Howard's "simplified" industrial relations system has once again been shown up to be empty rhetoric as courts and tribunals across the country try to figure out who's in and who's out of the federal system

Different courts have now come to completely different conclusions about

what sorts of organisations are "trading corporations" covered by the federal system. The problems are most acute in two important areas of employment – local government and the community sector.

Local councils – going?

In the *Etheridge Shire Council* decision, the Federal Court decided that as a matter of principle a local council **could not be a trading corporation**. The Court decided that the Council's predominant activities were not trading in goods and services, but the provision of local government. It said that it was inconsistent with the Commonwealth constitution for the federal government to control local governments through the federal power over "trading corporations".

The decision has limited significance in Queensland because the Queensland Government has already de-corporatised all local governments in Queensland (except the Brisbane City Council) returning them to the state industrial relations system. The NSW government is proposing a similar de-corporatising of its local councils to achieve the same result.

The *Etheridge* decision does, however, call into question whether the Brisbane City Council can continue to operate in the federal system. If the decision is right, BCC will be back in the state system where it came from without all of the restrictions that the federal system imposes on unions and employees.

The *Etheridge* decision is, on its face, seemingly out of kilter with the approach taken in recent years by the AIRC and the Federal Court to deciding who is in and who is out. It also contradicts a decision of the WA Industrial Relations Commission that came out only a few days earlier which held that a small rural council,

similar to Etheridge Shire Council, **was a trading corporation** (*Bell v Shire of Dalwallinu*).

Confusion also reigns in the community and welfare sector after recent inconsistent decisions by state tribunals.

Community sector – going?

For some years, the trend of decisions was that many non-government or not-for-profit organisations were “trading corporations” because they provided goods or services in exchange for fees, even if those services were only a side-line to their main welfare activities and even if the bulk of their funds were government grants. So, the Red Cross, the RSPCA, sporting clubs, universities, religious schools and community housing groups were all found to be “trading corporations.”

A Full Bench of the NSW Industrial Relations Commission has now decided that a community sector employer (the *Bankstown Handicapped Children’s Centre*) is not a “trading corporation” and so is **not** part of the federal industrial relations system.

The Centre operated almost exclusively by receiving government grants to provide support services to various disabled groups. It made no profits, and the Commission decided it was really just a conduit used by the NSW Government to fulfil its obligations to assist disabled people.

The Full Bench found that there was nothing commercial in what the Centre did. Instead it was providing social welfare services relying on government grants and was not trading in services.

This decision followed an earlier decision of the NSW Commission that a research charity whose primary function was raising funds for medical research was not trading in services nor dealing in finance and so was not a trading corporation or a financial corporation. Over in Western Australia, however, the Full Bench of the WA Industrial Relations Commission has taken an entirely different approach.

In *Aboriginal Legal Service v Lawrence* the Full Bench decided that a social welfare organisation, whose sole effective source of funds was the government, engaged in “trading” when negotiating its funding arrangements with the government. As a result, **it was a trading corporation**, it was covered by the post-Workchoices federal legislation and the former employee had no recourse to the state system’s unfair dismissal regime.

In contrast, the NSW Full Bench in the *Bankstown Handicapped Children’s Centre* case expressly rejected this approach and concluded it had to look at the reality of what the organisation did (provide community services) not the form by which it received its funds (contracting with government for grant money).

Certainty and simplicity – gone

The problems of determining if a community sector employer is in or out of the federal system don’t stop with those inconsistent decisions.

What happens when an organisation’s funding sources change, or it takes on new roles that involve competing for government services – does it get pulled into the federal system? Does it fall out again when it gets a new round of government funds? How much “trading activity” is enough to make it a “trading corporation”? If its trading sideline declines or picks-up does it fall out of the federal system or get pulled back in?

There are no obvious answers to these questions. The practical answer is that the NSW decisions, building on older authorities, provide scope for unions to argue that these employers are still covered by state industrial relations systems and, most importantly in the current climate, state unfair dismissal legislation.

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