



THE 'BANKSTOWN DECISION' & WHY IT'S IMPORTANT TO NOT-FOR-PROFIT SECTOR EMPLOYERS

A recent landmark Federal Court ruling, now known as the 'Bankstown Decision', has significantly altered the Industrial Relations environment of Not-for-profit (NFP) Employer across Australia.

The Bankstown Decision means that Employers who previously believed they were **NOT** Constitutional Corporations (ie Trading corporations) and were covered by their State IR jurisdiction may now find that their relationships with government (ie service/funding agreements) will be deemed to be one of 'trade' and as such render them Constitutional Corporations.

This decision is of primary significance for Employers in Western Australia (WA) given the WA government has not referred their IR powers to the Commonwealth unlike all other State governments.

The Bankstown Decision is equally important to Employers in all other States who previously believed they were not trading corporations as Modern Awards may apply to them **NOW** (and have done so since 1 January, 2010) as opposed to 1 January, 2011.

If you are a Constitutional Corporation for the purposes of the *Fair Work Act 2009* you will be covered by the Federal Industrial Relations System.

As such, organisations that previously believed they were not trading corporations and were 'State' based Employers may now need to comply with the following timeline for compliance with the Federal IR System:

- ❖ From 1 July, 2009 comply with the *Fair Work Act 2009*
- ❖ From 1 January, 2010 comply with Modern Awards (subject to State to Federal phasing in provisions which may mean they will not apply 'til 1 January, 2011)
- ❖ From 1 January, 2010 comply with the National Employment Standards
- ❖ From 1 July, 2010 may need to apply rates of pay under their applicable Modern Award (subject to State to Federal phasing in provisions which may mean they will not apply til 1 January, 2011)

If you are currently a respondent to the WA SACS Award (or similar) you may now be covered by the **Social, Community, Home Care and Disability Services Industry Award 2010** (Modern SACS Award) from 1 January, 2011. Rates of pay under this Award apply from 1 July, 2011 and are subject to the outcome of the ASU Pay Equity Case set to be heard by FWA later this year. As such the rates of pay currently prevailing under this Award are lower than they will be come 1 July next year.

What is the Bankstown Decision?

The distinction between whether or not a not-for-profit organisation is deemed to 'trade' is an important one.

The precedent case that has changed the landscape for not-for-profit's so considerably is the Federal Court of Australia decision in the matter of *Bankstown Handicapped Children's Centre Association Inc. v Hillman* [2010] FCAFC 11 (25 February 2010). This decision overturned the original full bench of the NSW Industrial Court in the matter of *Hillman v Bankstown Handicapped Children's Centre Association Inc.* [2008] NSWIRComm 64 (16 September 2008) and the *Aboriginal Legal Services v Lawrence (No.2)* [2008] WASCA254. Both decisions were held as authorities that providers of public services which were reliant on government funding were **not** regarded as having sufficient trading or financial activities to be deemed a constitutional corporation (as defined).

It was both of these cases that led most fully or majority government funded organisations to believe they were **not** constitutional corporations and as such would remain in the WA State IR system.

Most funding arrangements between not-for-profit organisations and the State and Federal governments are managed by service or funding agreements, or similar, whereby the organisation provides specified services in exchange for funds. All funding is conditional upon the provision of specified outcomes and subject to the submission of a tax invoice including GST (even if it is claimed back). Most funding or service agreements would normally set out the financial and accountability requirements which the organisation must meet and are subject to reporting (and or acquittal) requirements.

As such, the relationship between these organisations and the State and Federal governments are commercial contracts for services in return for payment. This is distinct from government departments providing a grant over which it has no control of how those funds are used or are subject to specified outcomes.

In the Bankstown Decision the Court found at paragraph 55 that "All these matters appear to us to point to the relationship between the Association and DOCS as having been a commercial one involving trade in services."

In view of the particular rationale applied by the magistrates in reaching their decision in this matter there is now a widely held view that most not-for-profit organisations that are fully or majority funded by State or Federal Governments will in fact be deemed to be trading corporations. This determination is subject to the nature of the organisations activities and note there is still uncertainty as to current case law being able to settle on a consistent application of the "activity test" in deciding such matters.

In short, while this is still a grey area this precedent case has turned previous case law on its head. Unless your organisation is specifically challenged on the matter via an unfair Dismissal claim or other workplace dispute and Fair Work Australia is called to rule you will never know for sure – that is unless, of course, the WA government refers their IR powers to the Commonwealth.

While the activities of each not-for-profit organisation must be examined on its own merits, the Bankstown Decision provides a useful guide for future reference. The decision has certainly made it clear that an organisation which is incorporated under the Associations Incorporation Act is not necessarily excluded from 'commercial trading' based on the fact the actual service is wholly or partly for welfare sector purposes.

What now?

Employer Assist strongly recommends Not-for-profit Employers who previously believed they were not constitutional corporations and did not need to comply with the *Fair Work Act 2009* reconsider their position in light of the Bankstown Decision.

Employer Assist can assist you to make this determination for yourself and in turn assist you to comply with the provisions of the *Fair Work Act 2009*, National Employment Standards and the applicable Modern Awards.

Our article '*Is your NFP organisation a Constitutional Corporation*' may assist if you are unsure. [Click here](#) to request a copy to be emailed to you.

Employer Assist also have a very '**Special Offer**' to assist NFP organisations to meet their employer obligations under the *Fair Work Act 2009*.

We will:

1. Review your existing Contracts of Employment, Letters of Offer, + Policy and Procedure documents for compliance with the *Fair Work Act 2009*, Modern Award/s and NES – and provide written compliance advice
2. Determine which Modern Award/s apply to your workplace
3. Advise which substantive changes will impact on your workplace including wage increases from 1 July, 2010 and 1 January, 2011 and 1 July, 2011

[Click here](#) to view our 'Special Offer'.

[Click here](#) to request more information or call us direct on **1300 153 154** for an obligation free chat.

NFPN Employer Assist are available at any time to answer any questions you may have about the new IR system – simply call us on our National toll free number **1300 153 154** or visit our website at www.indigofield.com.au for a complete list of our services and to send an on-line enquiry.

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