

Is Your Organisation a Constitutional Corporation?

Under the new “Work Choices” legislation, most Australian employers will become subject to federal regulation of their employment relations, even if they were previously covered by State awards, or no awards at all.

As a result of the reforms, the federal *Workplace Relations Act* will apply to virtually all persons or organisations who employ staff in Victoria, the Northern Territory or the ACT. But in the other States, whether an employer is a “federal system employer” will generally depend on whether it can be classed as a **constitutional corporation**.

What is a Constitutional Corporation?

A constitutional corporation is defined as a foreign corporation, or a trading or financial corporation formed within Australia.

So there are two questions that must be answered to determine whether an employer is a constitutional corporation:

- *Step 1:* Is it a corporation?
- *Step 2:* If it is, is it a foreign, trading or financial corporation?

Some organisations operate through a series of related bodies or entities. In each case, what matters for this purpose is the character of the particular entity that employs staff to perform work for the organisation.

If a trust has been established to engage in certain activities on behalf of someone else, it is usually the trustee who employs any staff. If so, the question becomes whether that trustee is or is not a constitutional corporation.

What is a Corporation?

A corporation for this purpose includes:

- a proprietary company (often indicated by “Pty Ltd” at the end of the organisation’s name);
- a not-for-profit association incorporated under State or Territory incorporated associations legislation (usually indicated by “Inc” at the end of the organisation’s name);
- a statutory authority incorporated under special legislation.

An individual person is **not** a corporation. Nor is a partnership between two or more persons.

Foreign, Trading and Financial Corporations

As the name suggests, a **foreign corporation** is any body that has been incorporated overseas.

For bodies incorporated within Australia to be a constitutional corporation, they must either be a trading or a financial corporation. A **financial corporation** is a corporation that engages in a significant number of financial activities. In practice though, almost every financial corporation would also be a trading corporation. So for an Australian entity, the key question is generally whether it can be regarded as a **trading corporation**.

What is a Trading Corporation?

Under the approach currently adopted by the courts, a trading corporation is any corporation that engages in **trading activities** to a significant extent.

It does not matter that the predominant *purpose* of the organisation may not be to engage in trade or to make a profit. It is enough that the body engages, to a sufficient degree, in trading activities as at the time the question arises.

Hence a not-for-profit body may be incorporated under State or Territory incorporated associations legislation, and still be regarded as a trading corporation.

Many not-for-profit bodies have been found to be trading corporations, including local councils, public universities, hospitals, benevolent or charitable organisations, and emergency services providers.

What are Trading Activities?

“Trading” for this purpose means any activity that involves some notion of **buying or selling** and that **generates revenue** — regardless of whether the activity is carried out at a profit.

Here are some examples of trading activities:

- providing services to clients or customers, in return for a fee or charge;
- providing services to members in return for a fee or subscription;
- selling goods (from a shop, market stall, etc);
- selling goods through telemarketing;
- presenting a performance, event or other public spectacle and charging for admission;
- hiring out or servicing equipment in return for a fee;

- selling food and drink, for example at a bar or canteen;
- selling merchandise and souvenirs;
- fundraising, through auctions, raffles, lotteries, sale of chocolates, etc;
- providing a car park in return for a fee;
- conducting social functions for which a charge is imposed on those who attend;
- deriving income from investments;
- renting out property, or provision of other forms of accommodation for a charge.

One major type of revenue that is *not* regarded as resulting from or involving a trading activity is the receipt of funding (whether from government or from a private source) for the purpose of providing public services. This is so even if the funding is provided under some form of “contract”.

But a body that is funded to provide services to others may still be a trading corporation if it **imposes a charge** on its clients or customers for the services it provides, and if that raises a significant amount of revenue — even though the charge may not cover anything like the full cost of providing the services.

And even if no charge is imposed in relation to its “core” functions, a body in this situation may still be a trading corporation if it engages in other trading activities to a significant degree: for example, fundraising, earning interest on investments, etc.

Applying the Trading Activities Test

To determine whether your organisation is a trading corporation, look through the list of trading activities set out above and consider how many of them apply to the organisation. There may also be other activities that you would consider to involve trading, even if they do not appear in the list.

Then ask the following questions:

- How important are those trading activities in the overall scheme of what the organisation does?
- What percentage of the organisation’s total revenue is derived from those trading activities?

Unfortunately there is no bright line or magic figure that can tell you whether your organisation’s trading activities are sufficiently “significant” as to make it a trading corporation. It is all a matter of degree — and different courts may have different views as to the threshold.

However if more than 20% of annual revenue comes from trading activities, it would be reasonable to assume that the organisation is a trading corporation, even if those trading activities would not be regarded as central or “core” to what the organisation does.

Where less than 20% of annual revenue comes from trading activities, they *may* still be regarded as “significant”. Figures of as little as 5% have been regarded as sufficient in some cases, in relation to a large organisation where the amounts raised were sizeable in dollar terms.

If you are in doubt, it would usually be sensible to seek legal advice. This cannot guarantee you a “correct” answer, but would at least give you a firmer basis on which to decide whether or not you are a “federal system employer” for the purpose of the *Workplace Relations Act*.