
Not-for-Profit Organisations: Modern Awards and the Retention of State Awards in Western Australia

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Abstract

This paper reviews the law applying to not-for-profit organisations in relation to modern awards and State awards in Western Australia. It examines the meaning of 'trading corporations' in relation to not-for-profit organisations. It examines the legal position applying to not-for-profit organisations before both Work Choices and the *Fair Work Act 2009* (Cth) as well as the impact of modern awards upon those organisations covered under the *Fair Work Act 2009* (Cth). The significance of State awards to those organisations covered under the *Industrial Relations Act 1979* (WA) is also canvassed.

Introduction

The key provisions of the *Fair Work Act 2009* (Cth) came into force in 2010.¹ This article examines the application of modern awards on not-for-profit organisations in Western Australia and the legal position of those organisations not covered by that statute in relation to Western Australian State awards. By way of background, this paper commences by reviewing the legal position in relation to some matters.

In this article, the phrase 'not-for-profit organisation' refers to an organisation which, unlike other profit originated commercial organisations, does not have the objective of making profits for its owners or investors. Should there be any profits, those profits are used for the altruistic purposes for which the organisation was set up. Typically this includes charities, trade organisations, sporting groups and those types of organisations which are able to be registered in Western Australia under the *Associations Incorporation Act 1987* (WA).²

A brief survey of websites provides diverse examples of not-for-profit organisations in Western Australia, such as a playgroup organisation,³ an organisation involved with dyslexia,⁴ organisations involved with riding for the disabled,⁵ organisations involved with disability and the arts,⁶ organisations promoting science,⁷ a club formed for the exchange of knowledge by women,⁸ a car club,⁹ and an angling club.¹⁰

Awards Prior to the *Fair Work Act 2009* (Cth)

The *Fair Work Act 2009* (Cth) builds upon the decision of the previous Howard federal government to use the corporations power contained in the *Australian Constitution* rather than rely on the use of the industrial

¹ Many of the provisions of the *Fair Work Act 2009* (Cth) became operative on 1 January 2010.

² See C Huntly, 'A Century of Incorporated Associations in Western Australia 1896-1996' (Working Paper, School of

Business Law, Curtin University of Technology, October 1996).

³ Playgroup WA (Inc).

⁴ Dyslexia-Speld Foundation (WA) Inc.

⁵ Riding for the Disabled Association Australia Ltd.

⁶ Disability in the Arts, Disadvantage in the Arts Australia (WA) Inc.

⁷ The Royal Society of Western Australia Incorporated.

⁸ Karrakatta Club Inc.

⁹ Buick Owners Club of Western Australia (Inc).

¹⁰ West Coast Angling Club (Inc).

relations power.¹¹ This policy decision has had a profound effect on some not-for-profit organisations.

Prior to the *Fair Work Act 2009* and *Work Choices*, which heavily utilise the corporations power, the previous federal legislation¹² relied predominantly upon on the industrial relations power.¹³ In a wide variety of constitutional decisions, there were restrictions which made it difficult to apply the federal legislation universally to employers throughout Australia. These included a restricted meaning of industry, a restricted meaning of industrial matters and the requirement for an interstate dispute¹⁴ to occur. These restrictions have been widely discussed in a large volume of academic work.¹⁵ A significant requirement for not-for-profit organisations under the pre-2005 legislation was that in order to be covered by an award under the federal legislation, a union representing employees had to be in dispute with the employer or an employer's association. Under that legislation, the tribunals handed down awards which were binding on the parties in dispute and upon the employees of any employers covered by the award. Due to constitutional constraints these awards did not then bind any employers other than those named in the federal awards.

Due to the residual powers left to the States in the *Australian Constitution*, those jurisdictions covered the industrial relations issues not covered by the federal system. In Western Australia, most employees not covered by the federal legislation were effectively covered by the *Industrial Relations Act 1979* (WA) and

its legislative predecessors. Thus, the employers and employees who were not in an industry for the purposes of the Commonwealth legislation, or those only involved in an intrastate dispute, or those who sought coverage by the State system were generally covered by the State systems. For unions, a significant feature that the Western Australian system could offer over the federal system was 'common rule awards'. By virtue of s 37(1) of the *Industrial Relations Act 1979* (WA), State awards were, subject to any expression otherwise in the award, to be read as applicable to all employees employed in any calling mentioned in the award, in the industry or industries to which the award applied. The award also applied to all of the employers of these employees, subject, of course, to any prevailing federal legislation. As previously mentioned, the coverage of a wide range of employers and employees resulted in them being known as common rule awards. In addition, the State laws offered more certainty in relation to unfair dismissal, redundancy and termination of employment matters.

As a result of this dual system of regulation, federal awards covered some not-for-profit organisations, where the unions had sought coverage by federal awards under the federal system. In most cases, those employers in the Western Australian not-for-profit sector who were not under federal awards, were covered by State awards by virtue of the common rule concept of State awards.¹⁶

Alongside that structure, there was a trend in the 1980s towards individual and collective agreements which were registered in various jurisdictions. This was a move away from the award system and was manifested most strongly in the *Workplace Agreements Act 1993* (WA) and the introduction of Australian Workplace Agreements in the *Workplace Relations Act 1996* (Cth).

¹¹ The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which made amendments to the *Workplace Relations Act 1996* (Cth), relied heavily upon the corporations power in s 51(20) of the *Australian Constitution*.

¹² *Conciliation and Arbitration Act 1904* (Cth), the *Industrial Relations Act 1988* (Cth) and before 2005, the *Workplace Relations Act 1996* (Cth).

¹³ Section 51(35) of the *Australian Constitution*. The corporations power (s 51(20)), the external affairs power (s 51(29)) and other relatively minor powers have been used for certain matters.

¹⁴ Strictly speaking these required an interstate quality.

¹⁵ For a recent discussion of these impediments see R Owens et al., *The Law of Work* (Oxford University Press, 2nd ed, 2011) 100-105.

¹⁶ Some examples of such awards were the *Aboriginal Communities and Organisations (WA) Award 2001*, the *Crisis Assistance, Supported Housing WA Award 2002*, and the *Social and Community Services – WA Award 2002*.

These significant changes were made after federal and State governments made a concerted effort to encourage parties to make either collective or individual agreements that had the legal effect of overriding any existing federal or State award. These agreements were required to be made without coercion and at both State and federal levels contained various means and degrees of protection to prevent exploitation.

Some employees fell into a category where they never sought to form a union and therefore never sought an award. The legal rights of these employees, most commonly found in the senior management of an organisation, were mainly covered by their individual common law contracts, and as a result, the federal or state legislation canvassing federal or state awards or registered agreements was usually not applicable to these types of employees.

Summary of the Situation before the *Fair Work Act 2009* (Cth)

Before the implementation of the *Fair Work Act 2009* (Cth) there were a variety of legal instruments that could apply to not-for-profit organisations in relation to the terms and conditions under which they employed workers. These instruments can be summarised below:

- Common law contracts only.
- Federal awards. These awards covered certain named categories of employees to whom the award applied.
- Collective agreements at an enterprise level. The agreement determined certain categories of employees covered by that agreement. These were typically described as federal enterprise bargaining agreements ('EBAs').
- Federal individual agreements with certain individual employees. These were commonly known as Australian workplace agreements ('AWAs').
- State awards that covered either the employer specifically or employers in the industry as a whole. These State awards covered certain categories of employees named in the award.¹⁷
- State industrial agreements that covered certain categories of employees. Also typically described as State EBAs.¹⁸
- State individual agreements with certain individual employees.¹⁹

Work Choices

Much has been written about the Howard government's introduction of Work Choices amendments to the *Workplace Relations Act 1996* (Cth).²⁰ It is not the purpose of this paper to revisit those changes, but to consider the significance that the legislation placed on the corporations power found in s 51(20) of the *Australian Constitution*. By a five to two majority, the High Court in *New South Wales v Commonwealth* (commonly referred to as the Work Choices Case)²¹ upheld the validity of using this constitutional power to regulate the employment conditions of employees covered by employers who were foreign, trading or financial corporations. It is this power in the *Constitution* that the *Fair Work Act 2009* (Cth) continues to use and which will be discussed here.

It should, however, be pointed out that those not-for-profit organisations that fell within the constitutional meaning of trading corporation²² at the time of the implementation of Work Choices, were subject to that legislation under a number of provisions. Under Work Choices legislation, constitutional corporations which

¹⁷ Section 33 and div 2A of the *Industrial Relations Act 1979* (WA) provides for State awards to be made by the WA Industrial Relations Commission.

¹⁸ Division 2B of the *Industrial Relations Act 1979* (WA) provides for industrial agreements.

¹⁹ Between 1993 and 2002, the *Workplace Agreements Act 1993* (WA) provided for individual agreements between an employer and an employee.

²⁰ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

²¹ (2006) 229 CLR 1.

²² The meaning of 'trading corporation' is discussed later from n 27 onwards.

had State awards or State agreements prior to Work Choices had their State award preserved through a 'notional agreement preserving a State Award' (NAPSA)²³ or their State agreement preserved as a 'preserved State Agreement' (PSA).²⁴ Those organisations therefore found themselves removed from the state jurisdiction and placed into the federal jurisdiction, albeit with terms and conditions with their employees that predominantly remained the same.

Fair Work Act 2009

This article will not look at every scenario in which a not-for-profit organisation will find itself under the *Fair Work Act 2009* (Cth), but it will examine the way in which the National Employment Standards and modern awards under that legislation apply to such an organisation. The latter part of the article will examine the application of State awards and minimum conditions to other not-for-profit organisations under Western Australian legislation.

The starting point for a not-for-profit organisation is to determine whether or not it falls under the *Fair Work Act 2009* (Cth). The phrase 'national system employer' or 'national system employee' is used throughout the *Act*. This is defined in s 13 of the *Fair Work Act 2009* (Cth), and for most not-for-profit organisations the entity described as a 'constitutional corporation' is the most likely to apply. As previously explained, this requires the organisation to be a foreign, trading or financial corporation as required by s 51(20) of the *Australian Constitution*.

Is a Not-for-profit Organisation a Corporation?

A not-for-profit organisation that is incorporated under the *Corporations Act 2001* (WA) will clearly be a corporation. In addition, a not-for-profit organisation incorporated under the *Associations Incorporation Act 1987* (WA) can also be covered under the meaning of

'constitutional corporation' as a result of the decision of *Hughes v Western Australian Cricket Association (Inc)*.²⁵

As an aside, it is noted that a recent Productivity Commission report made a case for uniform governance, compliance and registration procedures to apply to not-for-profit entities.²⁶ It remains to be seen whether this will result in a requirement that such organisations incorporate.

Is the Not-for-profit Organisation 'Trading'?

Once it is established that the not-for-profit organisation is a corporation, the next issue is whether the not-for-profit organisation is 'trading'. The courts apply an activities test rather than a purpose test. They therefore examine the current activities of the corporation to determine whether it is trading.²⁷ In applying this test, the courts look at any business activity of the corporation that involves buying and selling which produces revenue for the organisation.²⁸ The application of this test has seen the WA National Football League,²⁹ the Western Australian Cricket Association,³⁰ an emergency services provider,³¹ the University of Western Australia,³² the Royal Society for the Prevention of Cruelty to Animals in Victoria,³³ a church-run private school in Queensland³⁴ and the

²⁵ (1986) 19 FCR 10.

²⁶ Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, Productivity Commission, January 2010).

²⁷ *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 304.

²⁸ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (also known as *Adamson's case*).

²⁹ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

³⁰ *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

³¹ *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346.

³² *Quickenden v O'Connor* (2001) 109 FCR 242.

³³ *Orion Pet Products Pty Ltd v RSPCA (Vic) Inc* (2002) 120 FCR 191.

³⁴ *Educang Ltd v Queensland Industrial Relations Commission* (2006) 154 IR 436.

²³ Part 3 of sch 8 *Workplace Relations Act 1996* (Cth).

²⁴ Part 2 of sch 8 *Workplace Relations Act 1996* (Cth).

Australasian College of Dermatologists,³⁵ all held by various courts or tribunals to be involved in trading.

If the trading activities are merely peripheral to the organisation's other activities, the requirement of trading will not be satisfied. Nevertheless, if the trading activities are substantial or significant then the organisation may bear the characteristic of being a trading corporation. Each case will ultimately depend upon its own facts. As a result, some of the decisions from a variety of courts and tribunals appear to be a little unpredictable. A number of organisations, including the Aboriginal Legal Service of WA,³⁶ have been held not to be trading corporations, yet the Bankstown Handicapped Children's Centre Association in NSW³⁷ and the Umoona Community Council Inc³⁸ have been held to be trading corporations. In *E v Australian Red Cross Society*,³⁹ both the Australian Red Cross Society and the Royal Prince Alfred Hospital were held to generate enough revenue from sources other than government funding to qualify themselves as trading corporations.

The reasoning behind these decisions has been discussed elsewhere⁴⁰ but there remains uncertainty in this area, not least because the High Court has not provided any decision that clarifies the position of not-for-profit organisations and whether the activities test is indeed the correct test to apply.⁴¹ Until such a review, the prevailing view is that if there are substantial or

significant trading activities, the not-for-profit organisation will be held to be trading.⁴²

Employment Relationship

If a not-for-profit organisation satisfies the corporation test and the trading test, then it will be a constitutional corporation for the purposes of the *Fair Work Act 2009* (Cth). However, under the *Fair Work Act 2009* (Cth), there is another requirement that has to be satisfied before much of that Act applies; that there is an employer/employee relationship. The tests for determining whether such a relationship arises have been subject to many judicial decisions and commentary, including decisions of the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd*⁴³ in 1986 and *Hollis v Vabu Pty Ltd*⁴⁴ in 2001. That issue has been extensively considered elsewhere and will not be discussed in this paper.⁴⁵

Once that relationship is established, then the trading corporation employer and that employer's employees will find that many of the provisions of the *Fair Work Act 2009* (Cth) apply. That legislation provides for a number of measures relevant to the topic matter of this paper. The topics contained within the *Fair Work Act 2009* (Cth) which will be discussed below relate to the National Employment Standards,⁴⁶ Modern Awards⁴⁷ and very briefly, Enterprise Agreements.⁴⁸

National Employment Standards

The National Employment Standards (NES) apply to all the employees of a not-for-profit organisation covered by the *Fair Work Act 2009* (Cth). This will include all employees whether or not they are also covered by a modern award or an enterprise agreement. The

³⁵ *Shahid v Australasian College of Dermatologists* (2007) 72 IPR 555.

³⁶ *Aboriginal Services of WA Inc v Lawrence (No 2)* (2008) 37 WAR 450.

³⁷ *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483.

³⁸ *Pellow v Umoona Community Council Inc* (unreported, AIRC Print PR973365, 19 July 2006) AIRC 426.

³⁹ *E v Australian Red Cross Society* (1991) 27 FCR 310.

⁴⁰ See: M J Pittard and R B Naughton, *Australian Labour Law: Text, Cases & Commentary* (LexisNexis Butterworths, 5th ed, 2010) 659-662.

⁴¹ See the discussion of this point in B Creighton and A Stewart, *Labour Law* (Federation Press, 2010) 114.

⁴² Ibid 112-113.

⁴³ (1986) 160 CLR 16.

⁴⁴ (2001) 207 CLR 21.

⁴⁵ See eg C Sappideen et al., *Macken's Law of Employment* (Law Book Co, 6th ed, 2009) Chapter 2.

⁴⁶ Part 2-2 (ss 59-182).

⁴⁷ Part 2-3 (ss 182-168L).

⁴⁸ Part 2-4 (ss 169-257).

standards are listed in s 61(2) and cover the following topics:

- maximum hours of work;⁴⁹
- requests for flexible work for parents;⁵⁰
- parental leave;⁵¹
- annual leave;⁵²
- personal leave, carer's leave and compassionate leave;⁵³
- community service leave;⁵⁴
- long service leave;⁵⁵
- public holidays;⁵⁶
- notice of termination of employment and redundancy;⁵⁷ and
- a Fair Work Information Statement in the workplace.⁵⁸

An overall explanation of the NES can be found on the Fair Work Ombudsman website.⁵⁹ Modern awards and enterprise agreements must retain the NES. It seems that the NES alone will be most applicable to those employees who do not have an award or enterprise agreement, such as those employees subject to common law agreements. Part 2-2 of the *Fair Work Act 2009* (Cth) provides that common law employees can rely upon the National Employment Standards.

In practice it appears that this is significant to employees such as senior managers or possibly those professionals who would normally rely solely upon their contract of employment to determine their legal terms and conditions. Notably, under the *Miscellaneous*

Modern Awards 2010 the following employees are expressly exempt from that award: 'managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists'⁶⁰ and therefore provide a good indication of those employees who are award-free.

Modern Awards

In the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth), the Australian Industrial Relations Commission was required by an 'award modernisation request' to modernise the previous multi-employer awards.⁶¹ At the end of the modernisation process in late 2009, some 1500 awards were replaced by 122 modern awards. These modern awards tend to be less complex and much clearer than the awards that they replaced. They are generally written to apply to industries but some are occupational in character. These modern awards normally incorporate the NES requirements.

Some of the not-for-profit organisations already in existence may now may find themselves being covered by a modern award, provided the earlier criteria considered in this paper are satisfied. Not all of these not-for-profit organisations and their applicable modern awards can be canvassed here. However, an example of a modern award that applies to a significant number of not-for-profit organisations is the *Social, Community, Home Care and Disability Services Industry Award 2010*. It covers the crisis assistance and supported housing sector;⁶² the family day care scheme sector;⁶³

⁴⁹ Part 2-2, div 3 (ss 62-64).

⁵⁰ Part 2-2, div 4 (ss 65-66).

⁵¹ Part 2-2, div 5 (ss 67-85).

⁵² Part 2-2, div 6 (ss 86-94).

⁵³ Part 2-2, div 7 (ss 95-107).

⁵⁴ Part 2-2, div 8 (ss 108-112).

⁵⁵ Part 2-2, div 9 (ss 113-113A). These provisions on long service leave are unlikely to apply, as section 113 preserves any State laws in Western Australia on long service leave.

⁵⁶ Part 2-2, div 10 (ss 114-116).

⁵⁷ Part 2-2, div 11 (ss 117-123).

⁵⁸ Part 2-2, div 12 (ss 124-125).

⁵⁹ <http://www.fairwork.gov.au/employment/national-employment-standards/pages/default.aspx>.

⁶⁰ Clause 4.2 of the *Miscellaneous Modern Awards 2010*.

⁶¹ Part 10A.

⁶² In the award this means the provision of crisis assistance and supported housing services.

⁶³ In the award this means the operation of a family day care scheme for the provision of family day care services.

the home care sector;⁶⁴ and the social and community services sector.⁶⁵

Not-for-profit organisations that provide employment for those people with disabilities who generally require support to remain in paid employment are covered by another modern award, the *Supported Employment Services Award 2010*. That award provides for exceptions in its cl 4 dealing with coverage.⁶⁶

In Western Australia, licenced clubs which are established and operate on a not-for-profit basis for the benefit of members and the community have their own award. The *Registered and Licensed Clubs Award 2010* is a modern award covering employers who employ employees in those clubs, provided the constitutional corporation criterion is satisfied.⁶⁷ The award contains some exemptions including those employers covered by the *Racing Clubs Event Award 2010* and a variety of other awards.⁶⁸

Those employers which are not-for-profit corporations and which were subject to multi-employer awards but

⁶⁴ In the award this means the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence.

⁶⁵ In the award this means the means the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services, including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting, including respite centre and day services.

⁶⁶ Employers under an enterprise award are currently not covered by this modern award (eg *Cooma Challenge Ltd Business Services (State) Award*).

⁶⁷ Schedule A to the *Club Workers' Award 1968 (WA)* gives an indication of some of the clubs in Western Australia that may be covered by this modern award: Kalamunda Club (Inc); Bellevue Returned Serviceman's Club (Inc); Gosnells Bowling and Recreation Club (Inc); Air Force Association Country Club (Inc); Royal Perth Golf Club (Inc); Royal Perth Yacht Club of W.A. (Inc); Fremantle Club (Inc); East Fremantle Football Club (Inc); Commercial Club; Collie Club (Inc); Pemberton Country Club (Inc); Emu Point Progress Association Sporting Club (Inc); Northam Workers Club; Moora Club (Inc); Geraldton Yacht Club (Inc); Merredin Bowling and Tennis Club (Inc); Kalgoorlie Ex-Serviceman's Memorial Club (Inc); Ord River Sports Club (Inc).

⁶⁸ See cl 4 of the *Registered and Licensed Clubs Award 2010*.

do not fall under the *Social, Community, Home Care and Disability Services Industry Award 2010*, the *Registered and Licensed Clubs Award 2010* or the *Supported Employment Services Award 2010*, need to identify which of the remaining 119 modern awards apply to them. It should be pointed out that the *Miscellaneous Modern Award 2010* appears to apply and bind those employers and employees who had multi-employer agreements before but for whom none of the modern awards apply. However, as previously mentioned, the award appears to exclude employees such as salaried and professional staff who were not previously covered by an award.⁶⁹

Single Employer Awards and NAPSAs⁷⁰

Those awards that only applied to one employer and the NAPSAs that remained as a result of the transition provisions under Work Choices were not subject to this modern award process. Creighton and Stewart observe that there are over 970 such federal awards and 650 NAPSAs.⁷¹ There is provision in the *Fair Work Act 2009* (Cth) for an application to be made to the Full Bench of Fair Work Australia to replace them with a 'modern enterprise award',⁷² but to date this process has met with little success.⁷³ If no application is made before 1 January 2014, or they expire over time, these single employer awards and NAPSAs will automatically terminate and the parties will default to the appropriate modern award.⁷⁴

Enterprise Agreements

A discussion of modern awards would not be complete without briefly referring to enterprise agreements. The *Fair Work Act 2009* (Cth) allows constitutional corporations to make enterprise agreements with their employees.⁷⁵ The main advantage to employers is that

⁶⁹ See above n 16.

⁷⁰ See above n 23.

⁷¹ Creighton and Stewart, above n 41, 264.

⁷² Part 2 of sch 6.

⁷³ See *Application by Molanka Pty Ltd* [2010] FWAFB 3906.

⁷⁴ Schedule 6, item 9(4).

⁷⁵ Section 172.

some of the administrative complexities of complying with a wide range of conditions within modern awards can be modified in such an agreement. A common motivator for employers is the capacity for removing allowances and penalty rates in these agreements. A motivator for employers and unions is the capacity to agree upon higher rates of pay than awards. These agreements must, however, follow a due process, comply with the NES⁷⁶ and satisfy a better off overall test.⁷⁷ Whether individual not-for-profit organisations are in a position to comply with these requirements frequently depends upon their financial capacity to satisfy the better off overall test.

Enforcement

The Fair Work Ombudsman has the authority to provide a point of contact for information and to educate workers and employers about work practices, rights and obligations, and also investigates complaints or suspected contraventions.⁷⁸ Significantly, the Fair Work Ombudsman is also able to litigate to enforce workplace laws under the *Fair Work Act 2009* (Cth).⁷⁹

An early media release from the Fair Work Ombudsman in November 2008 indicated that 33 Bendigo businesses were in breach of the former *Workplace Relations Act 1996* (Cth). Amongst them was the employee of a large not-for-profit organisation who had been underpaid \$16 600. This media release indicates that from an early stage, the Fair Work Ombudsman was prepared to apply the legislation to not-for-profit organisations.

Section 544 of the *Fair Work Act 2009* (Cth) places a six year limitation on commencing proceedings for any contravention. As indicated by the above mentioned media release, the Fair Work Ombudsman can, and is prepared to, enforce the previous legislation and awards and other workplace obligations against employers, in

the event of non-compliance by a not-for-profit organisation. There is no indication that it will not apply the new provisions of the *Fair Work Act 2009* (Cth) to not-for-profit organisations.

In 2011, the Fair Work Ombudsman indicated in a media release that an unnamed Perth-based not-for-profit organisation working with young people had reimbursed one of its managers for various mistakes, following intervention by the Fair Work Ombudsman.⁸⁰ In that case, underpaid annual leave, long service leave and redundancy entitlements were paid back and the organisation indicated that it had put in processes to ensure the mistake was not repeated. As a result of the payment being rectified, the Fair Work Ombudsman indicated that no further action would be taken.

Although the reports of the many prosecutions taken by the Fair Work Ombudsman in the Federal Court do not indicate any that are taken against not-for-profit organisations, the quantity of prosecutions being commenced suggest that it is likely to be only a matter of time before such a prosecution occurs.⁸¹ Certainly the media releases and the prosecutions reported on the Fair Work Ombudsman website indicate that the organisation is vigilant in following through with investigations and complaints.⁸²

Non-Constitutional Corporations

Any not-for-profit organisation that either has not incorporated, or does not satisfy the trading test, does not normally fall under the jurisdiction of the *Fair Work Act 2009* (Cth), at least with respect to the topics raised in this paper. Typically it will be sole traders, partnerships and those not-for-profit organisations that

⁷⁶ Section 186 (2)(c).

⁷⁷ Section 193.

⁷⁸ Section 682(1).

⁷⁹ Section 682(1)(d).

⁸⁰ Fair Work Ombudsman, 'Not-For Profit Group Back-pays Manager \$47,000' (Media Release, 8 April 2011).

⁸¹ It is noted that the Australian Industrial Relations Commission was not prepared to entertain an argument that it was not in the public interest for awards to cover not-for-profit organisations in *Media, Entertainment and Arts Alliance v WA Basketball Association Limited* (C No. 22100 of 1997) Dec 090/98 S Print P8411.

⁸² The willingness of the Fair Work Ombudsman to prosecute is identified in Creighton and Stewart, above n 41, 507.

do not meet the constitutional corporation tests discussed earlier in this paper. In Western Australia these non-constitutional corporations and their employees are covered by the *Minimum Conditions of Employment Act 1993* (WA) as well as the *Industrial Relations Act 1979* (WA).

Minimum Conditions of Employment Act 1993 (WA)

This *Act* provides for minimum conditions, many of which are the State's equivalent to the NES conditions. However there are some differences and the conditions clearly provide for a minimum wage, unlike the NES.⁸³ The minimum conditions include:

- hours of work (ss 9A-9B);
- minimum wages (ss 10-14);
- casual loading (s 11);
- method of payment of wages (ss 17A-17D);
- illness or injury or family care leave (ss 19-22);
- annual leave (ss 23-26);
- bereavement leave (ss 27-28);
- public holidays (ss 30-31); and
- parental leave (ss 32-39).

Most State awards will contain better entitlements than these conditions, but in the event that either the award does not satisfy these conditions, or the employee is not covered by an award or an industrial agreement, these conditions will apply. As with the NES, they are likely to apply to those professional or salaried staff who are award or industrial agreement-free, such as senior managers.⁸⁴

Industrial Relations Act 1979 (WA)

This *Act* provides for the making of State awards by the Western Australian Industrial Relations Commission. As previously explained, these awards can be common

rule awards and to the extent that they apply to the not-for-profit sector, they can apply to employers who are non-constitutional corporations and their employees. Some examples of current State awards that apply to non-constitutional corporation situations are the *Aboriginal Communities and Organisations (WA) Interim Award 2011*; the *Crisis Assistance, Supported Housing WA Interim Award 2011*; the *Social and Community Services – WA Interim Award 2011* and the *Club Workers' Award*.

Although these awards may list specific organisations that are bound by the award, the award nevertheless would apply to all employers in the industry, provided they are non-constitutional employers. Thus, for example, in the *Aboriginal Communities and Organisations (WA) Interim Award 2011*, although Appendix D lists specific employers bound by the award,⁸⁵ cl 4 of the award is written pursuant to s 37(1) of the *Act* to apply to all employers in that industry. Although it specifically exempts certain employees in cl 4(3), it would nevertheless, pursuant to cl 4(1), apply to any non-constitutional employer that is in the Aboriginal Communities and Organisations industry.

The awards mentioned above apply to the industries and the categories of employees mentioned in the award. However some awards are written to apply to occupations or callings. Thus, for example, the *Cleaners and Caretakers Award 1969* applies to any non-constitutional employers who engage employees as cleaners unless, of course, there is a clause in either that award or another award providing for its exclusion. For example, cl 1.3.1 of the *Cleaners and Caretakers Award 1969* specifically applies to 'churches, clubs, local government, societies and/or organisations and private industry employers'. Clause 7 names the parties to the Award as:

⁸³ However, the *Fair Work Act 2009* (Cth) provides in div 4 of pt 2-6 (ss 293-299) for a minimum wage order that applies to all award or agreement-free employees.

⁸⁴ See also above n 16.

⁸⁵ Eg Bloodwood Tree Association and the Onslow Women's Group Corporation.

1. The Anglican Church;
2. The Anzac Club;
3. Cottesloe Town Council;
4. The Freemasons;
5. Perth City Council;
6. The Presbyterian Church;
7. The Roman Catholic Administration;
8. The Trinity Congregational Church;
9. The Uniting Church in Australia (formerly Presbyterian Church);
10. The Wesley Church.

However, as indicated above, the award applies to other non-profit organisations that are non-constitutional corporations.⁸⁶ There a number of other State awards that are also applicable to occupations or callings. Employers in the State system should review all of their employees and their employment categories in order to determine which award, if any, applies to each employee.

The State *Industrial Relations Act 1979* (WA) also provides for employers to make either individual employer-employee agreements⁸⁷ or alternatively, industrial agreements with unions.⁸⁸ In practice, these provisions are likely to have a significant effect only in those situations where a union is prepared to make an industrial agreement with a non-constitutional not-for-profit employer. Unless it is a not-for-profit employer with a significant number of employees, this seems unlikely.

Conclusion

Following the implementation of the *Fair Work Act 2009* (Cth) in 2010, a not-for-profit organisation should review its organisation's status and consider whether it falls under the definition of 'constitutional corporation' or 'national system employer' found in the *Fair Work*

Act 2009 (Cth). If it falls within either of these definitions, then it needs to give consideration to the legal obligations it will have to its employees as a result of the NES and applicable modern awards. Those legal obligations need to be complied with because the Fair Work Ombudsman is currently vigilant in applying those legal requirements to employers.

If a not-for-profit organisation in Western Australia does not come under the meaning of 'constitutional corporation' in the *Fair Work Act 2009* (Cth), it should examine the Western Australian legislation and the State award system. The not-for-profit organisation should review its obligations to its employees flowing from any of the various State awards which may apply to it, after giving consideration to the common rule concept that applies to State awards. Employers in this non-constitutional corporation category also need to consider the minimum conditions found in the *Minimum Conditions of Employment Act 1993* (WA).

⁸⁶ For example, it would appear that this award would apply to the Aboriginal Legal Service of WA (see above n 36).

⁸⁷ Part VID.

⁸⁸ Section 41 and div 2B.