

FACT SHEET

Application of the *Fair Work Act 2009*



The *Fair Work Act 2009* (the “Act”) replaced the *Workplace Relations Act 1996* on 1 July 2009 as the main piece of employment legislation in the federal arena. From 1 January 2010 most private sector employers and employees in Queensland became subject to the national workplace relations system.

Prior to these dates the workplace relations system employers and employees were subject to was dependant on the employing entity’s status.

For example from the 27 March 2006 all incorporated employers, which were constitutional corporations, and their employees were covered by the federal workplace relations system. Whilst this was instituted by the ‘WorkChoices’ legislation, it has continued under the current federal workplace relations framework of Fair Work.

Employing entities that were classified as unincorporated prior to these dates were subject to the State workplace relations system.

The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* enabled States to refer their workplace relations powers to the Commonwealth to support a single national workplace relations system for employers and employees in the private sector. This consequently resulted in the Act being amended in late 2009 to include reference to referring States, of which Queensland was one.

Whilst an employing entity’s status will now not have an effect on the system of law an employer and employee will be subject to, it’s important for employers to be aware of the status for the purposes of certain terms and conditions of employment such as wage rates.

The remainder of this Fact Sheet will highlight which employer and employees are currently subject to the Act.

APPLICATION OF THE ACT

The Act will apply to national system employers and national system employees as defined below.

1. National System Employer

A national system employer is an employer who is:

- A Constitutional Corporation;
- The Commonwealth;
- A Commonwealth Authority;
- A person that is connected with constitutional trade or commerce in relation to the employment of: A flight crew officer; A maritime employee; or A waterside worker;
- A body corporate incorporated in a Territory; or
- A person who carries on an activity – whether of a commercial, governmental or other nature) in a Territory in relation to the employment connected to the activities carried on in the Territory.

Section 30D of the Act extends the meaning of a national system employer to include a ‘referring State’:

30D Extended meaning of national system employer

(1) *A national system employer includes:*

- (a) *any person in a referring State so far as the person employs, or usually employs, an individual; and*
- (b) *a holder of an office to whom subsection 30E(2) applies.*

(2) *This section does not limit the operation of section 14 (which defines a national system employer).*

Note: Section 30H may limit the extent to which this section extends the meaning of national system employer.

In summary, all employers within the private sector are subject to the federal workplace relations system.

2. National System Employees

An employee will be regarded as a national system employee if they are employed by a national system employer – provided they are not on a vocational placement.

DEFINITIONS

The following definitions are useful when having consideration to who is subject to the Act:

Constitutional Corporations

As highlighted on the previous page a national system employer includes a constitutional corporation. A constitutional corporation has been defined by the High Court as:

- Australian trading and financial corporations that engage in substantial trading or financial activities; or
- Foreign corporations.

1. Corporation

‘Corporations’ generally include any company established or operating under the *Corporations Act 2001* (Cth).

A corporation is –

- A proprietary company (typically ‘Pty Ltd’)
- A not for profit association incorporated under State or Territory incorporated association legislation
- An incorporated statutory authority.

In addition to being a corporation, it must engage in substantial trading or financial activities.

2. Trading or Financial Activities

Activities of trading and financial corporations involve buying and selling activities that generate income (regardless of whether the income is generated for profit or otherwise). Some examples of trading activities are as follows:

- Providing services to customers in return for fee or a charge
- Presenting a performance or event and charging for admission
- Selling food and drink, for example, at a bar or canteen
- Selling merchandise and souvenirs.

The importance of the above activities in the overall scheme of the organisation, and the percentage of the total revenue which is derived from those activities must be considered in order to determine whether an organisation’s trading activities are sufficiently ‘significant’ as to make it a trading corporation. A corporation that engages in significant trading is a Constitutional Corporation for the purposes of the Act, the Act will be the employment reference point.

Referring State

As highlighted on the previous page a national system employer includes a referring State. In 2009 the Commonwealth and the Queensland Government passed legislation to enable the Queensland Government to refer its private sector industrial relations powers to the Commonwealth. This consequently resulted in the Act applying to unincorporated employers (ie employers who are not incorporated as per the definition above) and their employees.

Section 30B of the Act defines ‘referring State’ as:

30B Meaning of referring State

- (1) *A State is a referring State if the Parliament of the State has referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:*
 - (a) *if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and*
 - (b) *if and to the extent that the matters are included in the legislative powers of the Parliament of the State. This subsection has effect subject to subsection (6).*
- (2) *A State is a referring State even if:*

- (a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or
- (b) the State's referral law provides that particular matters relating to State public sector employees, or State public sector employers, of the State are not included in any or all of those matters.

Reference covering referred provisions

- (3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by amending this Act, as originally enacted, to include the referred provisions.

Reference covering amendments

- (4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

- (5) This subsection covers making laws with respect to the transition from the regime provided for by:
- (a) the Workplace Relations Act 1996 ; or
 - (b) a law of a State relating to workplace relations;
- to the regime provided for by this Act.

Effect of termination of reference

- (6) Despite anything to the contrary in a referral law of a State, a State ceases to be a referring State if any or all of the following occurs:
- (a) the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (3) terminates;
 - (b) the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (4) terminates;
 - (c) the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (5) terminates.

Despite the Act applying to unincorporated employers from 1 January 2010, Modern Awards only commenced applying from 1 February 2011 for such employers.

Refer: QHA's Award Application Fact Sheet

INTERACTION WITH STATE LEGISLATION

The *Fair Work Act 2009* will apply to the exclusion of all State and Territory industrial laws so far as they would otherwise apply to national system employers and national system employers. In Queensland that includes the *Industrial Relations Act 1996* (Qld) for long service leave provisions.

However it is important to note that the Act does not exclude the *Anti-Discrimination Act 1991* (Qld) and discrimination matters which arise and be dealt with through State legislation.

Further the exclusion of State or Territory industrial laws does not apply to any 'non-excluded matters'. Under the Act 'non-excluded matters' includes superannuation, workers' compensation, occupational health and safety, matters relating to outworkers, child labour, training arrangements, long service leave, leave for victims of crime, public holidays, jury or emergency services, business trading hours and workplace surveillance. Reference should be made to State or Territory legislation when referring to 'non-excluded matters'.

Further Assistance

If after reading this information, you have further queries about your individual situation, please contact the QHA's Employment Relations Department on 07 3221 6999 or er@gha.org.au.

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