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RE: WorkChoices Legislation and MTS apprentices

Dear MTS Trainer.

The new WorkChoices legislation has raised questions as to where MTS apprentices fit. Are they covered by the new federal laws and must therefore be paid a minimum \$25,000 wage, possibly reducing the number of apprentices a ministry can employ, or are they outside these laws because they work for a church or student ministry?

Unfortunately there is not a straight forward answer to this question for all MTS apprentices. The answer is that 'it depends' on several things.

After meeting with Steven Lucas who is the legal officer in the Anglican Diocese of Sydney, I have put together some information that should help you work out where your ministry organisation stands on this issue.

In a nutshell the all important issue is what sort of organisation is employing the ministry apprentice and not what sort of work the apprentice does or whether they are trainees or involved in Christian ministry or whether their employment contract uses or omits certain phrases. Basically an apprentice falls under the WorkChoices legislation if they are employed by a "Constitutional Corporation".

If the apprentice falls outside the federal legislation their employment is governed by state laws – NSW have no minimum wage except if employees are covered by NSW state awards, which ministry apprentices are not (Note: the wage must still be 'fair'). TAS, SA, WA and QLD have minimum wages ranging from \$484.40 to \$504.40 per week. VIC and ACT fall under the federal laws in any case. Note: MTS recommended apprentice wage for 2007 is \$ 18,558 which is less than some gazetted minimum state wages, you will obviously need to follow the appropriate laws. Apprentices will also need to be paid superannuation and covered by Workcover.

In general employees of Anglican Parishes in Sydney are not covered by WorkChoices and so if your apprentice falls in that category the new laws do not affect their situation. However for apprentices employed by denominations with different legal structures than the Anglican situation, and for apprentices employed by para-church or other Christian ministry organisations, even where those organisations are non-profit, the situations may not be straight forward.

So now the question is what type of organisations are deemed to be “Constitutional Corporations”? For our purposes they are “Trading Corporations” and “Financial Corporations”.

To allow you to answer the question, I have included the relevant excerpts (to MTS apprentice employers) from a document produced by Steven Lucas on WorkChoices. There are also some case histories of non-profit organizations that are still covered by WorkChoices. (I acknowledge and thank Steven for allowing MTS to use his material).

So now it is over to you – the next steps in solving this puzzle is to analyse your organisation to see if it fulfills the criteria of being a trading or financial corporation and so falls under WorkChoices or not. If this is not clear I urge you to get legal counsel.

Please contact me if you wish to discuss these matters.

Sincerely

Hans Norved
Operations Manager

Annexure - examples of trading corporation and financial corporation cases in the non-profit sector

Public universities

In *Quickenden's Case*¹ the University of Western Australia was found to be both a trading corporation and a financial corporation.

The Federal Court had regard to the following trading activities of the University –

- Activities in connection with the Festival of Perth.
- Sale of publications and services.
- Sale of computing equipment and services.
- Fees and charges to overseas university students.
- Accommodation fees.
- Parking fees.
- Sale, development and leasing of land.
- (On one view) income derived through the Higher Education Contribution Scheme.

The Court found that the University was a trading corporation notwithstanding that it found the principle activities of the University to be teaching and research. The trading activities of the University were found to have amounted to 18% (or on one view 28%) of its operating revenue in the relevant year. This was regarded as being substantial.

The Court found that there is no absolute measure of the level of trading that is substantial. One of the judges observed – “...substantiality in this context, when measured in dollars, does not mean a large absolute figure. I think that it is a relative measure, that is compared to the total income generated by the corporation. It is not necessary to decide the percentage point below which an amount becomes insubstantial.”

The University was also found to be a financial corporation on the basis of its investment in loan transactions and substantial sums on the short-term money market. Significant administrative services were devoted to these activities.

Australian Red Cross Society

In the *Australian Red Cross Society Case*², the Federal Court found that the Red Cross was a trading corporation.

The Court found that in supplying blood and blood products to hospitals the Red Cross was acting gratuitously and that it was not an act of trading or commerce. The Court noted that the Red Cross received substantial payments from the government to support its blood transfusion services but regarded the blood transfusion activities to be a public welfare activity and not a trading activity.

¹ *Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission and Others* [2001] FCA 303

² *E v Australian Red Cross Society and Others* (1991) 27 FCR 319

However the Red Cross earned over \$2 million in the relevant year through the sale of goods and services – this comprised opportunity shops, street stalls, first aid courses and its Clarence Street Gift Shop. These trading activities were found to be substantial.

The Court noted that these trading activities were not motivated by the hope of private gain but purely to earn revenue to support the charitable activities of the Red Cross. However the Court held that the motives of the Red Cross in undertaking trading activities were not relevant.

Providers of medical services

The *Australian Red Cross Society Case* also involved consideration of the status of Prince Alfred Hospital.

The Court found that the predominant activity of the hospital was the provision of medical and surgical care to patients and that this objective was not antithetical to the notion of trade. The hospital received significant amounts of money in patient fees and government subsidies. It was found to be a trading corporation.

Providers of emergency Services

In the *Metropolitan Fire and Emergency Services Board Case*³ it was determined that 5.11% (or approximately \$8 million) of the Board's revenue was derived from the installation and servicing of fire equipment. The Court found that the Board's trading activities in this regard were sufficient to characterise it as a trading corporation.

In the main the Board's revenue came from government funding, municipal councils, insurance companies, community levies and cost recovery.

State Superannuation Board – financial corporation case

In the *State Superannuation Board of Victoria Case*⁴ the majority of the High Court applied the same activities test as had been applied for trading corporations. The High Court determined that the superannuation board's financial activities were a substantial and not insignificant part of its business.

The superannuation board was found to engage in lending to government, commercial entities and contributing members. Surplus funds were invested on the short-term money market and in real property.

The High Court noted that the superannuation board's financial activities were all carried on for the end purpose of providing superannuation benefits to contributors but this was held not to be an obstacle to the conclusion that the board was a financial corporation.

³ *United Firefighters' Union of Australia and Ors v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346

⁴ *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282

Excerpts from Steve Lucas' letter to diocesan organisations

The Application of the WorkChoices legislation to diocesan schools and organisations

As you are no doubt aware WorkChoices makes substantial changes to the existing Workplace Relations Act.

We want to alert you to the fact that not all organisations are covered by the WorkChoices legislation. For this purpose we set out below some information to enable you to consider whether or not you are covered by the legislation and whether you require further assistance in making this decision.

Secondly, we want to alert you to the key changes made by the WorkChoices legislation.

Are you covered by the WorkChoices legislation?

WorkChoices applies to "Constitutional Corporations". For the present purposes, a Constitutional Corporation is either a trading corporation or a financial corporation as those terms are used in the Australian Constitution.

In order to determine whether you are a trading or financial corporation and therefore covered by WorkChoices, it is necessary to consider how the Courts understand these terms.

Are you a corporation?

The first thing you will need to determine is whether you are a corporation. A corporation is an organisation which has a legal personality separate to the individual members of the organisation.

The most common type of corporation is a company. However corporations also include diocesan organisations and schools which have been incorporated under the Anglican Church of Australia (Bodies Corporate) Act 1938.

If you are not a corporation your workplace arrangements will continue to be governed by NSW Industrial Relations legislation and other miscellaneous State legislation and industrial awards. Even if you are a corporation, your workplace arrangements will still be governed by NSW legislation and awards unless you are a "trading corporation" or a "financial corporation".

Are you a trading corporation?

Over the years the Courts have taken different approaches in determining when an organisation will be a trading corporation. However, the current understanding of the term "trading corporation" appears to be as follows –

1. The fact that a corporation trades does not of itself make it a “trading corporation”.
2. A corporation will be a trading corporation if it undertakes trading activities which are “substantial” or “a significant proportion of its overall activities”. Trading must not be just a peripheral or trivial activity of the corporation. The question is one of fact and degree.
3. Trading in this context is not limited to buying and selling. It extends to any business activity carried on with the view to earning revenue and includes trade in services. Importantly, the activity of trading need not necessarily involve profit or the intention to make a profit.
4. However trade probably does not include the gratuitous provision of public welfare services the costs of which are substantially reimbursed by government.
5. A corporation whose rules prohibit trading cannot be a trading corporation.

Are you a financial corporation?

The Courts have approached the question of whether an organisation is a financial corporation in an analogous way to deciding whether an organisation is a trading corporation. Accordingly, the following rules have emerged as the basis for deciding whether a corporation will be a financial corporation –

1. The fact that a corporation engages in financial activities does not of itself make it a “financial corporation”.
2. A corporation will be a financial corporation if it undertakes financial activities which are “substantial” or “a significant proportion of its overall activities”. Financial activities must not be just a peripheral or trivial activity of the corporation. Again, the question is one of fact and degree.
3. Financial activity most commonly involves the borrowing and lending of money. This includes making investments in loans such as deposits on the short term money market and in short term bills. Financial activity also extends to the use of skill and advice of persons with expertise in matters of finance to form financial judgments on investment decisions.
4. A corporation whose rules prohibit it from undertaking financial activity cannot be a financial corporation.
5. It is possible for a corporation to be both a financial corporation and a trading corporation.

Some examples of trading and financial corporations

In order to see how this understanding has worked in practice, we set out in the annexure some examples of not-for-profit organisations which have been found to be trading corporations and financial corporations.

Key changes made by the WorkChoices legislation

If you are a trading corporation or financial corporation the effect of WorkChoices on your operations will be different depending on whether you are presently covered by state or federal awards or agreements.

The key changes outlined in the WorkChoices legislation are as follows –

- A move towards a single national system of industrial relations.
- A reduction in the power of the Australian Industrial Relations Commission and the creation of the Australian Fair Pay Commission.
- The introduction of the Fair Pay and Conditions Standards as minimum safety net standards.
- Limitations on the termination of employment laws and the abolition of “unfair dismissal” laws for businesses with less than 100 employees.
- Increased prominence given to individual workplace agreements.
- Further restrictions on industrial action.

Steve Lucas
Legal Officer