

How do I know which industrial relations system covers my organisation?

The federal industrial relations laws, particularly the *Fair Work Act 2009*, apply primarily to constitutional corporations (see below). The WA state industrial relations laws, including the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993*, apply primarily to organisations that are not constitutional corporations (i.e. sole traders; partnerships; etc).

A flow chart that will assist you in determining which industrial relations laws cover your organisation is included with this fact sheet.

What is a constitutional corporation?

A 'constitutional corporation' is a business that is:

- a) incorporated; and
- b) undertakes trading activities that form a substantial or significant portion of its overall activities; OR
- c) is a foreign corporation; OR
- d) is a financial corporation.

If your organisation is incorporated, and has substantial trading activities or is a foreign or financial corporation, then it will be covered by the federal industrial relations system.

If your organisation is **not** incorporated (i.e. neither a corporate entity nor an incorporated association), or does **not** have significant or substantial trading activities, then it is **not** a constitutional corporation and will therefore be covered by the WA state industrial relations system rather than the federal system. However, there may be some transitional provisions under federal law which may impact on your organisation.

This fact sheet is intended to assist not-for-profit community sector organisations, who are unlikely to be foreign or financial corporations. Assuming your organisation is incorporated, the key question therefore is whether or not the organisation has substantial or significant trading activities.

What are "substantial or significant trading activities"?

Trading activities involve providing goods and/or services in exchange for benefit. An example of a trading activity is where an organisation provides training services to its members, and charges those members a fee for the service.

If your organisation carries on trading activities, these activities may or may not be sufficient for the organisation to be deemed a constitutional corporation. There is no prescribed proportion of revenue which must be derived from trading activities for your organisation to be deemed a constitutional corporation. Each organisation must be looked at on a case-by-case basis.

There have been a number of Court cases that have assessed whether or not particular organisations are constitutional corporations. Some not-for-profit organisations, such as the Red Cross and Salvation Army, have been found to be constitutional corporations. Some not-for-profit organisations have been found not to be constitutional corporations, such as the Aboriginal Legal Service.

Assessing whether an organisation's trading activities are significant enough for it to be deemed a constitutional corporation is a matter of "fact and degree". If your organisation does not engage in trading activities, or engages in trading activities that are incidental to its primary activities and do not form a significant portion of its revenue, then you may not be a constitutional corporation.

We receive funding from Government agencies to provide services to clients. Is that trading?

Unfortunately this is not a question with an easy answer. It will depend not only on the nature of the contractual relationship between your organisation and the Government agencies but also whether, in addition, your organisation has substantial trading activities.

What if my organisation engages in trading activities this month, but not next month? Does that mean we might be a constitutional corporation one month and not a constitutional corporation the next month?

Whether your organisation is substantially engaged in trading activities is not a month-by-month proposition. Lack of regularity of trading activities likely points to trade **not** being a substantial part of the business.

Why does it matter if I'm a constitutional corporation?

Other than for Western Australia, all other Australian states have referred their industrial relations powers to the Commonwealth Government. This means that in other states, the question of whether a business is or is not a constitutional corporation will no longer be important to determine industrial relations jurisdiction.

The WA Government has indicated that it will not refer its industrial relations powers to the Commonwealth. As such, the determination of whether your organisation is a constitutional corporation is crucial to ensure that you are complying with the law and that you are correctly paying terms and conditions of employment to your employees. It will also dictate in which jurisdiction a disgruntled ex-employee can bring an unfair dismissal or similar type claim.

What should I do to clarify whether or not my organisation is a constitutional corporation?

This fact sheet does not provide advice. It is but a guide. However, advice is available from Employer Assist. If your organisation is a member of WACOSS then you have access to discounted advice from Employer Assist.

You may also wish to seek legal advice. Every organisation's situation is different, and this is a complex area. Unfortunately, there is no "one size fits all" answer as to which organisations are or are not constitutional corporations.

I think my organisation is a constitutional corporation.

If your organisation is a constitutional corporation then it will be covered by the federal industrial relations system, underpinned by the *Fair Work Act 2009*. The federal industrial relations system includes a new set of minimum conditions, called the National Employment Standards, and a number of Modern Awards.

A fact sheet from ACOSS regarding the new federal industrial relations system is attached to this fact sheet. Further information regarding the federal industrial relations system is available from Employer Assist or the Fair Work Infoline on 13 13 94.

I think my organisation is not a constitutional corporation.

If your organisation is not a constitutional corporation, then it may still be covered in the federal industrial relations system if it is a named respondent to a federal industrial instrument such as an award. For example, if your organisation is named a respondent to the *Social and Community Services (Western Australia) Award 2002* (the SACS award) then your organisation may still be covered by that federal industrial relations system (by virtue of transitional provisions under the federal law) until 27 March 2011.

There may nonetheless also be a requirement to comply with entitlements under the National Employment Standards (which took effect 1/1/2010) to the extent of any detriment to an employee. Thereafter, in WA regulation of industrial relations will move to the state industrial relations system.

If your organisation is not a constitutional corporation, and is not named a respondent to federal industrial instrument like the SACS award, it is likely that it will be covered in WA by the state industrial relations system, underpinned by the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993*.

For more information regarding the WA state industrial relations system, please refer to <http://www.commerce.wa.gov.au/LabourRelations/> or call Wageline on 1300 655 266.

Is your organisation a **constitutional corporation**?

YES

Are your employees **covered by a registered agreement or agreements**?

This might be a collective agreement, Australian Workplace Agreement, Individual Transitional Employment Agreement or other registered agreement(s).

YES

Your organisation is in the **federal industrial relations system**. The Fair Work Act 2009 applies to you, including the National Employment Standards and Modern Awards.

Although your employees will continue to be covered by the registered agreement, you still need to be aware of the changes in the new legislation.

NO

Is your organisation in the **crisis assistance and supported housing, social and community services, home care, family day care or disability services sectors**?

These sectors are defined in the modern award.

YES

Your organisation is in the **federal industrial relations system**. The Fair Work Act 2009 applies to you, including the National Employment Standards and the Modern Award.

It is likely that your employees will be covered by the **Social, Community, Home Care and Disability Services Industry Award 2010**, which is a new 'modern award', from 1 January 2010.

NO

Is your organisation a **named respondent to a pre-27 March 2006 federal industrial instrument**, such as the Social and Community Services Award 2002?

This means that the name and address of your organisation is listed under the respondents to the award. If you follow the SACS award as a guide, but are not a respondent to the award, choose 'no'.

YES

Your organisation is in the **federal industrial relations system until 27 March 2011**, at which point it will move to the WA State industrial relations system. The Fair Work Act 2009 applies to you, including the National Employment Standards.

Your employees will **continue to be covered by the existing federal industrial instrument**, for example the Social and Community Services Award 2002.

NO

Your organisation is in the **State industrial relations system**. Most aspects of the Fair Work Act 2009 do not apply to your organisation.

Disclaimer: This fact sheet has been developed by the Western Australian Council of Social Service to assist not for profit organisations in Western Australia This fact sheet is provided as a guide only and should not be intended to be legal advice