



Who is caught by the new federal IR laws?

There's been a lot of attention on the Howard Government's new Industrial Relations laws. By now most people are aware that they undermine workers' rights, make dismissal easier and the work of unions harder. But one area that remains murky is exactly who will be caught up by the new laws. **LINDA GALE** explains.

The IR laws, like all federal legislation, depend on the exercise of powers set out in the Constitution of the Commonwealth of Australia. On federation, the states reserved large areas of responsibility to themselves, and gave the new federal body a limited list of things it was responsible for. This list is embodied in the Constitution.

For the first 105 years, federal industrial laws have been largely based on 'the conciliation and arbitration power' – s 51(xxxv) of the Constitution gives the Commonwealth power to legislate for a system of conciliation and arbitration to prevent and settle interstate industrial disputes. Under this power, the Australian Industrial Relations Commission developed.

There are a few other Constitutional heads of power which also come into play—for example, the international affairs power has given us the International Labour Organisation treaties on freedom of association and the rights of workers with family responsibilities. The Commonwealth has unlimited powers in relation to Commonwealth Territories, including the NT and ACT. It has general powers in relation to coastal shipping, air transport and telecommunications. And it has powers which have been granted to it by states since federation—most significantly, in the 1990s the state of Victoria decided to hand its power over industrial relations to the Commonwealth.

So the Federal Parliament can legislate to cover industrial relations in Victoria and the territories. Its reach in relation to other states has been more limited, with state industrial relations systems filling the gap. But now, the Howard Government has built a new industrial relations regime on a different head of power altogether: the corporations power.

Section 51(xx) of the Constitution gives the

'the Howard Government has built a new industrial relations regime on ...the corporations power'

Federal Parliament power to make laws with respect to 'Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'. It is this power that the new IR law is based on.

As a result, the new IR law only applies to:

- Victoria, the Northern Territory and the ACT; and
- Workplaces in other states where the employer is a foreign, trading or financial corporation.

For AEU members outside Victoria and the Territories, the key concept to understand is 'trading corporation': the employer must both be an incorporated entity and engage in trading activities (although it can do other, non-trading things as well).

Generally, then, people employed directly by state departments (except in Victoria) are not caught by the new federal law, since their employer is not a trading corporation. Many other people, employed by charitable trusts, religious organisations, unincorporated businesses and clubs, and a variety of other entities which do not fit the categories listed in s 51(xx), will also fall outside the federal laws.

For TAFE employees outside Victoria, ACT and NT, the key questions are:

- Is the employer the TAFE Institute/System or the state or minister?
- If it is the TAFE Institute/System, is that a trading corporation?
- Can anything be done to ensure that the employer is NOT a trading corporation?

In NSW, the state government recently legislated to bring most public sector employees clearly back into direct employment by the state. This included TAFE employees. As a result, NSW TAFE teachers joined their colleagues in Queensland, Tasmania and South Australia as workers who should be able to retain industrial regulation through state industrial systems, and escape the clutches of the new federal laws.

The situation in Western Australia is more complicated, with employment devolved to TAFE institutes. The question of whether TAFE Institutes would be held by a court to be trading corporations has never been tested, but cases dealing with the status of universities lead many to conclude that the answer for TAFE would be 'yes'. This is why the public sector unions' campaign to convince the WA government to emulate NSW and bring public sector employees clearly into direct state employment, is a critical issue for TAFE members. Without a move by the WA government, TAFE workers (and the Institutes) will be stuck in the bizarre and unfair world of Howard's IR laws.

Smaller groups of AEU members will also be caught: some employees in disability services, some community education institutions, Australian Technical Colleges, and cross-sectoral universities. And of course all members face the risk of being catapulted into the federal system at any time as a result of privatisation, devolution of employment, and corporatisation of government services.

The line between those who are in and out of the federal system is at best blurred. It is liable to shift suddenly and without warning as a result of court decisions, often about quite different industries, which will further clarify just how much 'trading' a corporate entity has to do to be a trading corporation for the purposes of the Constitution.

For members in the territories and Victoria, unfortunately it is clear that the federal industrial system applies. For everyone else, it depends only on whether state governments are willing to take the simple steps necessary to protect their own employees. ♦