

# Workplace Relations – simplification for small business

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## Introduction

In 2016, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) held a national consultation with small businesses and family enterprises to hear the issues they need the ASBFEO to champion. Workplace relations issues were one of the primary issues raised, particularly the need to reduce the complexity of the system, and streamline the ability to recruit and remove staff for business needs. In 2017, the ASBFEO established a Policy Forum, with members from 27 industry associations, to examine various small business issues. The Forum confirmed the complexity in the Australian workplace relations system remains a key issue as it is stifling business confidence to employ.

Unlike larger businesses, small businesses do not have access to the expertise necessary to navigate the complexities of the *Fair Work Act 2009*, where there are very narrow margins for error. Yet, small businesses make up more than 99% of all Australian businesses (source: Budget 2017-18), contribute \$380 billion to the economy and employ more than 5.5 million people (source: Treasury). Of this 75% of employing small businesses employ one to four workers. The small business owner invariably handles all operational and legislative requirements, which include administration workplace relations obligations. They are not HR or legal experts and do not have HR departments, legal departments or finance departments. Put simply, the workplace relations system is too complex and time consuming for Australian businesses.

This paper presents practical solutions to reduce complexity through non-legislative approaches, to make the system more accessible to smaller businesses. In addition, a small number of legislative changes are proposed, which should have general support and would further improve the system.

## Simplifying Award Compliance for Smaller Enterprises

- The Fair Work Ombudsman (FWO) to further develop the *Small Business Showcase* to implement an online decision-making and pay calculation tool (possibly in collaboration with accounting software providers, similar to the single-touch payroll initiative by the ATO) that can be used for evidence of compliance:
  - identifies the correct awards for the small business so they don't have to figure it out
  - lists key provisions in plain language
  - what should be paid
  - a time and wages record
  - generates a pay slip and tax to be withheld.
- Where a breach occurs and a small business has utilised and complied with the directions from the FWO's online decision-making tool with records of time and wages or complied with advice provided by a FWO 'endorsed' organisation such as industry associations, the FWO to operate a 'safe harbour' where the small business must make good but there is no prosecution, penalty or fine.

## **Streamlining FWC Processes**

- Establish a 'triage' process to remove unfounded, out of time or otherwise excluded, under-evidenced or under-particularised or deficient claims before proceeding further, particularly in relation to General Protections applications involving dismissal before a certificate is issued under section 368 of the Fair Work Act.
- Elevate substantive over procedural matters for unfair dismissal.
- Implement an online dispute resolution tool as an early intervention to quickly resolve more straightforward termination disputes. Review appeal processes to remove barriers for small businesses to access justice by reducing costs, setting maximum timeframes for determinations and providing free access to legal expertise.

## **Ensuring FWC outcomes are predictable, transparent and proportional**

- At conciliation, enable the conciliator to determine the substance and validity of the reason for dismissal rather than technical or procedural breaches, where it is evident that the small business meant to comply.
- Lower the compensation cap, and reduce the cost and time of conciliation and settlement processes to discourage small businesses opting to pay 'go away money'.
- The ASBFEO to lead a review of the Small Business Fair Dismissal Code and checklist, and re-invigorate it to ensure that it is in line with what was intended and binding.
- Improve the predictability of decisions by publishing common disputes and determinations in plain language to provide a layperson's account and 'learnings' for employers and their representatives.

## **Improving Communication/Education to Small Business**

- The FWO to extend its dedicated employers support line beyond the standard business hours (investigate the ATO phone back service).
- The FWO to utilise the ATO small business newsroom email service to get targeted key messages to businesses.
- The FWC and FWO to work together to establish a dedicated, consistent, shared small business resource centre that is user-focussed and in plain language.
- The FWO to review the mechanism for providing definitive advice so small businesses can have certainty and can rely on when defending a dispute to the FWC.
- In conjunction with relevant industry associations, the FWO to implement an ongoing national communication and marketing campaign to raise awareness that they are here to help employers do the right thing, including the promotion of small business resources, the Small Business Fair Dismissal Code and dispel myths such as three strikes and you are out.

## **Small Business Focus**

- Establish an ongoing consultation mechanism with relevant small business representatives (an example is utilising the ATO Small Business Stewardship Group).
- Expand the efforts of the FWC and FWO to understand the needs of small business owners and help them to do the right thing to improve all aspects of a small business owner's interaction with the workplace relations system, on the basis of the following principles:
  - support honest small businesses to thrive
  - support the capacity of small businesses to generate jobs, particularly for young Australians

- tackle the behavior of those who do not do the right thing and gain unfair advantage.
- The FWC to establish a dedicated Small Business Division with the appropriate expertise and adequate resources to focus on the ongoing needs of small businesses.

### **Legislative Changes**

- Review and remove drafting inconsistencies where national employment standards and awards overlap, and address technical drafting problems.
- Simplify administration by inserting the option of using loaded rates into relevant awards (where there are a significant proportion of small businesses), recognising the majority of Australian businesses are micro or small businesses.
- Recognise and legally accept the common small business practice of paying a buffer above the minimum award wage on the assumption this will 'take care' of additional obligations (all up rates, and require the FWO to take additional payments into account in recovery and enforcement activities (effectively codification of the way FWO already operates).
- For small businesses, allow for a dignified end to employment when an employee is no longer a 'good fit' for the business. This would be equivalent to a payment under the National Employment Standards entitlement . An employee who is a 'bad fit' in a small workplace can be a huge problem for all staff members. Currently the only options are a manufactured redundancy or a performance based exit. Both options are bad for the business and the employee.
- Create a dedicated small businesses Enterprise Bargaining Agreement (EBA) that streamlines requirements from an EBA in place for bigger and more complex business in a given sector.
- Better balance the level of compensation relief that can be granted against a small business in dismissal cases, reducing the maximum compensation from six months to three month's pay.
- Have a differential liability for settlements that is proportionate for small business (maximum compensation limited to 13 rather than 26 week's pay), recognising the financial resources available to a small business.
- Failing this, add an express consideration of the unique circumstances and resources available to small businesses to the criteria the FWC uses to assess compensation.