

Coming to Grips with the New IR Regime

“A small business is an individual who cannot possibly manage a complex workplace relations system as well as OH&S, tax requirements, local ordinance, marketing, financial management and stock control, as well as earn income. They aren’t big business. They don’t have a pay team and a raft of advisers. They haven’t got the time to sit on the phone for hours waiting for an answer.” (Mr Peter Strong, National Independent Retailers Association, quoted in the AFR, 9th February 2010).

Is The Sky Falling?

It is now over three months since the last elements of the new industrial/workplace relations system, the network of over 130 ‘*Modern Awards*’, came into effect.

During the period leading up to 1st January, and since, the media has been focusing on horror stories, emphasising the allegedly negative impact of the Fair Work Act on small to medium sized businesses.

Two cases in particular stand out; the first relates to a school aged employee denied the opportunity to work as a casual for a “couple of hours” after school at a retail outlet in regional Victoria.

The second relates to a successful application for re-instatement by a paper mill worker in Albury, reported in the AFR on 26th February.

Based on the facts before it, going to the employee’s length of service, age, financial and personal circumstances, *Fair Work Australia* ordered their re-instatement despite the employee having failed to comply with lawful and reasonable directions relating to proper safe work practices.

It is worthwhile to look behind the facts as reported, to ascertain the degree of jeopardy faced by small business operators under the new laws governing workplaces.

In the first example, the student’s employer claimed that a longstanding practice of allowing the young man to work one to two hours after school had been threatened by the minimum engagement provisions of the appropriate *Modern Award’s* requirement for payment “as for three hours worked.”

As presented it appears a harsh outcome as both the student and retailer were perfectly happy with the previous arrangement.

However looking beyond the colour and movement of the media coverage, the following appear to have been conveniently overlooked by critics of the new system:

1. During proceedings leading up to the making of the *Modern Award* concerned, no individual employer or industry association raised an objection to the three hour minimum engagement provision;

2. There is no evidence that the relevant predecessor to the Modern Award facilitated juniors working an engagement as short as one hour;
3. Equally there is nothing to demonstrate that the employer had endeavoured to address the needs of the business, and or the wishes of the employee concerned, through utilising the *Enterprise Bargaining* or *Enterprise Flexibility* provisions of the *Fair Work Act 2009*;
4. The employer involved pleaded ignorance of the new award's contents, and yet the Retailer's Association had declined to seek federal government funding to "*explain the new rules*" to members.

In relation to the paper mill worker, the reporting focused on the uncertainty engendered by a system which took heed of issues clearly beyond the employer's influence, a very reasonable point.

The author of the report, whilst conceding, "*to be fair, the principles FWA applied in this case are not new. The Howard Government's Work Choices legislation had similar provisions. The difference is that under the coalition, small business was not subjected to these sorts of unfair dismissal rules.*"

Unfortunately, in my view, at no point in the article was there an attempt made to clarify the status of the employer, *Norske Skog Paper Mills (Australia) Ltd* as being a 'small business' for the purposes of the operation of either the current act or its predecessor.

Compliance Issues

During a presentation at a function in Brisbane on 23rd February, the *Fair Work Ombudsman*, Mr Nicholas Wilson, announced that between March 2006 and early February this year, his organisation had recovered over \$100 million of wages owed to employees. On the face of it this appears a staggering figure.

Mr Wilson went on to say that in his experience most employers attempted to "*do the right thing by employees*", however across the economy his organisation estimated that there are 40 billion '*compliance requirements*' per annum.

To assist workplaces to understand and implement the new regulatory regime, *Fair Work Australia* has put in place an impressive array of services, the newest being a 'Pay Check' section of their website aimed at providing basic calculations of entitlements under the Modern Award network. When fully commissioned, by mid-year all 130 Modern Awards will be available to assess time and wages queries.

In the meantime the FWA Helpline is receiving 5,000 calls per week, one third of which are from Small to Medium Enterprises.

Mr Wilson maintained that "*the compliance model implemented by FWA is multi-faceted, flexible and fair*" and that it depended upon "*business to be informed and self-sufficient.*"

Availability of Resources

For all the controversy surrounding the *Work Choices* regime, one thing that stood out was the amount of resources the former government allocated to both educational programs and service delivery by way of prompt processing of applications and addressing queries.

Unfortunately the same can't be said of *Fair Work Australia*. By way of example, at the time of writing, the number of EBA applications awaiting approval are numbered in the hundreds with many having been lodged over four to five months previously.

Industry Associations complain that their senior officers have had to wait on for hours at a time on the helpline to gain advice on technical aspects of the operation of the new Act. The government to date allocated \$12.9 million to industry bodies to conduct educative sessions, which isn't a huge sum given the estimated 1.8 million small businesses operating around the nation.

It is obvious that *Fair Work Australia* is under-resourced for the tasks allotted to it under the new legislation; further it lacks the right skills mix to achieve one of the stated goals of having "*business informed and self-sufficient*".

In the meantime we all can expect to be regaled with '*horror stories*' such as those referred to earlier, during this election year.

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