

Industrial Relations & the Law

What You Need to Know

May 2009

This White Paper is designed to assist small and medium sized business owners and operators understand their industrial relations-related legal obligations.

Disclaimer: This paper has been prepared using Queensland as an example for state based employers. If your company operates in another Australian State, please refer to the relevant State based legislation wherever we discuss Queensland law. Employers engaged in the Northern Territory, the Australian Capital Territory and Victoria are Federal Employers and do not need to locate their respective territory or state based industrial relations legislation.

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1. Introduction

Small and Medium Sized Enterprises and the national economy

The strength of the Australian economy relies on the continued success of small and medium sized enterprise (SMEs) like yours. Yet during hard economic times, such as those currently being experienced in Australia and around the world, it is often SMEs which are the first to feel the force of the downturn and close their doors. This creates a vicious cycle – the economy worsens, businesses close, unemployment rises and the economy worsens even further.

Given the importance of SMEs to our national economy, it is essential that SME owners and operators are equipped with the knowledge and skills to effectively - and profitably – run their businesses. One of the most significant costs to your business are your employees, and this White Paper has been written to assist you in understanding the legal obligations which apply to you in relation to your staff. By knowing what you need to do, you can more effectively manage your business and minimise expenditure, thereby helping to strengthen the bottom line of both your business and the Australian economy.

What would you do?

Consider the following scenarios and think about what you would do in each case:

1. You run a small firm supplying car parts to an international car manufacturer. Times are tough but you have just managed to secure a new contract to supply 10 000 units of a particular part within 7 days. On the first day of production, your employees advise they will not start work unless you provide them with a pay rise which, they say, they have earned due to considerable overtime performed in the previous month. Manufacturing the parts on order must start immediately. What will you do?
2. You own a medium sized warehouse and have always enjoyed good relations with your 45 permanent, full-time employees. You were very sad to learn that one of your employees recently had a car accident outside of work and must now use a wheelchair to get around. Quite unexpectedly, the employee calls you to advise he

is ready to come back to work, but to do so he will require a ramps to be installed and the refurbishment of the employee kitchen and toilets so that they become wheelchair accessible. When you express some reluctance at making these changes you are told that a failure to make the workplace wheelchair accessible amounts to discrimination and legal action will follow. You can't afford to make the changes or fight a costly legal battle. What will you do?

3. You run a medium sized construction company employing 120 people. One day, while walking around on your factory floor, you discover one of your employees smoking marijuana. You advise the employee that she is "fired" and promptly escort her out of the factory. One week later you are contacted by her lawyer who advises that she plans to bring a claim against you for unfair dismissal, but that she is willing to cancel the action if you agree to pay her \$5000 in compensation for the loss of her job. In truth, she has always been a troublesome employee and you would be happy to settle the matter as quickly as possible, but paying the \$5000 would cancel out your entire month's profit. What would you do?
4. You run a clothing store employing 40 part-time casuals. During one of the busiest days of the year when you are finally making some good sales, a representative from the relevant trade union arrives and announces that he intends to meet with your employees one by one in the lunch room. You're happy for your employees to talk to the Union but meetings today would seriously disrupt sales and interfere with the staffing roster. The Union official sets off towards the lunchroom without waiting for your answer. What would you do?

Even if you have never experienced any of the above scenarios in your business, chances are you have certainly experienced frustration, anxiety and uncertainty when unexpected industrial relations issues arise. By becoming familiar with your legal obligations you can avoid these negative experiences and, instead, manage your employee relations with confidence and certainty.

Assets and Liabilities.

Remember, your employees are not only your most important asset, they are also – potentially - your greatest liability. This White Paper introduces you to some of the most important aspects of Australian industrial relations law and will help you understand your obligations and protect your bottom line.

2. Federal Industrial Relations Law

A New System is on It's Way to You.

The election of the federal Labor Government in 2007 effectively ended the further implementation of the Coalition's *WorkChoices* policy framework. New legislation has now passed through the Commonwealth Parliament which will substantially change Australia's industrial relations system, and it is vital you know how this new system will affect you and your business. Key aspects of the new industrial relations system will become effective in the next few months with even more significant changes 'going live' as of 1 January 2010. You need to know what this means for you and your business.

State or Federal Law?

Previously, most Queensland-based SMEs were bound by Queensland industrial relations legislation. This meant most business would need only to refer to state-based Awards when determining their legal obligations to staff on such issues as pay, annual leave and trade union representation. As a result of changes which were initiated by the Howard Government in 2006, however, many Queensland-based SMEs are now governed by federal industrial relations legislation. This gradual transfer of industrial relations powers from Queensland to the Commonwealth Government may continue under the new industrial relations system introduced by the current Deputy Prime Minister and Minister for Employment and Workplace Relations, Julia Gillard.

To determine whether you are bound by state or federal industrial relations law you will need to consider the way in which your business has been established. In summary, if you are a sole-trader, a trust with an individual trustee or your business is a simple partnership, you will be governed by Queensland industrial Relations law. However, if your business is a 'constitutional corporation', and financial or trading – that is, you are a 'Pty Ltd' or 'Ltd' and are engaging in commercial business activity – your business is now governed by federal industrial relations law.

Awards and the new Federal Industrial Relations System.

As a result of the changes made by the Commonwealth Government in 2006, many Queensland SMEs found that their industrial relations obligations were now governed by the Commonwealth Government. In order to ensure consistency and ease the transfer to the new federal system, the Commonwealth introduced a new industrial relations instrument known as a Notional Agreement Preserving a State Award, or NAPSA. NAPSAs ensured that entitlements provided by the Queensland Government via state-based Awards would continue to be enjoyed by those employees whose employment conditions were now governed by federal law.

One of the most significant changes resulting from the new federal industrial relations system will be the introduction of new 'modern awards' from 1 January 2010. These new awards are now being developed by the Australian Industrial Relations Commission and will replace existing federal awards, as well as any remaining NAPSAs. Modern Awards, unlike their predecessors, must meet or exceed the 10 minimum conditions of employment the Federal Government has set out in the new National Employment Standards (NESs). The ten standards are as follows:

1. Maximum weekly hours of work
2. Flexible working arrangements
3. Parental leave
4. Annual leave
5. Personal and carer's leave
6. Termination and redundancy
7. Community service leave
8. Long service leave
9. Public holidays
10. Provision of a Fair Work Information Statement

If your SME is governed by the federal industrial relations system, it is essential that you are fully aware of the impact each of these employment standards will have on your legal obligations.

Remember: A new Modern Award which applies to your business may contain entitlements which are more generous than those set out in the NES and current NAPSA (old state award). The Government considers it to be your responsibility to ensure you are meeting your new legal obligations. If you are not, you may be subject to legal action by employees or the relevant workplace authorities.

Unfair Dismissal

An 'unfair dismissal' occurs where it is concluded that an employee's termination of employment was unfair, unjust or unreasonable. One of the most talked-about changes being introduced to federal industrial law relates to the rules around such dismissals. Under the Howard Government's *Workplace Relations Act 1996*, SMEs employing 100 or fewer employees were entirely exempt from unfair dismissal legislation. This meant any worker whose employment was terminated by their employer in a business with 100 or fewer employees could not lodge a claim for unfair dismissal. A number of justifications were provided for this exemption from unfair dismissal laws:

- the need for flexibility in the workplace, especially in SMEs
- the inability of most SMEs to afford expensive legal representation
- the lack of dedicated human resource departments in most SMEs, making the task of managing employees much more difficult for SMEs than for larger organisations
- abuse of the unfair dismissal provisions by trade unions and aggrieved employees

Under the new federal industrial relations system, the exemption from unfair dismissal is changing dramatically. From 1 July 2009, only businesses employing 15 or fewer employees will be exempt from unfair dismissal legislation. This change will mean that thousands of previously exempt SMEs will now be captured by laws which, if breached, could result in substantial financial penalties being levied. If yours is one of these newly-captured SMEs, you need to take action now to ensure you are fully aware of your new legal responsibilities.

Note: Under the new federal system, a special process for unfair dismissals will apply to small businesses employing 15 or fewer employees. The new *Fair Dismissal Code* will ensure these small businesses are given the benefit of the doubt when dismissing employees, provided certain steps have been carefully followed. Contact us for more information if your business falls into this category.

Redundancy

It is inevitable that in times of great economic uncertainty some SMEs will be forced to shed staff in order to reduce costs and increase efficiencies. Under the new industrial relations system, redundancies will - for the first time - be governed by specific provisions within federal law. Previously, provisions relating to redundancies were confined to enterprise agreements or awards, meaning that employers were usually quite familiar with what was required of them and provisions were usually industry or

enterprise-specific. The new NES requires that all employees covered by the federal system be provided with a redundancy payment by their employer of up to a maximum of 16 weeks' pay. However, your employees may be entitled to far more generous payments if this has been provided for within a new Modern Award applicable to your sector. It is, therefore, imperative that you seek advice as to the content and applicability of any new Modern Award in your area of business.

Note: Small businesses employing less than 15 employees are exempt from these new provisions. Other conditions and requirements may also apply.

Unions, Collective Bargaining and the New Federal System

The new federal system marks a significant departure from the previous Government's focus on individual workplace agreements. Under the new system, collective bargaining will, once again, form the centrepiece of the industrial relations system. This means it is more likely that you will come into contact with trade unions and other employee representatives. It is important to know that even if your employees wish to establish an enterprise agreement with you, there is no obligation whatsoever on you to involve a trade union where none of your employees are trade union members.

Also, the Federal Government has made it very clear that the rules relating to 'right of entry' into your business by authorised trade union representatives will not change. This means you should ensure you are familiar with both your rights and your obligations as a small or medium sized business owner or operator. Furthermore, rules relating to 'freedom of association' also remain in place. If an employee approached you with concerns relating to membership or non-membership of a trade union, would you know what advice you could, or should, provide? Ensure you are up-to-date with your legal obligations by contacting a relevant industry body, attending appropriate training or getting in touch with an expert industrial relations consultancy such as **SME Assistance Group**.

Remember: As part of the changes made to the national system, the previous 'fairness test' has been replaced with a 'no-disadvantage test' for the making of new agreements. Certain entitlements can also no longer be 'bargained-away'.

SME owners and operators must also keep in mind that all bargaining undertaken with employees and/or their representatives must be undertaken in 'good faith'. If you are unsure what this requires, you should seek expert advice.

3. Queensland Industrial Relations Law

Your Obligations.

If your business is not governed by the federal industrial-relations system you are, nonetheless, bound by a comprehensive suite of Queensland-based legislation against which you must comply. Failure to comply with Queensland's industrial relations regime may result in fines and other penalties which will affect your businesses' bottom line, so it pays to be fully-informed and up-to-date.

Legislation

The *Industrial Relations Act 1999 (Qld)* sets out the main requirements of Queensland employers who are not bound by federal law. As an employer, it is your responsibility to ensure that you are in full compliance with this Act, or with any state-based Award or enterprise agreement to which your business is bound. Remember, even if you comply with the minimum conditions set out in the *Industrial Relations Act*, you may be in breach of a relevant Award or agreement and action can be taken against you. Imagine the cost to your business should you be informed that you have been paying your employees incorrectly over a period of years. To avoid situations like this, ensure you receive expert advice and remain up-to-date on changes to Queensland legislation.

SME owners and operators should keep in mind that Queensland has a significant number of state-based Awards covering a huge range of industries and occupations. Most of these Awards will provide entitlements over and above the minimum conditions set out in the *Industrial Relations Act*, including more generous rates of pay, loadings and leave provisions. Where no award or agreement applies to your employees, you are free to negotiate a 'common-law' agreement with your staff provided it meets the minimum conditions set out in the *Industrial Relations Act*. These agreements do not need to be in writing, but it is advisable to record any undertakings in writing and have all parties sign and retain original copies.

Remember: For a collective agreement or Award to be legally binding, it must be lodged with, and certified by, the Queensland Industrial Relations Commission (QIRC).

The Future of Queensland Industrial Relations Legislation

The current Federal Government has announced its intention to continue moving towards a unified, consistent federal industrial relations system. This means, ultimately, that Queensland-based industrial relations legislation may eventually become obsolete. Already, Queensland workers employed by 'constitutional corporations' – that is, any business operating as a 'Pty Ltd' or 'Ltd' – have their employment conditions determined by the federal, and not the state, industrial relations system. From the Federal Government's announcements, in time, Queensland workers employed by the private sector may eventually have their employment conditions governed by federal law.

Given this, it makes good business sense for SME owners and operators to become familiar with the federal industrial relations system now, rather than wait until they become legally bound. Furthermore, Employer's may find that federal industrial relations laws better support the operation of their enterprise and may then choose to become an incorporated and trading entity. Developing a pro-active business strategy to ensure compliance and gain available opportunities should be a priority for all SMEs – seek advice or obtain suitable training as soon as possible.

4. Anti-Discrimination & Privacy Law

Introduction

Many employers, especially those involved in the operation of SMEs, wrongly assume they will avoid costly legal action if they simply ensure strict compliance with relevant state or federal industrial relations law. Whilst compliance with these laws is absolutely essential, employers also have obligations to their employees which arise independently of those specific industrial laws. Two such examples are anti-discrimination and privacy laws. Familiarity and compliance with this legislation will help protect your small or medium sized business from substantial disruption, costly legal action and unreparable damage to your reputation.

Anti-Discrimination Legislation

Australia's workforce is becoming increasingly diverse as more and more of our population comes from culturally and linguistically diverse backgrounds. Simultaneously, society's views around workforce participation by people with disabilities have changed dramatically, as have our attitudes towards age. For all of these reasons both the State and Federal governments enacted legislation which prohibits discrimination in the workplace. It is more important now than ever before to be fully aware of your obligations in this regard.

As a starting point, all SME owners and operators should familiarise themselves with the state and federal anti-discrimination legislation which applies to employment within the private sector. The key pieces of legislation are summarised in the following table:

Federal Legislation		State Legislation	
Act:	Prohibits Discrimination based on:	Act:	Prohibits Discrimination based on:
Race Discrimination Act	Race, colour, descent, national or ethnic origin	Anti-Discrimination Act	Gender and gender-identity, race, age, impairment, religious or political belief, union activity, sexual orientation, pregnancy. This list is not exhaustive.
Sex Discrimination Act	Gender, marital-status, pregnancy, family responsibilities		
Age Discrimination Act	Age		
Disability Discrimination Act	Disability		

As evidenced by this table, state and federal anti-discrimination legislation is extremely wide-reaching and the obligations these laws impose on you, as an SME owner or operator, are complex. It is impossible within the confines of this brief White Paper to

comprehensively address the full suite of legal obligations which apply to you and your business. However, the following key points should be noted:

Direct and indirect discrimination. Policies or practices which discriminate may do so either directly or indirectly. Direct discrimination occurs when an employer's actions clearly discriminate against a certain type of person. For example, an employer who refuses to hire female workers is engaging in direct discrimination. Indirect discrimination occurs when a seemingly fair policy has a disproportionate effect on a certain group of people. For example, an employer who specifies that he will only employ workers who have more than 5 years of relevant experience may be engaging in indirect discrimination on the basis of age as younger applicants will be less likely than older applicants to meet this requirements. **With some limited exceptions, both direct and indirect discrimination are unlawful.**

Sexual harassment. State and federal laws are very clear when it comes to sexual harassment: it will not be tolerated. Both the Queensland *Anti-Discrimination Act* and the federal *Sex Discrimination Act*, make it an offence for a person to sexually harass another. You should note:

- The gender of the parties involved is irrelevant – sexual harassment may occur regardless of whether the alleged offender and victim are male and female. It is well established that men can be sexually harassed and harassment can also occur where both parties are of the same gender, irrespective of actual or perceived sexual orientation.
- The intention of the alleged offender is irrelevant. It does not matter whether the person who engaged in the conduct intended to harass the victim. The question which a court or tribunal will ask is whether a 'reasonable person' would have felt offended, humiliated or intimidated, by the alleged offender's conduct.
- The relationship between the alleged offender and the victim is also irrelevant. It does not matter whether they are close friends or complete strangers.
- Sexual harassment may occur even if the conduct happens only once. It is not necessary for the conduct in question to be repeated or for the victim to have made a previous complaint.
- Employers need to take reasonable steps to ensure they protect their staff from sexual harassment

Damages awarded for sexual harassment can be very high whereas the cost of training your employees and establishing appropriate workplace policies is comparatively low. Moreover, having your business embroiled in a sexual harassment claim can cause irreparable damage to your reputation.

Victimisation

Victimisation occurs where a person experiences discrimination as a result of having made a prior complaint or having assisted another to make a complaint. As a SME owner or operator, you should take active steps to ensure any person involved in a complaint receives proper support and experiences no negative repercussions as a result of the complaint. Where an employer has been found to have engaged in victimisation – or has failed to prevent victimisation from occurring – stiff penalties may be applied. It is not worth the risk to you or your business to ignore allegations of victimisation or fail to provide proper safeguards for complainants.

Vicarious liability

Remember that you can be held responsible for the actions or omissions of your employees even though you do not engage in any discriminatory action yourself. This is known as vicarious liability. You are expected to know what happens in your workplace, regardless of the number of staff you employ or the complexity of your business operations. If you feel it is not possible to remain abreast of unfolding issues in your business, be sure to seek expert advice or support from a suitably experienced business and industrial relations advisory service.

Note: Claims of discrimination may be brought against you by an employee (or potential employee) under either state or federal law, but not both simultaneously. An aggrieved employee must 'elect a jurisdiction' at the time he or she lodges their complaint against you. If a complaint is lodged against you, ensure you seek expert advice immediately.

Privacy Law

Laws relating to privacy in the workplace are generally governed by the federal *Privacy Act 1988* which, in turn, is administered by the Office of the Australian Privacy Commissioner. This Act contains ten National Privacy Principles, or NPPs, which apply to the private sector. These Principles cover the following subjects:

- Collection of data
- Use and Disclosure of information
- Data quality
- Data security
- Openness of process
- Access and Correction of information on record
- Identifier replication
- Anonymity
- Transborder Data flow, and

- Sensitive information

Importantly for SME owners and operators, the Act does not currently apply to private sector businesses with an annual turnover of less than \$3m or to 'employee records'. This means that, at present, almost all small businesses and a substantial number of medium sized businesses - are exempt from the operation of the Privacy Act. Further, even where an enterprise has an annual turnover of more than \$3m, the NPPs do not apply to employee records.

In 2008, the Australian Law Reform Commission (ALRC) submitted a report to the Commonwealth Attorney-General which recommended, among other things, the removal of the exception relating to business turnover and employee records. If given effect by the Commonwealth Government, these changes would mean all SMEs would, for the first time, be bound by the NPPs. The ALRC has also recommended that the NPPs be eventually replaced by a set of new Uniform Privacy Principles, or UPPs, which would be consistent across both the public and private sectors. It is, therefore, vital that you remain up-to-date with legislative developments around privacy to ensure you fully comply with any new legal obligations. A breach of the privacy principles by your business can result in substantial financial penalties being imposed by the Privacy Commissioner.

Note: Some businesses with a turnover of less than \$3m per year do not qualify for the general exemption from the National Privacy Principles. If you are unsure whether you qualify for the exemption, make sure you seek appropriate advice.

5. Summary

As this White Paper has made clear, the legal obligations which are attached to your business' industrial relations are complex and currently subject to major change. In particular, the Federal Government's slow but steady absorption of the State Government industrial relations jurisdiction means the rules by which you must operate your business may soon be very different. Moreover, this White Paper has set out only the most obvious IR-related legal obligations which you, as an SME owner or operator, are expected to understand and fulfil. The complex nature of IR legislation means that very few SMEs can invest adequate time and energy into ensuring absolute compliance, yet failing to comply can cost you much more. Expert advice and Employer Training is available and, in this increasingly difficult industrial relations environment, it is worth every cent.

6. Useful Links

SME Assistance Group: www.smeassistancegroup.com.au

Office of the Privacy
Commissioner: www.privacy.gov.au

Queensland Industrial Relations
Commission: www.qirc.qld.gov.au

Australian Industrial Relations
Commission: www.airc.gov.au

Workplace Ombudsman: www.wo.gov.au

Queensland Workplace Rights
Ombudsman: www.workplacerights.qld.gov.au

Australian Human Rights
Commission: www.hreoc.gov.au

Anti-Discrimination Commission
Queensland www.adcq.qld.gov.au

Disclaimer: This paper is the product of SME Assistance Group. The laws surrounding workplace relations are changing rapidly. The content in our paper is correct at the time of production however Employers are urged to make sufficient additional enquiry to satisfy themselves about their obligations at all times.

Employers and Employees should not rely on this paper as legal advice in circumstances requiring such advice. This paper is intended to operate as a guide, assisting Employers to understand the topic generally, and where to go to make further enquiry.