



# SMALL BUSINESS AND THE 2007 INDUSTRIAL RELATIONS DEBATE

**A**n important subset of the current debate about industrial relations policy is the impact of *WorkChoices* and proposed policy changes on small and medium businesses. At the forefront of the mind of policy makers must be the fact that most employers are small and medium businesses that are the modern-day entrepreneurs and risk takers, and also the engine room for jobs growth.

ACCI has for many years advocated reform of the Australian workplace relations system in order to benefit economic growth and jobs, including in small and medium businesses.

In most cases, reform initiatives do not need to distinguish, in design, between large and small businesses. However, there are strong grounds for targeted reforms proposals, where this is necessary, that take specific account of small business characteristics and circumstances (e.g. proposals for small business exemptions or differentials in termination or redundancy matters).

There are also many instances where flexibility needs to be built into any safety net to take into account different capacities of small businesses (e.g. work and family proposals for employee preferred rosters, home work or additional leave).

## OVERVIEW

Both Government and Opposition workplace relations policy has small business impacts.

ACCI supported the workplace bargaining direction of workplace reforms by Labor and Coalition governments in 1993, 1996 and 2006, including major aspects of the *WorkChoices* reforms, on the basis that they would improve workplace relations in businesses of all sizes, and in particular in smaller workplaces.

On some issues of detail though, including the new fairness test that now underpins agreement making and the obligation to distribute fact sheets on employee rights to all employees by 20 October, the Government has added to red tape and small business concerns.

The Federal Opposition has made various announcements on industrial relations policy during recent months. The

Opposition proposals recognise change since the period the ALP was last in government and would maintain some underpinnings of the contemporary workplace relations system.

However, in a number of key areas, the Opposition policy would reverse substantial changes to the Australian workplace relations system in favour of a reduced capacity for workplace level determination, a return to prescription and limitations in bargaining, and an enhanced role for trade unions, universal employment standards and compulsory arbitration.

The Opposition has acknowledged the legitimacy of small business and independent contracting interests, and this is welcome. However, this sentiment is not widely reflected in its industrial relations policy design or detail. It appears on balance that key aspects of the Opposition industrial relations policy would, if implemented as outlined to date, adversely affect small businesses throughout Australia.

There would be less scope for smaller workplaces to genuinely bargain, an enhanced role for the unions (small business employees are largely non-unionised), and a more challenging compliance task (for example, if union behaviour is unlawful, or if secondary boycotts are applied). There would however be some recognized commercial freedom for independent contracting, although the scope for unions to impinge on this through agreements with large employers to restrict the use of contractors is unclear.

It would be undesirable if workplace relations was again elevated above the heads of employers and employees in small business and returned to the hands of remote tribunals and union officials.

## SMALL BUSINESS AND WORKPLACE RELATIONS

Small businesses, however defined, face both particular advantages and challenges in managing their workplace relations.

On the one hand, small business people often work beside their staff, live and work in their communities, and enjoy a level of rapport and trust which larger businesses need to specifically encourage, in order to bargain. The inherent day-to-day trust and informal rapport of working in a small business makes bargaining and practical workplace relations easier in many instances.

However, smaller businesses often lack the resources and technical experience to be fully informed of their employment obligations and capacities, particularly compared to larger businesses.

They may have no dedicated human resources advisor within the company.

Compliance can also be financially challenging for smaller businesses that generally face lower cash flows, smaller financial reserves and greater day-to-day operating pressures.

Small business people often lack the specialist professional experience necessary to comply with complex workplace relations laws. Particular problems include:

- informal approaches to recruitment and selection;
- complying with often counterintuitive procedural requirements in disciplining, counseling and terminating staff; and
- misunderstanding workplace relations obligations, including the need to register agreements and comply with rules on bargaining and agreement making.

Whilst employer and business organisations offer substantial advisory services to smaller businesses:

- not all small businesses are members of the ACCI network;
- even when small business people are members of employer associations, they can misunderstand the services available to them and not utilise available advice; and
- small businesses have a tendency to seek advice from non-expert sources, including local accountants and

lawyers, or even their small business peers. This advice is often wrong or out of date.

Small businesses are also far less likely to be unionised than their larger counterparts. Whilst this can create more bargaining and employment options, it can also create challenges – particularly when small businesses do interact with unions and unionised operations.

Smaller businesses are also generally less well resourced to litigate in defence of their rights. Even when they are correct in their workplace relations, small business people generally lack resources to litigate in their defence, particularly when facing well resourced unions and inspectorates.

Smaller businesses are disproportionately at the sharp edge of compliance with any system (employing the most people and potentially making the most mistakes), but are often the least equipped to comply.

Small business people often take home incomes far closer to those of their employees than their colleagues owning or running larger businesses, and almost universally have far greater personal indebtedness. Assumptions of inherent income disparity and vulnerability between employers and employees break down when applied to small businesses.

The unique challenges facing smaller businesses have been recognised across various areas of government regulation for many years.

There has long been a significant customisation of laws and compliance requirements to take into account business size.

## UNFAIR DISMISSAL AND WORKCHOICES

The most visible change to the system benefiting smaller businesses was in the area of unfair dismissal. *WorkChoices* exempts businesses employing less than 100 employees from actions alleging unfair dismissal. All employees retain capacity to take action in instances of alleged unlawful termination.

ACCI and members long supported significant changes to the system to take better account of the challenges for smaller businesses in discipline and termination of employment. ACCI and members supported various legislative proposals to exempt small businesses from unfair dismissal prior to 2005.

Whilst there is not yet economic modelling of the specific impact of the small business exemption, very significant

employment growth has followed the *WorkChoices* reforms.

## BARGAINING AND WORKCHOICES

Another key thrust of the *WorkChoices* reforms is making bargaining more accessible to more small businesses. This should allow more small business people and their employees to share in the job security and income benefits that bargaining has delivered.

Several of the *WorkChoices* reforms are designed to make bargaining more accessible and less costly, including agreements operating from lodgment and the simplification of procedures for bargaining and agreement approval.

Overall numbers of agreements in the wake of the reforms would indicate some success in these measures.

However it should be recognised that Australia still regulates the conduct of both bargaining and agreement making to an extent near unparalleled internationally.

There is significant scope to further reform the regulation of bargaining and agreement making to further encourage small business to take up agreement making opportunities.

## EMPLOYMENT STANDARDS UNDER WORKCHOICES

A particular compliance challenge for smaller businesses has been the replacement of elements of the award system with the Australian Pay and Conditions Standard under *WorkChoices*.

In time, the standard may offer a level of universal consistency and compliance, so long as it is not over-regulatory.

In the immediate term, it means changes in compliance, new record keeping obligations, and in some cases additional leave obligations.

## COMPLIANCE WITH WORKCHOICES

The *WorkChoices* reforms have been matched with an unparalleled expansion of enforcement and compliance in Australia.

With the creation and expansion of the Workplace Ombudsman (formerly the Office of Workplace Services) and the passage of *WorkChoices*, there are more inspectors than ever before, and considerably higher resourcing of

inspection and compliance. There are more prosecutions than ever before with significantly higher penalties.

There are also a variety of new offences, to which substantial penalties are also attached.

This occurs in the context of a system which is new to employers and which requires new approaches to compliance. Small businesses face the combination of new offences, higher penalties, and more inspectors at the same time as they are adjusting to new rules and obligations.

## INFORMATION AND EDUCATION

The Government has sought to support the introduction of the *WorkChoices* reforms with substantial information and promotion activities specifically targeted at small business.

ACCI and its members have strongly supported these efforts, including ACCI members delivering services to smaller employers as part of the *WorkChoices* Employer Advisory Programme (EAP).

## SHIFT INTO NATIONAL SYSTEM

Smaller businesses are also disproportionately likely to have made a transition from state systems into the expanded national system under *WorkChoices*.

Whilst small businesses have benefited from this shift, or stand to benefit in the future, they are also more likely to face difficulties in compliance due to the split between national and state coverage based on the incorporated status of the business concerned.

Impacts of this include that small business people have:

- a higher incidence of being unincorporated employers than larger businesses;
- fewer resources to vary or determine their corporate status; and
- fewer resources to take advice on their compliance obligations under *WorkChoices*.

In future, smaller businesses would benefit from an expanded national system that does not rely on the corporate status of the employer. A simpler, more comprehensive system should (depending on the level of regulation and workplace autonomy) benefit small business.

## RECENT CHANGES TO WORKCHOICES

In May 2007 the Prime Minister announced the addition of a fairness test for bargaining under *WorkChoices*.

Operating similarly to the pre-*WorkChoices* no disadvantage test, this will ensure benefits including penalties and loadings are not removed or altered in bargaining without employees receiving 'fair compensation'.

ACCI and members questioned the need for the amendments, concluding that they would be likely to add red tape to the agreement making process, at least in the short term. However, ACCI and members have encouraged the Government to provide proper and timely advice to employers on compliance with the new obligations.

The second recent change relevant to small business is the new requirement for employers to distribute a Workplace Relations Fact Sheet to their employees.

This is a new regulatory impost upon small business, which is being required to address an information deficit for government, on government policy. The Opposition also proposes a mandatory information sheet distribution obligation on employers relating to union membership rights.

## FEDERAL OPPOSITION POLICY

During recent months the Opposition Leader and the Deputy Leader and Shadow Minister for Industrial Relations, have made various announcements of Opposition industrial relations policy.

This includes principally the Opposition's *Forward With Fairness* industrial relations policy, but also extends to various other ad-hoc policy statements and announcements.

Also relevant is the ALP platform passed by the 2007 National Conference and the additional conference resolution on industrial relations (resolution 133R).

This body of policy statements from the Opposition includes various commitments directly and indirectly relevant to Australian small businesses.

## ALP AND UNFAIR DISMISSAL

Just as one of the highest profile reforms in *WorkChoices* was the abolition of small business unfair dismissal claims, the hallmark of the Opposition policy is reimposing unfair dismissal liabilities on smaller businesses.

Small businesses would no longer be exempt from unfair dismissal claims under the Opposition policy.

The Opposition claims that it accommodates small business concerns by providing a longer qualifying period during which claims cannot be brought.

Under the Opposition's policy:

- an employee of an employer with 15 or more employees must have been employed for 6 months to bring a claim; and
- an employee of an employer with fewer than 15 employees must have been employed for 12 months to bring a claim.

However, small business people are all too aware that:

- employment difficulties and poor performance do not always come to light in the first 365 days of employment. People change, circumstances change and relationships change, and they do so outside the strict timetable the Opposition would impose;
- small businesses change hands and new proprietors can experience irreconcilable differences with often quite long standing employees of a former owner; and
- small business owners have no more resources or time to fight an unfair dismissal claim after 12 months of employment than they do at the start of employment.

Assessing where the balance of interests lies, is a fundamental question in considering imposing dismissal rights for employees on small businesses.

The Opposition has recognised in its policy that it does not lie solely with the employee, but then fails to apply this consistently in not providing an ongoing exemption.

In addition, the Opposition proposes a Fair Dismissal Code. However well intentioned, this proposal may be a double-edged sword for small business.

There are also problems inherent in how the Opposition proposes unfair dismissal actions be conducted where they are available. The Opposition proposes a one-stop-shop through its Fair Work Australia mega-regulator – a new body that the Opposition has already recognised will need to include separate divisions to deal with judicial and non-judicial matters.

There are no guarantees the adjudicator of dismissals will have any expertise or exposure to small business people

or their concerns. Although the legislative detail is unclear, it is possible that employers (or their representatives) will not be able to ask their ex-employees questions in an open forum, and that employers will face a conference process to determine matters.

This raises a number of natural justice issues. There appears to be substantial scope for legal challenge to how Fair Work Australia will make its decisions and conduct its activities. Small businesses of course will not have the resources to conduct these challenges. Any flaws in how Fair Work Australia is to operate are likely to disproportionately impact on smaller businesses.

## ALP AND INDIVIDUAL BARGAINING

One of the hallmarks of Opposition policy is the abolition of Australian Workplace Agreements (AWAs) and the removal of any statutory capacity to bargain on an individual basis.

Many small businesses have used AWAs, either on the basis that it suits their employment arrangements to form agreements individually with staff, or based on relative transaction costs.

Small businesses have sought the capacity AWAs offer to sever links to the previous award system and to conduct workplace relations in a manner which matches their workplace culture (often a very micro level set of personal relationships).

Removing AWAs from the system entirely would rob small business of these capacities.

Their only option to set aside or vary award regulation would be to collectively bargain with employees. This in turn appears set to encourage unionisation of smaller workplaces, or at very least having to accord with union-determined industry and pattern outcomes.

## ALP AND COLLECTIVE BARGAINING

The Opposition policy will compel collective bargaining where this is demanded by a union on behalf of a majority of employees, or a majority of employees themselves compel it.

Collective bargaining (when initiated by unions or employee interests) is usually a process designed to extract higher wages and employment conditions than legally payable minimums in legislation or awards.

Under the Opposition policy, it will not be lawful for the small business to simply 'get on with business' and decline

the request to collectively bargain. The employer can ultimately reject demands, but must meet, must consider and must give reasons for their position, and must make some (non confidential) business information available. If the small business fails to do so, they will be subject to order of Fair Work Australia compelling them to do so. In some (limited) situations the employer could also be ordered to pay over-award wages or conditions.

There has been a great deal of uncertainty in analysis of the Opposition policy on the extent to which it allows or encourages pattern or industry bargaining.

Based on a reading of the Opposition policy however, it appears that there will be some scope for industry/pattern bargaining. For example:

- *“Collective bargaining will be based on bargaining at the level of an enterprise. The well understood definition of ‘enterprise’ will continue and may include a single business or employer, a group of related businesses operating as a single business or a discrete undertaking, site or project. For example, this means a collective enterprise agreement can be made for employees at a warehouse, a chain of shops, a manufacturing plant or a major construction project.” (Forward With Fairness policy, p.13); and*
- *“Fair Work Australia may also facilitate multi employer collective bargaining for low paid employees or employees who have not historically had access to the benefits of collective bargaining, such as employees in the community services sector, cleaning and child care industries.” (Forward With Fairness policy, p.14)*

Small businesses face the prospect of unions seeking pattern outcomes and wanting to enforce them on parts of an industry. Laws which support this would remove meaningful capacity to bargain from small businesses.

Smaller businesses appear set to have to bargain with unions 'in good faith' even where the small business person and a sizeable part of the workforce may not want an agreement with the union.

Awards will also potentially only allow customisation on an industry model basis, which will further promote the use of pattern agreements.

In all, on a cost benefit basis, seeking to deviate from the pattern may become too difficult for smaller business. Whether through direct or tacit encouragement, pattern bargaining may become the only meaningful option for many smaller businesses.

## ALP AND STATUTORY MINIMUM STANDARDS

The Opposition would expand the existing 5 statutory minimum standards to 11 or 12 statutory minimum standards.

Opposition policy would add new minimum standards, including:

- a right for employees (on request) to alter their hours, days and times of work (and potentially work locations and tasks) based on their family responsibilities;
- a new right to paid and unpaid community services leave;
- a right to public holidays and public holiday penalties when worked (as an inviolate and un-bargainable part of the employment standards);
- a requirement to distribute an information statement to employees, including directing employees to trade unions;
- minimum severance pay on a scale of 4 to 16 weeks pay; and
- minimum long service leave, including the prospect of some degree of portability between employers.

Opposition policy would also increase a number of existing standards, for example a potential doubling of parental leave and its extension to both parents simultaneously. For example, employers would be required to grant 12 months leave on the first birthday of a child if the parent has not previously taken parental leave.

These new and increased standards would impact directly on small businesses. Of particular concern are the proposed process standards, which seek to impose new employee rights to secure particular outcomes.

There is no express recognition of small business circumstances and limitations in the proposal for employees to be able to double parental leave, or to change the hours, days or times of work. The Opposition has said in media commentary, that a small business can reject a right to request 2 years parental leave by the one parent if the rejection is reasonable. This however begs the question of how the reasonableness of small business rejections will be enforced.

## ALP AND REDUNDANCY

One area in which the Opposition has recognised the interests of smaller businesses is in its proposal to create a new minimum standard for redundancy/severance pay.

Reversing the flawed decision in the AIRC's 2004 Redundancy Test Case, the Opposition would (as does the government) exempt small business from its minimum statutory redundancy pay obligation.

However, it is not clear from the ALP policy that Fair Work Australia could not impose this requirement on an industry-by-industry basis using the Opposition's revitalised award system.

## ALP AND AWARDS

The Opposition "safety net" has two parts - the minimum standards outlined above and an additional set of award conditions arbitrated on an industry basis by the proposed Fair Work Australia mega-regulator.

Of particular concern for small business are:

- wages set based on competencies;
- so called 'facilitation' of flexible work arrangements, including to balance work and family;
- an expanded definition of allowances;
- expanded forms of paid and unpaid leave in awards;
- retention and expansion of superannuation provisions in awards, including the prospect of:
  - cutting across existing choice of fund arrangements;
  - adding additional compliance obligations on smaller employers in particular;
  - potentially adding to the 9% SGA superannuation contribution; and
  - re-regulation of "consultation, representation and dispute settling procedures."

Added to this is the prospect that industry awards can augment and expand upon (including apparently increasing the quantum of obligation) each of the minimum standards.

In essence, key concerns for small business people in the

Opposition's plans for awards include:

- being able to bargain with reduced flexibility on fewer matters;
- more day-to-day regulation of hours, days and times of work;
- additional regulation being introduced under the banner of flexibility for employees;
- the prospect of large business, unionised models being applied at an industry level to which small business have to conform. A return to one-size-fits-all, collective assumptions for facilitation and dispute settlement is a real threat and would not be appropriate for smaller businesses;
- some flexibilities only being available with the agreement of unions, even in un-unionised workplaces; and
- annualised salaries and other bargained arrangements only being accommodated for large operations/ existing agreements with unions.

There is a very real fear that the framing and content of awards will become creatures of unions, Fair Work Australia and perhaps some larger employers. There appears to be no requirement that Fair Work Australia take account of the smaller businesses that will most likely be subject to awards on a day to day basis.

Both award and statutory obligations appear set to apply in bargaining, further limiting the flexibility available to smaller businesses.

## ALP AND ENFORCEMENT

The Opposition would create the Fair Work Australia mega-inspectorate to ensure compliance with its new system. It would inherit not only the enhanced resources of the Workplace Ombudsman, but also the higher penalties under *WorkChoices*.

It is not clear what new offences the Opposition may create to support its new system, however it is likely that new offences would attach to the conduct of bargaining particularly in non-unionised and partially unionised workplaces.

## UNION CAMPAIGNS

Whilst small business people do enjoy direct, high trust relationships with their staff, they are also vulnerable

to the misinformation campaigns of the trade union movement. In addition to union efforts to foster a culture of mistrust of *WorkChoices*, the union advertising campaigns have also vilified AWA making in particular.

This is a particular concern for smaller businesses which lack the resources to correct the facts on AWAs generally and their agreements in particular.

## STATE GOVERNMENT REACTIONS TO WORKCHOICES

State governments have, during 2006 and 2007, deliberately created new laws, obligations and institutions with the express purposes of counteracting the *WorkChoices* reforms through the creation of additional state obligations, which:

- render lawful actions under *WorkChoices* unlawful under state laws;
- impose additional procedures and requirements upon employers seeking to exercise lawful rights and capacities under *WorkChoices*;
- discredit the *WorkChoices* reforms and portraying them as:
  - harmful to employees generally and to particular groups of employees; and
  - ineffective in achieving their stated purposes.

The combination of new "child labour" legislation, workplace rights bodies, good faith bargaining requirements, and changes to workers compensation laws impacts on small business. These impacts include:

- creating confusion amongst small businesses regarding their rights and obligations. Some states have deliberately sought to exploit the boundaries between state and federal laws and to engineer a contest of laws that could only be resolved by a business undertaking very substantial and costly litigation (which is not possible for a small business);
- imposing additional obligations, compliance and risks upon small businesses. The key example of this is the new NSW child employment legislation. Small businesses in retail and hospitality in particular are major employers of young people. The NSW legislation imposes additional obligations and creates a very confusing situation for those seeking to bargain with young people under *WorkChoices*;

- discrediting employers and consensual workplace cultures in favour of a return to the low trust, “us and them” style approaches of previous decades. State government publicity to employees emphasising ‘foregone’ rights has contributed to this. This makes bargaining and day-to-day workplace relations harder for small business in particular, notwithstanding their very direct working relationships with their staff.

## ACCI GENERAL COUNCIL OUTCOME

The importance of these issues for small business culminated in a discussion of these matters amongst Chief Executives and Presidents of Australia’s major employer organisations in Perth on 25 July 2007.

Speaking with one voice through the ACCI General Council, the employer bodies adopted a specific and direct resolution on the topic. That resolution, set out below, provides an excellent summary of the issues from a small business perspective.

*“ACCI General Council, noting the critical role of small business in the Australian economy, that most Australian employers are small businesses, and that this sector is widely regarded as the ‘engine room’ of jobs growth in the economy:*

- *recalls the special challenges for smaller businesses to comply with often complex or highly prescriptive workplace relations laws;*
- *states the importance of workplace relations laws being framed to take into account the circumstances of all employers, including the needs of small business, and to accommodate their more limited capacity to comply with over-detailed or prescriptive legislation;*
- *reiterates support for most of the workplace reforms since 1993, including major elements of the WorkChoices reforms, and in particular measures designed to better accommodate the needs and capacities of smaller businesses;*
- *opposes workplace relations policies that would reverse workplace reform, (including WorkChoices), impose additional regulation or red-tape on smaller business, and/or reverse existing recognition of the unique considerations facing small business;*
- *opposes in particular proposals to:*
  - *Abolish Australian Workplace Agreements (AWAs) and provide no scope for statutory individual bargaining to vary award regulation;*
  - *re-impose unfair dismissal liabilities upon currently exempt small businesses;*

- *reintroduce compulsory arbitration of employment conditions on a national or industry basis;*
- *impose compulsory collective bargaining obligations, and directly or indirectly allow a return to forms of pattern and industry bargaining affecting small business, or encourage bargaining with unions for un-unionised small businesses;*
- *expose small businesses to unlawful union behaviour;*
- *mandate the distribution of information statements; and*
- *make day to day operational and employee management decisions subject to challenge in arbitral tribunals, including the operation of the “reasonable grounds” test.*

- *draws attention to the importance of any system of workplace regulation being properly supported by information and advisory services targeted to smaller businesses;*
- *highlights the particular benefits of an enterprise and employer/employee focussed national workplace relations system for smaller businesses, and urges the making of further inter-governmental agreements to move to a national system with more universal coverage, not determined by the corporate status of a small business employer; and*
- *reiterates its opposition to recent measures by state and territory governments to oppose and complicate the WorkChoices reforms through such measures as workplace relations, occupational health and safety and purchasing policy, in particular where these measures impose additional regulation upon smaller businesses.”*

## CONCLUSION

Whilst light on detail and still in a state of flux, Federal Opposition industrial relations policy announcements contain much that should concern small business people.

Key concerns include:

- re-imposing unfair dismissal litigation against smaller businesses, thereby removing incentives and confidence to create new jobs;
- removing key bargaining options for small businesses, including abolition of AWAs and no scope for statutory individual bargaining;
- re-introducing centralised or industry wide compulsory arbitration;
- compelling collective bargaining, and allowing some return to pattern and industry bargaining; and

- re-regulation through minimum standards, and an award system that adds further requirements standards above the statutory minimum standards.

It is important to recognise that the Opposition policy would (if the Senate permits) be implemented in its totality. New award and statutory obligations would be introduced at the same time scope for AWA making was removed. Mandatory collective bargaining, and some pattern and industry bargaining (with industry-imposed award outcomes) would emerge at the same time small business people were given less scope to vary such universal regulation on an employer-employee basis.

A key point of difference between *WorkChoices* and the Opposition alternative lies in the small business impacts.

*WorkChoices*, whilst far from ideal on issues of detail and itself introducing some unhelpful red-tape obligations, is arguably predicated on a small business, direct workplace relations model. The Opposition approach is a return to more traditional assumptions, of larger businesses and a standing institutional role for trade unions.