THE WORKPLACE RELATIONS ACT 1996

A GUIDE FOR MICRO BUSINESSES

Table of Contents

1. The Workplace Relations Act 1996 5

2. Awards 7
   - The award safety net 7
   - Simplification 8
   - Logs of claims and roping-in 10

3. Agreements 12
   - Informal agreements 12
   - Australian workplace agreements 13
   - Who can make an AWA? 14
   - Certified agreements 16

4. Termination of employment 18
   - Having a valid reason for termination 18
   - Procedural fairness 19
   - Unlawful termination 21
   - Exclusions from termination of employment provisions 22

5. Definition of employee 24

6. Freedom of association 26
   - Right of entry 27

7. Industrial action 30

8. More information 32

The Act

Awards

Agreements

Termination of employment

Definition of employee

Freedom of association

Industrial action

More information

ISBN 0 642 32455 7

The Commonwealth, its employees, officers and agents do not accept any liability for the results of any action taken in reliance upon, based on or in connection with this document. To the extent legally possible, the Commonwealth, its employees, officers and agents, disclaim all liability arising by reason of any breach of any duty in tort (including negligent misstatement) or as a result of any errors and omissions contained in this document.

Published by the Department of Workplace Relations and Small Business, Canberra, 1998

The Workplace Relations Act 1996

A guide for micro businesses

This is a plain English guide to the Workplace Relations Act for micro businesses. It is the result of a recommendation, by the Micro Business Consultative Group, that the Government produce an easy to read guide explaining the Workplace Relations Act for micro business operators.

Micro businesses are defined as businesses that are owned or operated independently with fewer than five employees. The Micro Business Consultative Group comprised 21 members, the majority of whom were micro business operators. They met over 18 months and reported to the Government in February 1998. Their report, *Under the Microscope: Micro Businesses in Australia*, is available from the Department of Workplace Relations and Small Business.

This guide explains key areas of the Workplace Relations Act that are relevant to micro businesses, and also indicates where employers can seek further help.

1 The Workplace Relations Act 1996

The Workplace Relations Act has reshaped the Australian workplace relations system. The Act has provided a framework in which employers and employees can decide on employment arrangements that best suit their needs.

Some of the key features of the Workplace Relations Act are:

- direct employee–employer relations in making agreements and a reduced role for third parties;
- guaranteed genuine freedom of association for employees with choice about whether or not to join a union and about who may represent their industrial interests;
- clearer rights and responsibilities to support compliance with obligations under awards and agreements; and
- agreement-making arrangements that are more accessible, with greater choice about which kind of agreement best suits the parties.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

The Workplace Relations Act has also established a new unfair dismissal scheme. This scheme is based on the principle of a 'fair go all round', and strikes a balance between the rights of employers and of employees. The scheme ensures that employees have access to a fair and simple process of challenging dismissals while also recognising the important, but not absolute right of the employer to manage his or her own business. Importantly, the provisions require the Australian Industrial Relations Commission (AIRC) to take account of the circumstances facing a small business when determining an unfair dismissal case.

2 Awards

Awards are documents that set out the minimum wages and conditions of employees. They normally cover a group of employees and address issues such as:

- minimum pay rates, allowances and classifications
- penalty rates, such as overtime rates
- hours of work
- leave provisions, such as sick leave, recreation leave etc.

The award system has changed under the Workplace Relations Act and now acts as a safety net of fair and enforceable minimum wages and conditions. Benefits beyond this system must be settled at the workplace level through workplace agreements.

The award safety net

The AIRC maintains the award safety net, with particular attention to the needs of low paid

CONTENTS PAGE

The Act

Awards

Agreements

Termination of employment

Definition of employee

Freedom of association

Industrial action

More information

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

workers. The AIRC sets the level and form of safety net pay adjustments and other minimum award rates.

Simplification

Awards have been simplified and can generally only contain 20 'allowable matters'. Any other matters have to be decided at the enterprise or workplace level.

From 1 July 1998, any non-allowable matters still in awards will not be enforceable.

The 20 allowable award matters

- Classifications of employees and skill-based career paths
- Ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours
- Rates of pay (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system

- Piece rates, tallies and bonuses
- Annual leave and leave loadings
- Long service leave
- Personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave
- Parental leave, including maternity and adoption leave
- Public holidays
- Allowances
- Loadings for working overtime or for casual or shift work
- Penalty rates
- Redundancy pay and notice of termination
- Stand-down provisions
- Dispute settling procedures
- Jury service
- Type of employment, such as full-time employment, casual employment, regular part-time employment and shift work
- Superannuation

- Pay and conditions for outworkers, but only when compared with those specified in a relevant award or awards for employees who perform the same kind of work at the employer's business or commercial premises
- Provisions incidental to the allowable matters and necessary for the effective operation of the award (for example, date and period of operation of the award, and facilitative provisions).

Logs of claims and roping-in

A log of claims is a demand from a union on employers. If these demands are not agreed to, the union will notify the AIRC that an alleged industrial dispute exists between it and the employers who have been served the log.

The AIRC, on being notified, will list the alleged dispute for hearing. If you are served with a union log of claims, the AIRC will notify you about the time and place of the hearing.

Employers are not obliged to be represented at the hearing. However, it is recommended you consult your advisers on whether you should be

represented, particularly if you want to resist the claim.

If the AIRC determines that an industrial dispute exists between the union and employers served with the log of claims, the union may seek the making of an award in settlement of the dispute. Under the Workplace Relations Act that award may bind employers unable to satisfy the AIRC that they are not parties to the industrial dispute. This is known as 'roping-in'.

If you are bound by the award through the roping-in process, you must employ staff under the terms and conditions of that award thereafter (unless you then make a certified agreement, Australian workplace agreement or State employment agreement). Contact your employer association or the Department of Workplace Relations and Small Business (see 'More Information') to determine your obligations to your employees if you are roped in to a new award.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

3 Agreements

Workplace agreements are the main focus of the Workplace Relations Act. Workplace agreements give employers and employees the chance to build arrangements that best suit the needs of their business or workplace and the type of work they do.

Under the federal system, employers and employees can choose to enter into formalised agreements, such as Australian workplace agreements (AWAs), which are individual agreements, or certified agreements (CAs), which cover employees collectively.

Informal agreements

Employers and employees may also make informal agreements which may cover such basic conditions as pay, allowances and leave. They may be verbal or in writing, and enforced as if it were a legally binding contract.

An informal agreement is one that has not been registered with, certified or approved by an

industrial tribunal such as the AIRC or a State industrial tribunal.

Unlike formal agreements, an informal agreement does not replace or override any award or formal agreement. An informal agreement operates in addition to formal awards or agreements already in place.

It is preferable that any informal agreement be in writing and make clear to the parties what their obligations under the agreement are.

Australian workplace agreements (AWAs)

An Australian workplace agreement is an individual agreement reached between an employer and an employee, about the employee's wages and conditions of employment.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

Who can make an AWA?

To be eligible to make an AWA you must satisfy one of the following categories:

- the employer is a constitutional corporation, which you will be if you are registered under the Corporations Law (if you are unsure about whether your business is a constitutional corporation, contact the Department of Workplace Relations and Small Business on the numbers listed in 'More Information');
- the primary workplace of the employee is in Victoria or a Territory;
- the employer is an unincorporated employer in Queensland and is bound by a federal award.

AWAs may be made collectively, but must be signed individually. Where agreements are negotiated collectively, they may be included in the same document if the same employer is party to all agreements.

An employer should offer AWAs in the same terms to all employees doing the same kind of work unless there is a good reason for not doing so.

There is no up-front requirement for hearings or submissions and there is no union intervention in the agreement approval process.

Employees may, however, appoint a bargaining agent such as a union, an employee organisation or some other person, to act for them. The bargaining agent cannot sign the agreement – the employee must do this.

AWAs are also subject to the 'no disadvantage' test. An AWA passes the test if it does not result, on balance, in a reduction in the overall terms and conditions of employment when compared with the relevant award or designated laws. AWAs are subject to any State laws dealing with occupational health and safety, workers' compensation, apprenticeship, or any other prescribed law.

AWAs have to be lodged with and approved by the Office of the Employment Advocate (OEA), which ensures that all AWAs pass the no disadvantage test.

The OEA has published *Australian Workplace Agreements – Employer Guide*. Contact the OEA on 1300 363 471 (for the cost of a local call) for a copy of this guide.

Certified agreements (CAs)

Certified agreements can be made between employers and unions, or directly between employers and employees.

If a union is to be party to a CA that is negotiated directly with employees, it must have at least one member employed in the business whose employment would be subject to the agreement.

The union must also be entitled under its rules to represent the workplace interests of the member for the work listed in the agreement.

CAs must be approved by a valid majority of the employees who will be affected by it.

The employer must ensure that all employees either have, or have access to, a copy of the proposed agreement 14 days before any approval is given.

CAs must also meet the no disadvantage test. This means that agreements must not cause an

overall reduction in employment conditions when compared with the relevant award.

CAs will override federal or State awards to the extent of any inconsistency between them. However, CAs are subject to any State laws dealing with occupational health and safety, workers' compensation, apprenticeship, or any other prescribed law.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

4 Termination of employment

The new unfair dismissal system is based on 'a fair go all round', striking a balance between employers and employees.

For employers, the important but not absolute right to manage their own businesses is recognised. When considering an employee's claim of unfair dismissal, the Australian Industrial Relations Commission simply asks whether the termination was 'harsh, unjust or unreasonable'.

The law aims to discourage claims that are not genuine by making employees aware before their applications are filed of the possibility that costs may be awarded against them.

Having a valid reason for termination

The Workplace Relations Act lists the factors that the AIRC must have regard to when making a decision in an unfair dismissal matter. They include:

- whether there was a valid reason for the termination related to the capacity or conduct of the employee;
- whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond to any reason related to capacity or conduct;
- whether the employee was warned about the unsatisfactory performance beforehand.

Procedural fairness

'Procedural fairness' refers to whether or not an employer warns an employee of poor performance, advises them of a reason for termination and allows the employee an opportunity to respond. While procedural fairness is only one factor the AIRC will be take into account when deciding whether a dismissal is unfair, it is a very important issue.

Notification

It is good business practice to give the employee in writing the reason(s) for termination and keep a copy for your own records. No matter what the reason for

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

termination, the AIRC will still consider whether the employee was informed.

Opportunity to respond

Giving the employee the opportunity to respond to the reasons given for dismissal provides fairness to employees who face losing their job (especially in relation to poor performance or conduct). It is good business practice to keep a written record of the fact that the employee was given a chance to respond, and record the nature of the response.

Warnings

There is no set number of warnings that must be given to an employee about unsatisfactory performance or conduct. At least one warning should be given of dismissal, which should clearly state:

- instructions for improvement of conduct and/or performance;
- a set time for review of performance and/or conduct; and
- that dismissal might occur if the problem continues.

More than one warning might be appropriate depending on factors such as the employee's length of service, the nature of the conduct or performance, and the number of previous warnings.

A written warning (a copy kept by the employer) is the preferable form of warning. Ideally this should be signed by the employee as an acknowledgment of receipt.

Unlawful termination

It is unlawful to dismiss an employee due to any of the following reasons:

- temporary absence because of illness or injury
- membership or non-membership of a trade union
- absence from work during maternity leave or other parental leave
- because of the employee's sex, race, age, physical or mental disability, national extraction, religion, pregnancy, sexual preference, marital status or family responsibilities

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

- the employee has made a complaint seeking enforcement of an award or agreement
- refusing to negotiate or sign an AWA.

It is also unlawful for an employer to dismiss a worker without notice or pay in lieu unless the employee concerned is guilty of serious misconduct.

Exclusions from termination of employment provisions

The following employees are excluded from the termination of employment law, including the unfair dismissal provision, and so cannot appeal against dismissal:

- an employee engaged under a contract of employment for a specified period of time or for a specified task (except where a substantial reason for the employer engaging an employee on this basis is to avoid obligations under the termination of employment provisions)
- a probationary employee (the period of probation should generally be no more than 3 months and should be determined before the employment commences);

- a casual employee with less than 12 months service;
- a non-award employee earning over $64 000 per annum
- a trainee whose employment under a National Training Wage traineeship, or an approved traineeship, is for a specified period, or is otherwise limited to the duration of the agreement.

If you are notified of a claim for unfair or unlawful dismissal against you:

It is recommended you seek immediate advice from either:

- your employer association
- your legal adviser.

The AIRC will serve you an application alleging an unfair dismissal and provide you with an Information Sheet on proceedings before the Commission. See 'More Information' for the contact details of the AIRC in each State or Territory. The AIRC Internet address is http://www.airc.gov.au

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

5 Definition of employee

A major concern for micro businesses is identifying whether a person is an employee or a contractor, and then ascertaining what legal obligations flow.

With this in mind, the Government has produced *Unravelling the Threads – Who is or is not an Employee*. The subjects covered in *Unravelling the Threads* are fringe benefits tax, Superannuation Guarantee, anti-discrimination, income (PAYE) tax, pay-roll tax, workers' compensation, occupational health and safety, long service leave and annual leave.

Unravelling the Threads has been produced in both hard copy and electronic forms.

Hard copies of *Unravelling the Threads* can be obtained by calling toll free 1300 366 889. The Department of Workplace Relations and Small Business will also make each topic covered in *Unravelling the Threads* available through a fax-back service on 1900 937 450.

The electronic version can be accessed through:

- the Department of Workplace Relations and Small Business Internet homepage at http://www.dwrsb.gov.au
- the AusIndustry administered Business Information Service (BizLink) at http://www.business.com.au
- a stand-alone diskette which can be loaded on 386 IBM compatible PCs, or later models, with a minimum RAM of 8MB. Diskettes can be obtained by calling toll free 1300 366 889.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

6 Freedom of association

The Workplace Relations Act outlaws compulsory unionism and there are new right of entry rules for union officials.

The freedom of association laws ensure that employers, employees and independent contractors are free to join or not to join industrial associations such as unions or employer organisations, and are not discriminated against or victimised because they are, or are not, members of such associations.

This means that as an employer you must not (and must not threaten to) dismiss, refuse to employ, or offer less favourable conditions to, an employee or independent contractor because they:

- are, or are not, a member of a union; or
- propose, or do not propose, to become a member of a union; or

- are, or have been, or propose to become, an officer or delegate of a union; or
- have participated in lawful union activities; or
- if they are an independent contractor, have not paid a fee to a union, or have employees who are not, or do not propose to become, members of a union.

The Office of the Employment Advocate helps and advises employees and employers on freedom of association issues and investigates contraventions of the freedom of association provisions. See 'More Information' for contact details.

Right of entry

Unions do not have an automatic right of entry to your premises at any time they wish.

As an employer, you might need to know about the new right of entry provisions.

Union officials can only enter your premises if:

- they suspect a breach of the Workplace

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

Relations Act or a federal award or certified agreement; or

- they want to speak to your employees.

In each case, they must have a right of entry permit from an industrial registrar and they must give you 24 hours notice of entry onto the premises.

In the case of entry to hold discussions with employees, a union may only enter premises where work is being carried on to which a federal award applies that is binding on the permit holder's union, and provided that employees who are members or eligible to be members of that union work on the premises. If employees agree to hold discussions with the permit holder, such discussions may only take place during meal breaks or other work breaks.

If a union suspects a breach of the Act, an award or agreement, and provided the conditions are met, union representatives with a permit may enter your premises during work hours and inspect any pay or time sheets, or other documents relevant to the breach, and speak to your employees.

Union officials cannot inspect an AWA, or other documents not relevant to a suspected breach. However, pay or time sheets remain available for inspection even if they concern work done under an AWA.

Taxation records would not normally be relevant, and the union has no automatic right to inspect them.

If you refuse entry to a union representative who is entitled to enter the site, you might breach the right of entry provisions.

Award provisions dealing with right of entry are no longer valid. They cannot be enforced.

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

7 Industrial action

Industrial action includes strikes, lockouts, stop-work meetings not authorised by the employer, bans, restrictions and limitations on work.

It does not include action related to occupational health and safety concerns.

The law dealing with industrial action has been revised to give a better balance between the rights of employers, employees, representative organisations and the general community.

There is a limited right to take industrial action and a right to lock out under the new law:

- it must take place during a bargaining period — a bargaining period starts seven days after one party gives written notice to another party and to the AIRC of its intention to reach an agreement;
- a genuine attempt to reach agreement must precede the industrial action or lockout; and

- three days written notice must be given of the intended industrial action.

Industrial action that occurs during the life of an agreement — that is 'unprotected' industrial action — is unlawful.

Under the Workplace Relations Act it is now unlawful for an employer to pay strike pay, or for a union to take industrial action to pursue strike pay, or for an employee to accept strike pay.

The AIRC has powers to give directions to stop or prevent unlawful industrial action.

8 More information

For more information on the Workplace Relations Act, awards and certified agreements contact:

Department of Workplace Relations and Small Business
GPO Box 9879
Canberra ACT 2601
Telephone: (02) 6243 7483
Web site: http://www.dwrsb.gov.au

Details of regional offices of the Department of Workplace Relations and Small Business are as follows:

New South Wales
Level 7, Main Tower
Sydney Central Building
477 Pitt Street, Sydney
GPO Box 9879, SYDNEY NSW 2001
Telephone: (02) 9282 0800

Australian Capital Territory
South West Area Office
Garema Court
148-180 City Walk, Canberra
GPO Box 521, CANBERRA ACT 2601
Telephone: (02) 6247 0144

Victoria
8th Floor, Customs House
414 La Trobe Street, Melbourne
GPO Box 9879, MELBOURNE VIC 3001
Telephone: 1300 363 264

Queensland
State Department of Employment, Training and Industrial Relations
199 Charlotte Street, Brisbane
Wageline: (07) 3872 0550

Northern Territory
6 Searcy Street, Darwin
GPO Box 385, DARWIN NT 0801
Telephone: (08) 8946 1666

South Australia
8th Floor West, Commonwealth Centre
55 Currie Street, Adelaide
GPO Box 9879, ADELAIDE SA 5001
Telephone: (08) 8237 6299

Tasmania
Level 6, 85 Macquarie Street, Hobart
GPO Box 9879, HOBART TAS 7001
Telephone: (03) 6235 1999

Western Australia
State Department of Productivity and
Labour Relations
3rd floor, Dumas House
2 Havelock Street, West Perth
Wageline: 1300 655 266

For more information on Australian workplace agreements, right of entry and freedom of association contact:

The Office of the Employment Advocate

GPO Box 9842, In your capital city
Telephone: 1300 366 632 (for the cost of a local call)

For information on unfair dismissal procedures contact:

The Australian Industrial Registry

Victoria
Level 42, Nauru House
80 Collins Street
MELBOURNE VIC 3000
Telephone: (03) 9653 8200

New South Wales
Level 8, 80 William Street
EAST SYDNEY NSW 2011
Telephone: (02) 9332 0666

Australian Capital Territory
2nd Floor, CML Building
17-21 University Avenue
CANBERRA ACT 2600
Telephone: (02) 6247 9333

Queensland
Level 14, Central Plaza Two
66 Eagle Street
BRISBANE QLD 4000
Telephone: (07) 3227 6666

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

Northern Territory
Level 10, NT House
22 Mitchell Street
DARWIN NT 0800
Telephone: (08) 8944 3131

South Australia
Level 8, Riverside Centre
North Terrace
ADELAIDE SA 5000
Telephone: (08) 8207 0900

Tasmania
1st Floor, Commonwealth Law Courts
39-41 Davey Street
HOBART TAS 7000
Telephone: (03) 6232 1753

Western Australia
Floor 16, National Mutual Centre
111 St Georges Terrace
PERTH WA 6000
Telephone: (08) 9278 8800

For information on other small business management concerns contact the State/Territory government

Small business advisory services:

New South Wales	(02) 9282 6977
Victoria	(03) 9651 9888
Victoria country callers	1 800 136 034
Tasmania	(03) 6233 5712
Queensland	(07) 3224 8568
Queensland country callers	13 26 50
South Australia	(08) 8233 4600
Western Australia	(08) 9220 0222
WA country callers	1 800 199 125
Australian Capital Territory	(02) 6283 5200
Northern Territory	(08) 8999 7916
NT country callers	1 800 193 111

CONTENTS PAGE
The Act
Awards
Agreements
Termination of employment
Definition of employee
Freedom of association
Industrial action
More information

CONTENTS PAGE

The Act

Awards

Agreements

Termination of employment

Definition of employee

Freedom of association

Industrial action

More information

A wide range of information of interest to small business operators is also available on www.ausindustry.gov.au