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Bringing Good Governance to Life



The Road Ahead

Human Resources Risk Survey

December 2009

Contents

About the Study	3
Executive Summary	5
New Industrial Relations Environment – What Are The Risks?	8
Unaware and Underprepared	11
Investing in People Management	12
Finding and Securing the Right People	14
Performance Management and Succession Planning	16
Managing the Termination Process.....	18
About CompliSpace	19

About the Study

From August to December 2009, CompliSpace conducted an in-depth survey of 352 Australian small to medium sized businesses, which together employ over 100,000 staff, to assess their overall level of human resources risk and to explore their level of understanding and preparedness for the changes introduced by the *Fair Work Act 2009* (Cth) and Modern Awards.

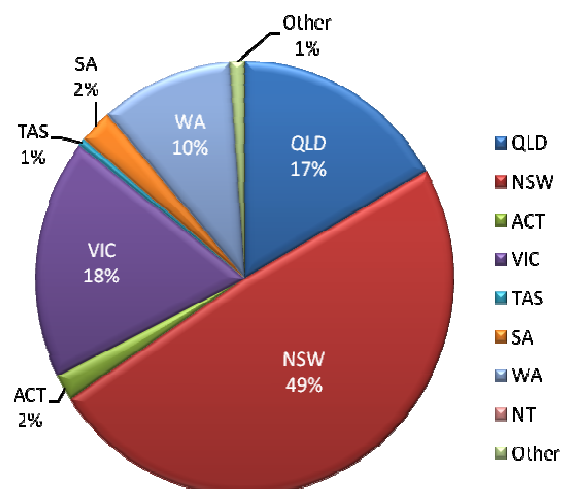
The survey consisted of 40 multiple choice questions addressing key elements of each businesses human resources infrastructure including: the level of preparedness and awareness for the new industrial relations environment; people management and development; recruitment; and succession planning.

Copies of the survey are available at www.complispace.com.au.

Demographic Profile

Location

The survey was completed by businesses in every Australian State and Territory with the exception of the Northern Territory. Forty-seven percent (47%) of respondents had operations in more than one Australian state or territory and eighteen percent (18%) employed staff outside Australia.

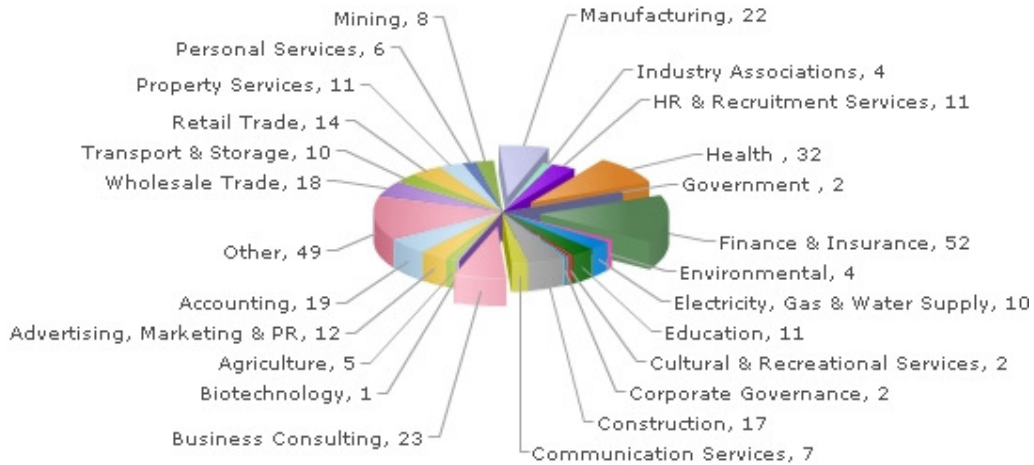


Size

The survey represented a good cross-section of businesses by size with 55% of respondents having between 15 and 250 staff, 26% having less than 15 staff and 20% having over 250 staff.

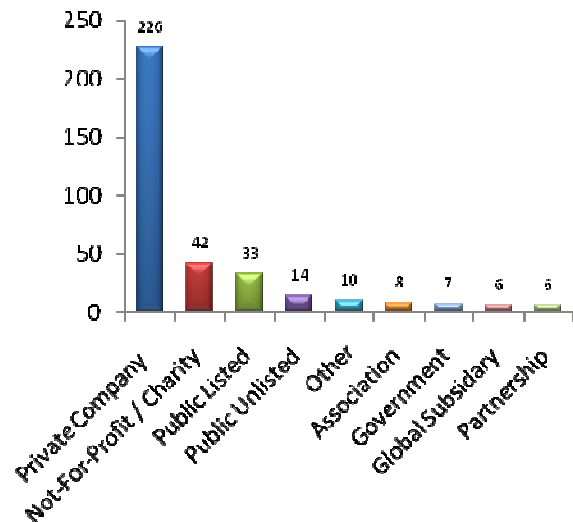
Industry

The respondents came from over 25 different industry groups with the largest representations coming from financial services (15%), health & community services (9%), manufacturing (6%) and wholesale trade (5%).



Ownership

Whilst respondents were mostly privately owned companies (64.2%) there was also a strong representation from the not-for-profit / charity sector (11.93%) and publicly listed companies (9.37%).



Executive Summary

The introduction of the *Fair Work Act* on 1 July 2009 marked the commencement of a significant new workplace relations system for Australian business, and the third major change in workplace reform that businesses have been asked to adapt to in the past four years.

On 1 January 2010, the introduction of the Modern Awards, and the 10 National Employment Standards will put in place the final, and perhaps most significant, element of the new national industrial relations system.

The changes introduced by the *Fair Work Act* and Modern Awards require business owners and their managers to re-think their human resources strategies, amend their internal policies and procedures, and re-train staff. Businesses are now confronted with significant new compliance obligations.

The results of this national survey of 352 businesses provides an indication of the level of awareness and adaption to the new laws and systems. The survey throws light on the following questions: Do Australian business managers understand the new national industrial relations system? Have business managers adapted their people management strategies and approaches? Are they readying their infrastructure and operational processes for change?

What is clear from this study is that a great number of companies remain unaware and unprepared for the substantial changes that have already been introduced by the *Fair Work Act*, such as expansion of the coverage of Unfair Dismissal laws, and those changes that will commence on 1 January 2010, namely the introduction of the Modern Awards and the National Employment Standards.

Key Findings

- Many managers are not aware of, or adequately prepared for, the changes introduced by the *Fair Work Act*. Changes that could significantly impact business include the re-introduction of the Unfair Dismissal remedy, the introduction of National Employment Standards and Modern Awards.
- Three in five managers surveyed did not have a good level of understanding of the “unfair dismissal” remedy and the corresponding potential impact on their business. In addition, only just over half of respondents agreed that their businesses had documented procedures to manage discipline and termination situations, being the principal means of mitigating the risks associated with dismissal claims.
- Over 50% of managers surveyed admitted that they do not understand Modern Awards. Despite the fact that non-compliance could have significant consequences, especially for employers who have acted on the mistaken belief that paying above award wages means that awards do not apply to them. Employers who ignore Modern Awards may be in for a rude shock given that the ‘flexibility clause’ contained in each award could mean that their current common law agreements no longer insulate them from obligations to pay overtime, penalty rates and leave loadings.
- The major problem for most businesses appears to be their ability to effectively maintain their human resources infrastructure, given the pace of legislative change. For many businesses the *Fair Work Act* and Modern Awards are the third set of industrial relations laws in the past four years.

Add to this, changes in work / lifestyle balance, which now sees a significant portion of the Australian workforce engaged in part-time employment, with a corresponding need to introduce flexible work practices, and the people management challenges confronting the Australian small-to-mid-sized business sector immediately become apparent.

This research provides an interesting insight into the commitment of most small-to-medium sized enterprises to effectively manage their people, whilst simultaneously revealing the challenges they face in keeping up-to-date with a seemingly ever changing workplace relations landscape.

Whilst the findings highlight concern, they also indicate that the vast majority of Australian businesses take their people management seriously and have invested in the core human resources infrastructure that is required to meet these challenges.

The real challenge, it seems, is that the laws are changing so quickly that it is difficult for the average business person to keep abreast of these changes, let alone interpret them and translate them into plain English policies that their staff can understand.

Ignorance of the law is, of course, no excuse and those that fail to meet these challenges face not only the risk of litigation, fines, penalties and investigation by a newly empowered regulator (Fair Work Australia), but also the risk of destroying real value in their business through damage to culture, brand and loss of productivity.

The fact that less than half of the businesses surveyed have comprehensive policies and procedures in place documenting key functional areas, and only slightly more than half have contingency plans in place to cover the loss of key staff, indicates that organisations are generally at high risk of losing value through lack of succession planning.

- More than 50% of respondents agreed they had a poor understanding of the National Employment Standards (NES). They are unaware of significant changes, such as the entitlement for carers of pre-school children (and children under 18 with a disability) to request flexible working arrangements, or the extension of unpaid parental leave from 12 to 24 months, and the introduction of redundancy entitlements for all workers.
- Although respondents reported low levels of awareness and preparedness for the commencement of the *Fair Work Act*, the survey found that the vast majority of businesses are committed to the development of an internal human resources program, with three in four businesses having allocated a director or senior manager to the task of managing the human resources function.
- Almost 80% of businesses have signed employment contracts and/or workplace agreements in place with all of their staff members. However, many have indicated that they may be at higher risk of contract related claims as their agreements were not drafted by a suitably experienced lawyer or not regularly reviewed to ensure currency with the law. Further, a large number did not maintain copies of key documents such as relevant awards and/or workplace agreements as required by law.
- 68% of respondents showed their commitment to investing in human resources infrastructure by having a Performance & Development Review (PDR) Program in place, which includes at least one formal review meeting between staff and their managers annually. These businesses also actively monitor PDRs to ensure that they are completed in a timely manner and do not “fall between the cracks”.

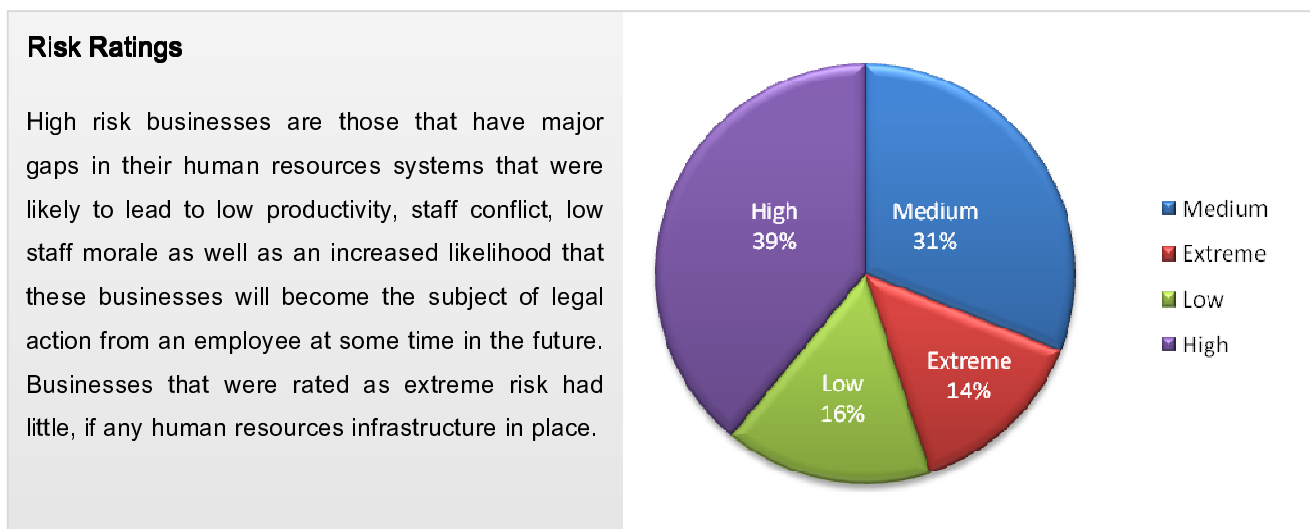
Based on their individual responses, each organisation that completed the survey was given a risk rating of extreme, high, medium or low. Overall the survey results indicate:

14% of respondents were considered to be **Extreme Risk** having little or no human resources infrastructure in place. For these businesses the consequences of failing to implement an appropriate human resources infrastructure include: low productivity as staff are not effectively trained; high levels of conflict as no clear procedural guidelines are provided; poor staff morale and a strong likelihood that these businesses will become the subject of legal action from a former employee at some time in the future. There is a very real risk that due to poor management, these businesses will become increasingly uncompetitive and slow to adapt to rapidly changing business conditions.

39% were considered **High Risk** having been found to have major gaps in their human resources systems that were likely to lead to low productivity, staff conflict, low staff morale and an increased likelihood that these businesses will become the subject of legal action from a former employee at some time in the future.

31% were considered **Medium Risk** having a relatively strong human resources infrastructure in place however with gaps in key areas that need to be addressed. Lack of true systemisation, or perhaps a lack of discipline, means that within these businesses, things will occasionally fall through the cracks and create disruption in the workplace, with the associated problems of lowered productivity and staff morale, as well as the potential for legal claims.

16% were considered **Low Risk** having a robust human resources infrastructure in place which, combined with disciplined management, creates a positive corporate culture and a platform for sustained growth. Clearly structured policies and procedures mean that staff in these businesses know what is expected from them as they receive clear feedback as to their performance. These businesses are likely to be highly productive resulting in increased profitability and shareholder returns.



New Industrial Relations Environment – What Are The Risks?

Key Changes Introduced by the New Industrial Relations System

The *Fair Work Act* and new Modern Award system together create changes that will require all business managers to re-think their human resources strategies and make amendments to their human resource policies and procedures. These changes have come in two waves.

The first wave of *Fair Work Act* changes commenced on 1 July 2009, with the re-introduction of unfair dismissal laws for businesses with less than 100 staff, as well as the introduction of new rules relating to enterprise bargaining, union rights of entry and transfer of businesses.

On 1 January 2010, the second wave of industrial change introduces the National Employment Standards and a new system of Modern Awards.

National Employment Standards

The National Employment Standards (NES) create a set of new minimum entitlements for all workers that cannot be modified to an employee's detriment by an employment contract, award or workplace agreement.

Whilst some of these standards will be familiar, others are completely new, or contain subtle changes, which create significant obligations on employers or increase their risk exposure. New obligations include:

- An entitlement for carers of preschool children (and children under the age of 18 with a disability) to request flexible working arrangements.
- The extension of unpaid parental leave that an employee can request from 12 to 24 months.
- The introduction of an entitlement to redundancy pay for all workers (not just those covered by awards) except those employed by small business (being those with fewer than 15 staff).

Subtle changes include:

- The extension of the definition of defacto spouse/partner to include same sex couples.
- The removal of the restriction, previously contained in the *Workplace Relations Act 1996*, which only allowed an employee to take a maximum of 10 days carer's leave in any 12 month period, notwithstanding the fact they may have accrued a greater entitlement.
- The increase of the age of a child to which adoption leave applies from 5 years to 16 years.

Modern Awards

Modern Awards are read in conjunction with the NES and contain additional terms and conditions relating to such things as minimum wages, overtime, penalty rates and workplace allowances. These awards are industry or occupation based and will apply to all national system employers and employees who perform work covered by a particular award.

As the coverage of the Modern Awards has been extended beyond the scope of the current system, it is advisable for all employers to act on the basis that they will have at least some staff that come under Modern Awards and to prepare accordingly. By way of example, employees who perform work in call centres in NSW were traditionally award free but will come under the new system, and the vast majority of employers, not covered by industry specific awards that contain clerical classifications, will have at least some administrative staff that fall under the new Clerks – Private Sector Award 2010.

Ignorance of Modern Awards will prove costly for employers. Many Modern Awards will provide loadings for part-time employees, and the casual loading for a number of industries will be set nationally at 25%. This will have a significant impact in states where the existing loadings are lower than 25% and in industries, such as retail and hospitality, which have traditionally employed casuals on award rates.

To add to the complexity of the situation, the Australian Industrial Relations Commission (AIRC) has created a five year transitional period which will apply to terms and conditions of employment relating to minimum wages, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties, and shift allowances. Application of these complex transitional provisions is likely to cause a major headache amongst those that have to deal with payroll administration.

Ironically, perhaps the greatest impact of the introduction of the new system of Modern Awards is its relative simplicity. The Modern Award system has created national uniformity by consolidating thousands of former Federal and State Awards into approximately 120 Modern Awards. In very simple terms, where many employers may have ignored awards in the past, the creation of a simplified national award structure means that employers' obligations are now much more clearly defined and much easier to enforce. Ignorance will not be an excuse.

Re-introduction of Unfair Dismissal Laws

In the first 10 weeks following the re-introduction of Unfair Dismissal laws for businesses with less than 100 staff, the number of applications filed almost doubled, indicating a clear willingness of employees to utilise this remedy.

Given that the *Fair Work Act* clearly sets out the matters that must be taken into account in determining whether or not a dismissal was unfair, the real risk for employers is failing to follow the correct procedures when dismissing a staff member or, conversely, retaining under-performing staff in the mistaken belief that the new system means that they can not dismiss a worker without being at risk of a claim.

Other Workplace Legislation

Whilst all the recent focus has been on the commencement of the *Fair Work Act* and the Modern Awards, the fact is that, in Australia, there are a vast array of other laws that also affect workplace relations including the complex maze of State and Territory laws covering such matters as discrimination, equal opportunity and workplace safety.

Whilst these laws stand outside the *Fair Work Act*, they often work in tandem, impacting employers in the form of unlawful dismissal claims, for example, where the termination of an employee is found to be discriminatory, or due to illness or injury, such as workplace stress.

There is also a great deal of industry-specific legislation that contains specific requirements relating to the adequacy of human resources infrastructure including the recruitment, training, monitoring and supervision of staff.

Recent Case Law

Since the introduction of WorkChoices in March 2006, there have been a series of Court decisions that have had a direct impact on how businesses should structure their affairs with respect to human resources.

Without doubt, the most significant of these cases has been *Goldman Sachs J B Were Services Pty Ltd V Nikolich* [2007] FCAFC 120. The Nikolich case represented a seismic shift in the way breach of employment contract and related claims are handled and determined, with the Courts now willing to hold that workplace policies are a two way street, being contractually binding on both the employee and the employer.

The commercial impact of this “shift” in any particular circumstance will largely be determined by the way in which an employer’s employment contracts and human resources policies are drafted and implemented. Simple wording and the effectiveness of internal procedures can have significant commercial ramifications and either reduce or increase an employer’s exposure to legal proceedings.

What do these changes mean for business?

What quickly becomes apparent is that in order to fully understand the current industrial relations environment and the practical implications for the day-to-day management of a business, it is necessary to have an understanding of the law beyond the text of the *Fair Work Act* and it is also necessary to establish a robust human resources infrastructure.

Human resources management and the law are intricately interwoven, impacting almost every stage of the human resources process from recruitment through to termination. The challenge for businesses therefore is to implement human resources programs through which they can both comply with their legal obligations and effectively manage their people.

Unaware and Underprepared

The survey results clearly indicate that a majority of small-to-medium enterprise business managers are either unaware or not adequately prepared for the changes introduced, or about to be introduced, by the *Fair Work Act* and the Modern Awards.

Ignorance of the new industrial relations legislation is likely to prove costly for employers both in terms of lost opportunities and downside risks.

By way of example;

- In the period leading up to the introduction of the Modern Awards, many employers have taken the opportunity to put in place enterprise agreements, based on old award structures, which may provide them with a greater degree of flexibility in their workplace, and a real commercial advantage over their competitors.
- Companies who are unaware of the detail of the NES changes may fail to provide staff their minimum terms and conditions and therefore could be exposed to legal claims, as well as potential diminution in the value of their business through damage to culture, brand and loss of productivity. The entitlement for carers of preschool children (and children under 18 with a disability) to request flexible working arrangements is a commonly cited example of an obligation that, if ignored, may have a significant impact on employers in the future.
- The low level of understanding of, and preparedness for, the re-introduction of the unfair dismissal remedy for businesses with less than 100 employees, indicates that many employers may fail to follow the correct procedures when dismissing a staff member or conversely hold onto under-performing staff in the mistaken belief that the new system means that they can not dismiss a worker.

Key Survey Statistics

July 2009 *Fair Work Act* Changes

- Only 40% of respondents agreed that their executive managers had a good level of understanding of, and had properly prepared for, the key changes introduced by the *Fair Work Act* on 1 July 2009 (including the reintroduction of the Unfair Dismissal remedy for businesses with less than 100 employees).

- Only 53% agreed that their businesses had documented procedures to manage discipline and termination situations being the principal means of mitigating the risks associated with unfair dismissal claims.

Introduction of National Employment Standards

- Only 46% of respondents agreed that their executive managers are aware of the fact that the new National Employment Standards commence on 1 January 2010 and that their business will be properly prepared to comply with these standards.

Introduction of Modern Awards

- Only 44% of respondents agreed that their executive managers are aware of the fact that the new system of Modern Awards commences on 1 January 2010 and that their business will be properly prepared to comply with these awards.

Investing in People Management

Although respondents reported low levels of awareness and preparedness for the commencement of the *Fair Work Act*, the survey found that the vast majority of businesses are committed to the development of an internal human resources program.

In an encouraging sign, as many as three in four companies have allocated a director or senior manager to the task of managing the human resources function and a similar number have developed a comprehensive suite of human resources policies and procedures. These figures are supported by the fact that 71% of respondents felt that individual positions and responsibilities, as well as reporting lines, were clearly communicated within their businesses.

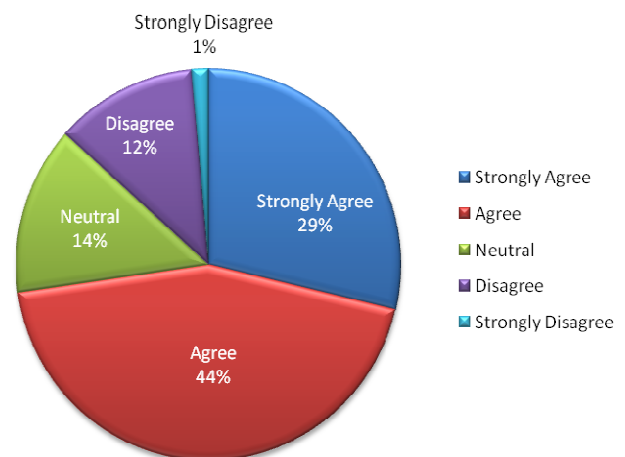
What is more, businesses are showing a strong commitment to developing their knowledge and skills. More than two in three companies felt that they have the right mix of knowledge and skills to achieve their strategic goals and objectives.

Key Survey Statistics

- Over 90% of organisations believe that they accurately capture records of all staff leave and that they keep accurate and complete time and wage records as well as issuing payslips to workers in the prescribed form.
- 74% had a director or senior manager allocated the task of managing the businesses strategic human resources function
- 73% felt that they had established an effective internal communication platform through which they provided all staff with easy access to current company policies and procedures.
- 72% felt that their businesses had the right mix of knowledge and skills to achieve their strategic objectives.

HR Strategic Planning

“Within our business a director or senior manager has been allocated the task of managing our strategic human resources function.”



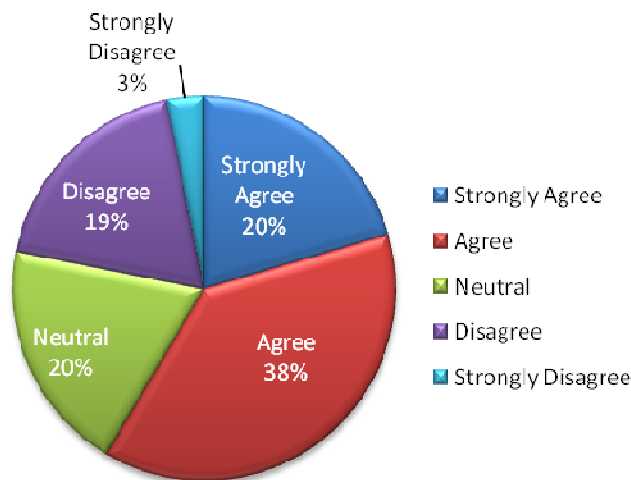
Once again the problem for most businesses appears to be their inability to effectively maintain their human resources infrastructure in the face of the seemingly never ending stream of legislative changes. Only 58% of businesses effectively review their suite of human resources policies and procedures for currency at least once every 12 months or when there is a material change in law.

The low levels of awareness of the *Fair Work Act* changes suggest that the majority of businesses will not be adequately prepared for the commencement of the NES or the Modern Awards.

Notwithstanding the fact that there is clear intent by most business managers to invest in their human resources function, it remains a concern that, based on their responses to over 40 questions covering commonly recognised elements of the human resources function, 14% of businesses that completed the survey were rated as having an extreme human resources risk profile, whilst 39% were considered to be high risk.

Currency of Policies & Procedures

“Our organisation’s human resources policies and procedures are reviewed for currency, when there is a material change in law, or otherwise at least once every 12 months.”



- 71% considered that they maintained an up-to-date suite of human resources policies and procedures dealing with high risk areas such as equal employment opportunity, discrimination, bullying and harassment.
- 71% maintained and made available to staff an up-to-date organisational structure diagram that clearly illustrates key positions/responsibilities and reporting lines.
- 70% maintained a statement of their corporate vision and values and effectively communicated it to staff, whilst 62% had gone further and developed internal systems and procedures to ensure that their organisations vision and values were regularly reinforced with staff.
- 70% maintained a documented suite of policies and procedures that dealt with general conditions of employment (such as dress code and email/internet usage) and with staff leave entitlements (including parental leave and personal leave).
- 58% reviewed their suite of human resources policies and procedures for currency when there is a material change in the law, or otherwise at least once every 12 months.
- 57% of organisations maintained an up-to-date internal grievance policy that was effectively communicated to all staff.
- Only 53% of organisations had developed documented procedures to manage discipline and termination situations.

Finding and Securing the Right People

One of the keys to any businesses' success is its ability to find the right people and to ensure that they are quickly and efficiently integrated into an organisation, to join the team and, become as productive as possible in the shortest period of time.

In order to do this it is generally accepted that businesses develop recruitment and induction procedures, ensure all employees have clearly documented terms and conditions of employment, and that they effectively utilise a probation period to determine the suitability of a new employee prior to offering them a permanent position.

The survey found that approximately 75-80% of businesses had implemented a recruitment program, developed procedures to ensure that all staff members had employment agreements in place and conducted formal probation reviews, whilst 69% considered that they had developed a robust induction program.

Following the trend of small-to-medium businesses struggling to manage effectively their human resources risk:

- 36% could not agree that their workplace agreements had been drafted by a suitably qualified lawyer and regularly reviewed for currency;
- 38% could not agree that they reviewed positions against relevant awards and made a copy of those awards available to workers as they are legally required to do; and
- 39% could not agree that they provided training to new employees with respect to high risk areas such as workplace safety, discrimination and harassment.

Key Survey Statistics

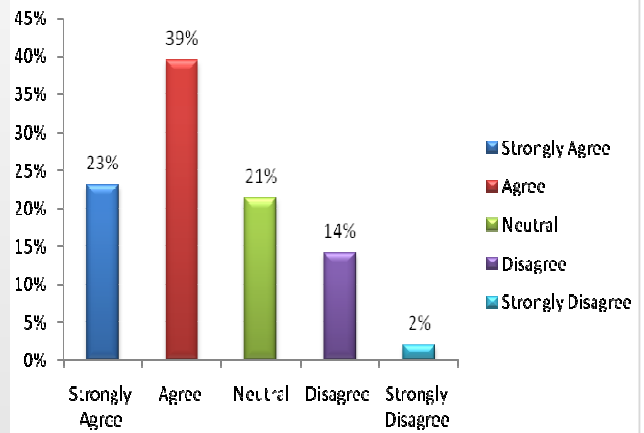
- 80% of businesses ensured that prior to making a recruitment decision they had a clear job description in place for the vacant position.
- Within 79% of businesses all staff members had a signed employment contract in place and/or are employed subject to a registered workplace agreement.
- 78% of businesses conducted thorough background checks on all new starters.
- 75% of businesses formally reviewed all employees during their probation period and provided feedback (both positive and negative), whilst 68% ensured that they made a positive decision, as to whether or not, to offer the new employee a permanent position prior to the end of probation.
- 69% of businesses had developed induction programs designed to allow new starters to become productive as possible in the shortest period of time.
- Only 64% felt that their employment/workplace agreements had been drafted by a suitably experienced lawyer and were regularly reviewed to ensure their currency with legal changes.
- Only 63% of respondents reviewed each staff position to identify whether or not individual workers are subject to a current award or workplace agreement and then made a copy of the relevant award / agreement available to staff.

The failure to effectively manage the processes of recruitment, induction and probation review often increases the likelihood of an organisation offering permanent employment to people that are inappropriately qualified or simply do not fit their corporate culture.

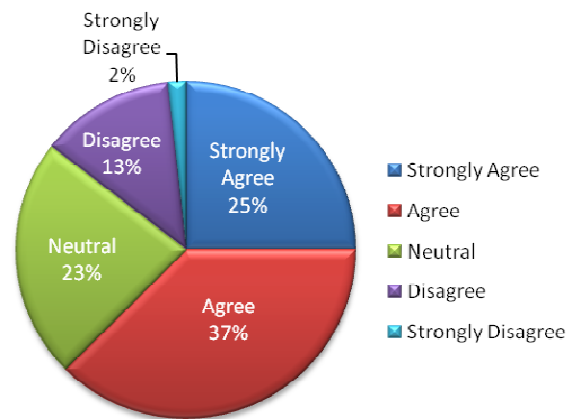
The consequence of failing to manage this risk is often seen in an increase in workplace conflict and a reduction in overall workplace productivity. In the event that the organisation does not have effective performance management review and discipline and termination procedures in place it is often these recruitment failures that ultimately result in legal claims being lodged against employers.

- Only 61% of respondents provided training to new employees with respect to high risk areas such as workplace safety, discrimination and harassment. This is despite the fact that 71% considered that they maintained an up-to-date suite of human resources policies and procedures dealing with these areas.

“Within our organisation we review each and every staff position and identify whether or not individual workers are subject to a state award (NAPSA), federal award or registered workplace agreement.”



“Where staff (for example clerical and administration staff) are subject to awards or registered workplace agreements we maintain a copy of the relevant awards and/or agreements and ensure that we meet the terms and conditions when dealing with these staff members.”



Performance Management and Succession Planning

The conduct of effective staff performance and development reviews is considered to be a critical factor in increasing workplace productivity and preventing potential employee related litigation. It is therefore a pleasing finding of this survey that two in three employers have invested in implementing robust performance management programs.

Perhaps in response to the global financial crisis, organisations are now sensing their vulnerability to rapid change. Traditionally an area where organisations have not been strong, over half of the companies are reporting that their workforce is well structured to achieve rapid growth or rapid reduction in staff numbers.

Planning for succession is regarded as a critical step toward building a sustainable and successful business. This is even more so when you take into consideration the high proportion of Australian business owners and executives looking to exit and retire from their businesses in the next 10 to 15 years. The need to take action to address succession planning in an organisation is therefore considered paramount.

Succession planning involves not only the identification and selection of capable back-up 'talent' to whom key managers can be comfortable "handing over the mantle" (whether by choice or through circumstance), it is also about ensuring that key intellectual property is effectively captured to stop any unnecessary draining away of value as a result of staff turnover. Some key aspects of this process involve ensuring that all information in the business is captured, protected, managed and maintained through documented policies and procedures. This ensures that key roles are documented through detailed job descriptions and that core competencies are covered by a number of key staff or other resources.

Key Survey Statistics

- 68% of businesses have a Performance & Development Review (PDR) Program in place that includes at least one formal review meeting, between a staff member and his/her manager, annually. These businesses agreed that they actively monitor PDRs to ensure that they are completed in a timely manner and do not "fall between the cracks".
- 67% reviewed the employees' job description at each formal performance review meeting to ensure its currency.
- Only 55% of businesses agreed that each of their employees have an up-to-date, documented job description and ensured where possible, core competencies were covered by a number of key staff and/or outsourced to an external service provider, to minimise the impact of the loss of a key staff member.
- Similarly, 55% of businesses agreed that they had structured their workforce to be suitably equipped to manage either a rapid growth, or a rapid reduction, in staff numbers depending on their commercial circumstances.
- 54% of businesses agreed that they provided staff with regular ongoing internal training with refresher training with respect to high risk areas such as workplace safety, discrimination and harassment. This compared to 71% that considered that they maintained an up-to-date suite of human resources policies and procedures dealing with these areas and 61% that provided initial training.

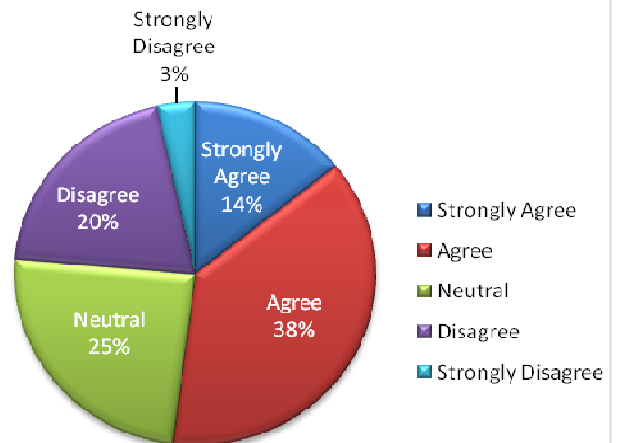
The fact that less than half of the organisations surveyed have comprehensive policies and procedures in place documenting key functional areas, and only slightly more than half have contingency plans in place to cover the loss of key staff, indicates that organisations are generally at high risk of losing value through lack of succession planning.

It was notable that approximately 40% of businesses do not provide initial training to staff in high risk areas such as workplace safety, discrimination and harassment and even fewer provided regular ongoing training. This failure to train staff effectively has the potential to reduce workplace productivity and to increase the likelihood of employee related legal claims.

- Only 44% of businesses agreed that they had developed a comprehensive set of policies and procedures documenting processes within key functional areas (e.g. finance and administration, marketing and sales, technology and operations) so as to capture intellectual property and minimise the impact of the loss of a key staff member.

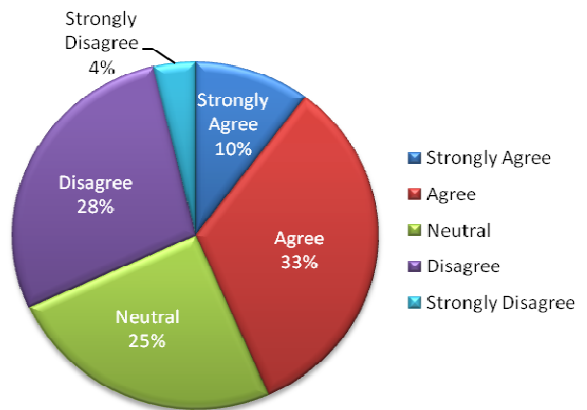
Performance Management

“Each employee within our organisation has an up-to-date, documented, job description in which, where possible, core competencies are covered by a number of key staff and/or out-sourced to an external services provider, to minimise the impact of the loss of a key staff member.”



Succession Planning

“Our organisation has developed a comprehensive set of policies and procedures documenting processes within key functional areas (e.g. finance and administration, marketing and sales, technology and operations) so as to capture intellectual property and minimise the impact of the loss of a key staff member.”



Managing the Termination Process

- Only 40% of respondents agreed that their executive managers understood, and had properly prepared for, the key changes introduced by the *Fair Work Act* (including the re-introduction of the unfair dismissal remedy for businesses with less than 100 employees).
- Only 53% agreed that their businesses had documented procedures to manage discipline and termination situations being the principal means of mitigating the risks associated with unfair dismissal claims.

Whilst the focus of most commentaries in recent times has been on the re-introduction of the unfair dismissal remedy for employees of businesses with less than 100 staff, it should be remembered that the availability of this remedy is limited by an employee's period of employment (6 months, or 12 months for small business employees) as well as his/her income level (\$108,300 is currently the high income threshold). The unfair dismissal remedy is also limited by the fact that an employee can only be awarded a maximum of 6 months' pay.

There are in fact a great number of employees, including the majority in management positions, to whom the unfair dismissal remedy is not available. When considering termination remedies all employers should be aware that, whilst unfair dismissal presents a significant risk, it is by no means the only remedy available to disgruntled employees.

During the period that unfair dismissal was effectively removed as a remedy for approximately 4 million workers, there was a significant increase in activity in alternative remedies, such as breach of contract claims and claims alleging unlawful dismissal on various grounds including discrimination and illness or injury. Unlike unfair dismissal, these alternative remedies are available to all employees and are not limited by period of employment, income levels, or the amount of damages that can be awarded.

It is therefore particularly concerning that only 40% of respondents agreed that their executive managers had a good level of understanding of the first tranche of *Fair Work Act* changes and only 53% had documented procedures to manage discipline and termination situations being the principal means of mitigating the risks associated, not only with unfair dismissal claims, but also claims for breach of contract and unlawful dismissal.

Given that the *Fair Work Act* clearly sets out the matters that must be taken into account in determining whether or not a dismissal is unfair, the real risk for employers is failing to follow the correct procedures when dismissing a staff member or, conversely, retaining under-performing staff in the mistaken belief that the new system means that they can not dismiss a person without being subject to a claim.

The simple message to employers is that the failure to properly manage discipline and termination situations significantly increases the prospects of financial loss, not only through employee claims but also, through loss of productivity as a result of the effect of stress on managers, increased workplace gossip (e.g. more work being done around the water-cooler), reduction in morale and potential damage to the culture of the organisation. Businesses that fail to manage termination situations effectively also risk significant brand damage not to mention destroying the value of any investment they may have made in positioning themselves as an 'employer of choice'.

About CompliSpace

CompliSpace specialises in providing corporate governance programs and services to the small and medium enterprise (SME) market. We combine specialist advice with practical technology-enabled solutions to demystify the complexity of the regulatory environment and provide organisations with a platform for sustainable growth.

In addition to a wider range of corporate governance services, CompliSpace provides cost effective online human resources programs, policies and procedures, as well as services that enable a business to meet its workplace relations obligations whilst building a positive corporate culture. Policies and procedures are kept up-to-date by our team of legal and industry experts to ensure currency with the law and industry best practice.

If you would like to know more about how CompliSpace can assist you, please contact us on +61 (2) 9299 6105 or contactus@complispace.com.au or visit www.complispace.com.au.

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