



Human Resources for Small Business

An occasional series

No: 4

Industrial Relations and High Paid Executives, Partners, and Business Associates

For most of us in SMEs, dealing with industrial relations is a necessary evil. And we tend to think that it only really applies in the case of our staff. We think that the relationship between our firm and our senior management, the relationships between ourselves as equity partners, and the relationships that may exist between our firm and other business entities, are relationships that are not subject to industrial relations law.

Typically our thinking goes something like this: "We're paying our general manager over \$75K a year, so that's well over the threshold for claims like unfair dismissal"; or "As partners we're in a business relationship covered by partnership law, there's no employee/employer relationship, so industrial relations law doesn't apply"; or "Acme Contractors do this work for us under contract, it's a business relationship, they're not our employees, so industrial relations law doesn't apply".

But our thinking here would be mistaken if our firm does business in NSW. Because in that case we are subject to section 106 of the New South Wales Industrial Relations Act 1996. Note that for section 106 to apply all that is required is that we do business in NSW, not that we have a business in NSW.

Section 106 deals with "unfair contracts". It has the effect that any contract must not only meet the substantive law associated with, for example, partnership law or corporations law, it must also be "fair". Of course, the question, "What is fair?" is like asking "How long is a piece of string?"!

Increasingly, section 106 is being appealed to by senior managers (eg., regarding their entitlements under a share bonus scheme), by partners (eg., regarding their removal from a partnership), and between one business and another (eg., a franchisee in disagreement with a franchisor). There have been some well known disputes that have ended up before the industrial relations commission under section 106. They include: a TV presenter/journalist and major television network; a senior manager and a major search engine corporation; a senior accountant and a top five accounting firm, to name but a few.

It should be stressed that in many cases under section 106 the individual/s or business taken to the industrial relations commission by an applicant actually welcome this development because it may be the only feasible means of acquiring a legally binding sign off on the dispute. So the aim of your HR professional or your legal adviser is not necessarily to devise means such that you never appear before the commission, but that if you do, the appearance is likely to have a result in your favour.

Nexus Consulting Services does not offer legal advice (we are happy to suggest legal firms if you are seeking legal advice). But over the last 2 years we have been giving workshops and seminars to SMEs on the HR practices which are likely to either make application to the IRC under section 106 unwarranted, and/or are likely to see you achieve a favourable outcome in the event that an application reaches conciliation or arbitration. These include properly designed and implemented performance management plans, properly conducted and documented performance counsellings, various policy documents and training (eg., in Harassment Prevention and Internet usage), and sound recruitment and selection procedures.