

The self-employed - human rights, equity and fairness

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The self-employed - human rights, equity and fairness.

Do the self-employed enjoy the same rights as workers and as others? Perhaps they are more privileged or less so?

Section 18c of the Racial Discrimination ACT has recently been under the microscope but that debate has ignored a more important human rights and general rights issue.

That is the rights of the self-employed person (also called a small business owner or an independent contractor). These people are the backbone of employment, of innovation, of our economy and a major contributor to our community and our culture. Yet they are treated as second class citizens and often as criminals who need to prove their innocence of other people's crimes. They are also a large part of 'middle Australia' and indeed employ another large part of our middle class.

There are some three million small businesses in Australia. Just over two million of these people do not employ anyone, they are independent contractors and home based businesses or professionals. There are approximately 800,000 self-employed people do employ around six million other people. We provide our employees with an income and a lifestyle, and then they help us achieve the same. We pay taxes, we contribute to charities, we sponsor community activities and we employ people with a disadvantage. Not all of us are perfect but over 90% comply with the laws of the land and collect the tax that keeps the country functioning.

Despite all this we are still a group of people - men and women - who are too often treated as criminals and failures, who are blamed for the action of others and given responsibility for events and processes over which they have no control. We are also given the rights of second class citizens when many important issues and rights are considered.

So who is it that has worked hard to make sure we remain second rate and are kept under watch? It is many of the people of the left and right who are the problem. They live on ideology and on the contents of text books not the changing and challenging world upon which those text books were written. They live on theory and when it suits them they dance to the tune of the powerful and rich people in oligopolies and big unions. They also make shallow statements such as:

*when you go into business you know what you are getting into; or
how hard is it?; or
it's their own fault if they fail; or
small business people need to become better managers (and who doesn't); or
the good thing is when one falls over there is another to take its place.*

So how are the self-employed removed from the rights agenda? What areas are we treated as less than others?

It's a long list where the potential injustice of ['vicarious liability'](#) leads the way. Vicarious liability is where "employers can be held legally responsible for acts of discrimination or harassment that occur in the workplace or in connection with a person's employment." This was apparently developed to punish big businesses who have toxic workplace environments. But from a small business point of view this means an individual can be held responsible for another individual's behaviour.

The areas where vicarious liability and other legislative demands are unfairly placed on the self-employed or where the self-employed are completely left out of the debate include: sexual harassment in the workplace; the racial discrimination ACT particularly Section 18e; mental health demands and support; general occupational health and safety requirements; Paid Parental Leave;

domestic violence leave; competition policy; superannuation collection and payment; and workplace relations. There is also the culture of late payment of invoices that has developed in Australia that punishes the small business people with whom cash flow is the key to a successful business. (See part B of this article for expansion on these issues.)

Society needs to give us our rights and treat us as the people we are. The demands placed upon us need to be minimal and achievable. Policy makers need to understand that we have many many issues to grapple with and that unlike the ideologues who have too much influence we aren't fixated on any off-beat philosophy or value system. Like the great majority most of us value the normal stuff based on health, education, safety for children and fairness in society.

Any demands placed upon us must be reasonable and achievable. Any protections and conditions given to workers should also be given to the self-employed. We do not want to be and cannot be responsible for the behaviour of others or for their well-being beyond what we can actually achieve and what is in our control.

A safe workplace is one where everyone is responsible for what they can reasonably achieve. A person should not employ another person if they do not value safety and are not prepared to meet their obligations. A person should not work for another person if they also do not value safety or believe that their safety is someone else's responsibility.

If a person vilifies another person in the workplace or sexually harasses a person in a workplace or cares nought for another person's health than that person should be dealt with. It must not be a third party who becomes involved and blamed because they employ those people. We are not responsible for another's behaviour. The thought that the small business person can be punished for not properly dealing with a situation in the workplace also shows a lack of understanding of the barriers placed in the way of good management. These barriers present themselves through poorly designed regulations. The policy makers and ideologues demand perfection and then make achieving perfection impossible.

The culture of blame – *"There must be someone to pay for this"* has got to change otherwise safety and care will never be achieved.

By all means keep protections in place if that is needed but do not blame an innocent third party for others thoughts and actions.

Do not ask the self-employed to undertake tasks that are unnecessary for their business to be successful or safe.

In the end the best way to look after workers is to ensure they have a job, they get paid the right amount and they are safe (which includes licences and certification where necessary). The other unchallengeable demand on small business people is to collect and remit tax, whether that be GST, PAYG, or their own personal tax. That's it, we should not be forced to do any other work on behalf of governments and others.

We do however have a recent win in our pursuit of fairness. This is in the world of contract negotiation which will now change somewhat on the 12th of November 2016. From that date there are certain contract terms that will no longer be acceptable in a contract between a small business person and a multi- national business or an oligopoly. The changes do not mean that some big businesses will change their bullying ways but it does go some way to removing a very uneven and muddy playing field.

Part B - What are our specific issues for fairness?

Vicarious Liability

The idea that an individual can be responsible for the behaviour of another individual is not acceptable in any other situation except apparently for a workplace. In a small workplace there may only be two people and one should not be responsible for the behaviour of the other person. Perhaps vicarious liability was initially designed to take action against an employer who has a toxic culture in their workplace. This may be the situation in some very rare instances but that should be dealt with through other means not by telling some three million people that they are responsible for how over six million other people behave.

Vicarious liability places demands on an employer, a person that cannot be met. Below is listed, from the HRC website, these demands:

An employer may be vicariously liable for acts of discrimination or harassment by:

- *individual employees or groups of employees*
- *directors, supervisors or managers*
- *workplace participants (where two people work on the same premises but have different employers)*
- *agents (such as insurance salespersons operating on behalf of the company)*
- *contract workers or people being paid commission*
- *a partner of a company harassing another partner*
- *members of organisations which grant occupational qualifications*
- *a person employed by a trade union harassing a member*
- *a person operating an employment agency who harasses someone who uses the agency.*

The message here seems to be one of “don’t bother employing anyone”.

Vicarious Liability can however be dealt with by following [12 steps as recommended by the Human Rights Commission](#). Those 12 steps are not actually achievable by most small businesses and does not take into account the nature of small workplaces. It places unfair demands on the employer.

It also appears we do not actually have a problem that needs this response. A response that can create a fear of failure when failure is the only outcome.

Sexual harassment in the workplace

One area of vicarious liability is when someone sexually harasses someone else, or sexually discriminates against someone. We don’t support harassment or discrimination yet this very process discriminates against employers who are female or from a minority group. Under this provision a woman who is an employer can be fined for letting someone harass her in her workplace.

It is important to stop discrimination and harassment but that will not be achieved by blaming a third person for another's behaviour.

The Racial Discrimination ACT - Section 18e

Under this section an employer can be fined, or at least dragged through the courts, if one of his or her employees racially offends another staff member or a customer. This fails any test of fairness. Indeed there are employers who have owned shops in Australia who have had nasty racist graffiti painted on their shop walls and windows. Other employers have had employees racially abuse them - can they be fined for letting that happen to themselves? Under this provision they can be fined. There is a suggestion that a person can only be fined if they do not do anything after the event has occurred. Again this fails to take into account the pressures and time constraints placed on a small business person. There is also the fact that this doesn't happen which begs the question as to why we have this provision?

Mental Health

Currently there is a commendable focus on assisting people with mental health issues. There is also a welcome focus on providing assistance in the workplace. The issue for the self-employed is twofold; firstly that our needs as individuals are ignored; secondly there is also the issue that the employer is responsible for dealing with the mental health issues of employees.

What if the employer has a mental health issue? What if the employer is dealing with their own demons associated with depression or anxiety? Why do they have to forget their own needs and concentrate on others? Why are employees not asked to show care and concern for their employer (which most do voluntarily as human beings are wont to do). What about those who do not employ others? The home-based businesses or contractors, are they (some 2m people) not important? Not visible?

Occupational Health & Safety

OH&S has a prime place in employment processes as it should. We find that employers are responsible for safety. There is no doubt that an employer will be responsible for what they can control yet a safe workplace will not be achieved until everybody is responsible for their own behaviour and for their environment. No person should be told or taught that safety is not their concern and that there is always someone else to blame.

Perhaps we can fully concentrate on OH&S if we are not asked to do unnecessary work such as be the pay clerk for the governments Paid Parental Leave or the collector of superannuation or some how able to manage and understand all the other rules and regulations we have responsibility to manage??

Paid Parental Leave (PPL)

Currently all employees in Australia are covered by government funded PPL. In theory a self-employed person is also eligible yet the rules clearly state that you must not work (except in an emergency) which basically precludes the self-employed, particularly women, from claiming the government's scheme. We need better provisions for the self-employed women in our society when it comes to child care and/or parental leave.

The payment process for PPL is also an imposition on the self-employed. The government has a system whereby those who are eligible will receive their payments via their employer. That means that a small business person will receive an extra payment from government that they then need to process and account for and upon which they will be regulated to ensure the payment is made.

It is a bad business practice to involve an unnecessary third party in a payment process. It also discriminates against a self-employed person who will have to take time away from her or his family to do the work of government. If the employer is also pregnant it is a double discrimination as not only is that person not eligible for PPL but they also have to do extra unpaid work for others.

There is the issue of double dipping whereby the employees of big business and government get PPL twice. The payment for the double dipping comes from the taxpayers and consumers including those that cannot double dip. That is discrimination against one group of people in favour of another group.

Domestic Violence Leave (DVL)

The idea of domestic violence leave may seem sound yet it fails many tests. There are the obvious tests around compliance, seeking a certificate, proving there is violence etc. There is also great discrimination against the self-employed. It is not beyond belief that a workplace of ten people may have two victims of domestic violence and one of those may be the employer. Yet she will have to provide extra leave to the other victim. This means she will have extra work and extra costs to cope with as well as dealing with her own domestic situation. This policy fails if it only supports one group and not another. This policy also fails to do anything for the contractors and the home-based businesses who do not employ people, they are completely forgotten or worse not regarded with any concern.

We should not have mandatory employer funded domestic violence leave, as domestic violence management does not belong in the workplace relations system; managing domestic violence is about identification, communication and support. For all not just some.

We could however have a government funded DVL scheme where any leave is sought and justified by the agencies who have the skill and experience in helping manage these situations.

Competition Policy

Competition policy is designed to ensure that consumers and businesses in Australia have the best and cheapest products available as well as choice of products. That is essential yet until the advent of Rod Sims competition policy regulation really only concentrated on low price. It seemed that competition policy was decided by the most dominant businesses in Australia who believed that price was everything as they could nearly always have low prices due to their ability to dominate the supply chain to retail. (The retail union also dominates the policies of the Labor Party for the same ends)

The trouble with this approach is that the other parts of the competition such as 'choice for consumers' was largely ignored. In the end the businesses that were most adversely affected were the small businesses who found themselves at the mercy of the biggest businesses and the biggest unions we have ever seen in Australia. Our plight was finally brought to public notice after Rod Sims properly and professionally investigated the behaviours of big businesses and the biggest didn't even bother going to court to argue and just accepted a fine for their unconscionable behaviour. Currently Woolworths has taken the other option of fighting the accusations but will soon lose that case and be found guilty.

The victims of this are the individuals and their families who run the businesses that supply these giants. They are victims of shallow thoughts creating shallow policies that affect the health of the self-employed and choice and price for consumers.

Superannuation collection and payment

There is only one group of people who do not get paid for the work they do in the superannuation industry and that is the small business employer. Everyone else is paid for their work, whether they are employed by big business, the government or the superannuation funds they still get paid, as they should.

A small business employer will either do the superannuation work in their own time or pay an accountant or bookkeeper to do that work. The only individual that can get fined for not doing their job is the small business person.

The collection process places a great demand and cost unfairly on small business people. Take us out of the system.

Work Place Relations (WPR)

There are many areas in WPR where the employer is always considered to have a team of HR and IR experts. The way awards are written is also archaic and confusing. This not only makes it difficult for the employer but also for the employee. Awards should be written in plain English and for non-experts to comprehend.

Often it is recommended that a small business develop an Enterprise Agreement (EA) similar to those that exist in large businesses. The costs for an EA is probably around \$5k to \$10k and that is beyond most small business people.

The President of the Fair Work Commission is currently working on plain English awards which is being resisted by union and big business representatives. We also believe there should be a small business industrial award as a choice for employers, that applies to the size of business not the type of business, as an option for business to use in lieu of other awards.

There are so many other areas of unfairness that they are too many to mention. From the fact that big retailers pay lower penalty rates than small business and some cafes and fast food big businesses can pay no penalty rates at all which makes competition very difficult for smaller businesses. This has to change.

We have a very good regulator in the Fair Work Ombudsman and she should be given more capacity to regulate the failed employers. That way we can make the rest of the legislation easier to understand and easier for a person to comply.

Business Finance

The right of the self-employed to access finance is limited by many things but in particular it is a stubborn APRA who refuse to accept that the statistics used to determine whether a small business is at higher risk of not honouring a loan are flawed. This is due to the way loans are made to the small business community. The loans made as personal loans are not considered as business loans and therefore these lower risk loans are not included in the statistics. The Reserve Bank has estimated that the unmeasured and unaccounted for small business loans may be as high as 80% of the total. The figures are skewed towards high risk businesses and do not reflect reality.

The problem is exemplified by this conundrum:

an employee of a small business will seek a loan from a bank. That person will show that they have secure long term employment and as a result receive a loan. The owner of that same small business, the employer, goes for a loan to the same bank and is either denied the loan or charged higher interest rates - as they are considered higher risk than an employed person. The employee is considered more secure and less risk than the person who provides him or her with a job. Go figure.

Payment of Invoices

Getting paid on time for work done is a basic right of workers and should be a basic right of the self-employed. Sadly Australia has developed a culture in our business sector of paying invoices well past the normal internationally accepted time of 30 days.

It is not uncommon for a 90 day payment time frame to be included in B2B contracts. In some cases this has extended out to 120 days. This behaviour has even extended to payment of individual contractors who in some cases are now facing 60 day payment terms. For an individual contractor their payment is more akin to wages than to a B2B payment, they need that money to live, to pay mortgages, to put food on the table, just to pay normal family expenses.

This is theft. This is using a small business as an interest free bank. This is unacceptable.

COSBOA is working with the Small Business and Family Enterprise Ombudsman Kate Carnell on this very issue. Maybe fairness can be achieved at least with payments of invoices?

Thankfully there is a desire to fix the problem and soon. We are asking that all businesses in Australia pay their invoices on 30 day terms by end June 2018.

A WIN!

Hopefully this is a start of things to come. If common sense and fairness is applied to small business then the winners will not only be the 3 million self-employed people; it will also be everyone as a freer small business cohort is good for the economy, for safety, for innovation, for diversity and choice.

Contract Negotiations

From 12 November 2016, a new law will protect small businesses from unfair terms in standard form contracts. The law sets out to target terms written into a contract that may be unfair. This includes:

- terms that enable only one party to avoid or limit their obligations under the contract
- terms that enable only one party to terminate the contract
- terms that penalise only one party for breaching or terminating the contract
- terms that enable only one party to vary the terms of the contract.

These terms have always been unfair and have created situations where small business people and their families have been unfairly treated and have lost everything – not because of bad management but because of bad laws.

This situation has existed because those in charge (big businesses, big unions, laissez-faire economists) made sure B2B negotiations were treated as equal in law. This meant that if a business such as Coles negotiated with a one person business it was considered to be an equal negotiation. This is obviously wrong but the big and powerful had their way for decades.

From 12 November 2016 that changes. This doesn't mean it's all good and all fair for small business people as we will be confronted by teams of barristers fighting hard against the limited resources of the ACCC to get their way again. These businesses, and their big union friends, will also attempt to undo the changes. They will constantly harass MPs and Senators; they will offer dinners, money, favours so that they can do what they want when they want to whomever they want for their benefit and to the detriment of the economy and society. The only ones that will respond to their demands will be the politicians and

policy makers who are shallow and still wedded to a policy, laissez-faire-ness, that espouses doing nothing as often as possible and letting big business have their way. Perhaps the way people across the planet are voting is a reflection of their lack of trust in those who are ideologues and care more for their particular policy than for the people effected?

Laissez-faire policy makers are lazy and create unfairness. We will continue to fight their laziness and shallowness.