Navigating wage compliance complexity

Key considerations on how to get it right

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In the current system, it is very hard for organisations to have full confidence in their payroll and wage compliance – here's why.

Organisations have faced ongoing challenges with wage non-compliance as high profile reports of underpayment continue. Historically wage non-compliance did not receive the same degree of public focus compared to other compliance areas, such as tax. But this is rapidly changing with wage compliance at the forefront of regulators, legislators, unions and boards.

The issue has been brought further into the spotlight with new state based criminal offences. COVID-19 has prompted a closer examination of Australia's workplace relations framework, including the formation of a working group of unions, employer representatives and experts to explore solutions around wage compliance and enforcement.

The consequences of getting it wrong can be high, resulting in damage to reputation and brand, large penalties, contrition payments and liability for back payment. Strong sanctions should apply to those who deliberately underpay however in many cases, the root causes of underpayment arise from errors which result in both underpayments and overpayments. Many organisations are deciding not to recover these overpayments, instead focusing on remediating underpayments and their root cause.

Wage non-compliance impacts industries and organisations of all sizes and while system complexity gives rise to risk, it is no longer an acceptable reason for underpayment of wages.

So why is it so hard for many organisations to have full confidence they are getting it right?

1

The framework is complex and requires specialist knowledge to navigate it

The workplace relations framework is an intricate web of rules drawn from legislated minimum standards, over 120 modern awards and enterprise agreements and successfully navigating these can be more art than science.

The complexity is compounded as awards are regularly reviewed and updated by the Fair Work Commission, enterprise agreements are renegotiated and courts regularly hand down decisions that can affect how the laws and industrial instruments should be interpreted and applied. This shifting landscape makes it difficult for organisations to stay up to date with their obligations and specialist internal or external support may be needed.

2

Ways of working are changing

Organisations need to innovate and evolve how they work in order to remain competitive and meet consumer demands. This has increased pressure to manage costs, create more flexible access for customers (including longer opening hours) and develop more nimble operating models and workforce structures.

COVID-19 has caused further disruption with both employees and organisations needing to work in different ways and at different times with impacts for employee pay and entitlements. This has seen some employees working at unconventional times to balance children at home, a need to redeploy employees into different roles and to different locations where parts of the organisation have been disrupted and changes in rostering arrangements and hours worked.

Yet awards and enterprise agreements often set out rules about working time and rostering that do not always align with the practical reality.

While steps were made to vary some modern awards and JobKeeper legislation introduced to help deal with the effects of COVID-19 as interim measures, the Australian Government has recently taken steps to bring key industrial stakeholders together to explore broader solutions via five Workplace Relations Working Groups.

While there is no single solution to address underpayment risk as the causes for wage non-compliance, in our experience there are a range of questions that organisations need to consider.

How does your workforce profile impact wage non-compliance risk?

Workforce demographics

The types and characteristics of employees can impact the nature of wage non-compliance risk that organisations face. For example, workforces in the retail and hospitality industry employ large numbers of young people whose wages are required to be increased on the basis of their age. Some sectors, such as the horticulture industry, also employ large numbers of migrants. These employees may be less inclined to raise a concern if they are not paid correctly, are considered 'vulnerable' by the regulator and therefore attract higher levels of scrutiny.

Employment types

Certain types of employment also create unique risks. For example, recent case law has increased the risk of casual employees that work on a regular and systematic basis being deemed permanent and therefore entitled to the benefits that ongoing employees receive. Long term engagement of fixed term employees can create similar risks.

Different rules in awards and enterprise agreements will often apply to part time employees, resulting in payment of overtime for work in excess of contracted hours. Systems may need to be designed in a way that contemplates there will be different triggers for payment of overtime and penalty rates based on individually agreed working hours.

Independent contractors

Organisations may engage contractors from time to time however the line between contractor and employee is not always clear and there is no single rule that determines this. Incorrect characterisation of a person as a contractor when the character of the relationship is really one of employer and employee can result in liability for wages and entitlements, superannuation, workers' compensation and payroll tax.

The nature of work and roles

The nature of an organisation's activities and the role of an employees within the organisation will impact an employee's wages and entitlements. For award-covered organisations, choosing the correct award can be a challenging exercise, particularly if the organisation operates across a diverse range of sectors. It may also be the case that multiple awards apply, adding to the complexity of the payroll environment.

Awards and enterprise agreements typically set out different classification structures. Where an employee's role sits in this classification structure determines what minimum wages they are entitled to. It can be challenging to know if the correct classification has been assigned to an employee and a subtle shift in duties can have consequences for wage entitlements.

How do your employment arrangements impact wage non-compliance risk?

Annualised salaries

In some cases, contracts are designed in a way that is intended to pay employees a salary that includes certain entitlements under an award. However, risks emerge if the contract is unclear about the entitlements included in the salary or if there is no process to track whether salaries are high enough to cover the value of these entitlements (for example entitlements to be paid for overtime).

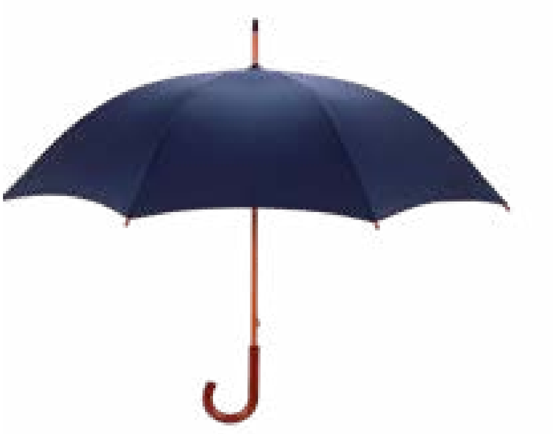
Awards and enterprise agreements

In the modern workplace, the need for flexibility is driven by both employee and organisational need but can result in working patterns that are not aligned with the detailed rules in enterprise agreements and awards that regulate working times. COVID-19 has compounded this challenge which has resulted in short term variations to modern awards and many organisations are reconsidering their enterprise agreement strategies in response.

The wording of awards and enterprise agreements can also be complex, open to interpretation and difficult to translate into payroll, HR and time and attendance systems. This is further complicated where there are multiple awards and enterprise agreements that apply. Payroll and systems stakeholders are often not involved in the making of the enterprise agreement and it is typically the case that the more complex the industrial instrument the greater the risk of error.

Organisations should review existing arrangements to identify the complexity in industrial instruments so they can seek advice or address them in the next round of bargaining.

Do you have governance arrangements in place to mitigate wage non-compliance risk?



It can often be difficult to identify who carries ultimate responsibility for wage compliance and this is because there may be multiple stakeholders that can impact pay accuracy.

Remuneration should be set in a way that gives consideration to how entitlements under awards are going to be satisfied across the entire employment lifecycle.

Processes should also be implemented for monitoring changes in awards, enterprise agreements and the regulatory environment and updating systems in response.

Traditional approaches to internal audit, finance and payroll checks are now no longer enough to identify exposure or vulnerability to wage non-compliance. Increased awareness of these issues together with heightened scrutiny from the Fair Work Ombudsman means that more focussed and technical approaches are needed, including testing compliance with ‘risky’ or complex provisions within enterprise agreements and awards.

Are your systems fit for applicable industrial instruments?

A set-and-forget approach – trusting that the systems and processes put in place will automatically apply the right pay rules is insufficient.

Many 'off the shelf' payroll systems have not been designed for the complex Australian workplace relations landscape and need to be customised to the nuances of modern awards and enterprise agreements and updated as they change.

Knowing what hours have been worked and when they are worked, is also critical in understanding whether employees have been paid sufficiently. Organisations need to balance a workforce's desire for flexibility with systems for tracking the time and attendance of their employees who are covered by industrial instruments.

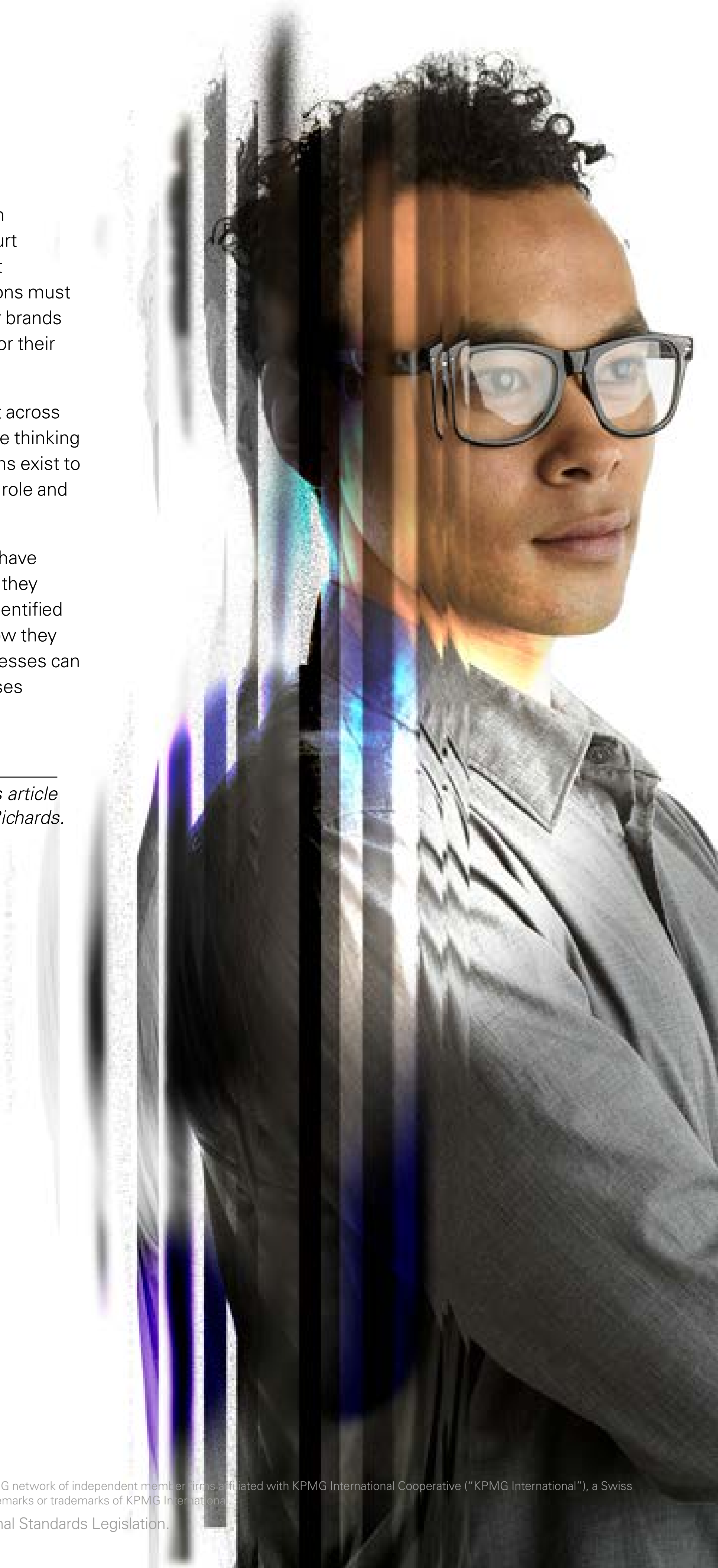
Summary

With an ever changing workforce coupled with a tangled web of complexity and landmark court decisions, it's no wonder organisations are left scratching their head. Despite this, organisations must take affirmative action to not only protect their brands and reputation – it's also the right thing to do for their greatest asset – their people.

Getting pay right requires a collaborative effort across multiple stakeholders. Organisations should be thinking about what processes and governance systems exist to ensure that all stakeholders are aware of their role and playing their part.

Organisations also need to demonstrate they have taken action to look and assess as to whether they have any issues. Where underpayments are identified consideration needs to be given not only to how they will be remediated but how systems and processes can be improved and reviewed to prevent the causes of underpayment from occurring again.

Acknowledging the input in the writing of this article by: Alana Matheson, Nina Spiccia and Carly Richards.



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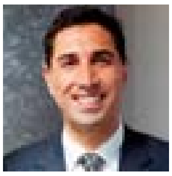

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