Small Business, Mental Health; navigating the complex landscape
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The economic, social and individual impacts of poor mental health have never been more prominent than now. Australia has had to face significant and cumulative challenges including drought, bushfires and COVID-19. While a range of government support measures have been put in place to address the immediate effects, the pandemic in many ways has served to highlight a series of systemic problems contributing to poorer mental health outcomes across our society.

Small business, in particular, has had to deal with unique challenges to survive the last several years and many have not survived.

Small businesses already operate with known resourcing issues. The COVID-19 pandemic has stretched these resources to breaking point with small business owners trying to support and manage the mental health and safety of their employees, while being mindful of their own mental health. All within what was an already complex operating environment with businesses required to navigate a raft of overlapping and confusing work health safety, workplace relations, discrimination, privacy and workers’ compensation legislation.

This report sets out the consequences of such complexity and outlines much-needed actions to achieve better mental health, participation and productivity outcomes for individuals, workplaces and communities.

How governments design systems must account for and be sympathetic to all users. It is critical that governments work with small business to get the legal and regulatory environments right – when the implications have such significant consequences on the mental health of individuals and small business owners.

Andrew McKellar
Chief Executive Officer
ACCI
On March 23 2020, I woke with the worst non-alcohol induced headache ever.

Australia’s Prime Minister had shut down the entire country due to the COVID-19 pandemic and our two regional businesses, a hotel and seaside restaurant would close. We had to stand down nearly 100 employees who had done nothing wrong.

How on earth could we do this to them? They had mortgages, rental commitments, families to support, school fees. I wondered what I could do personally to help, but I knew I could not support them all.

When JobKeeper was announced and we got through that process, my husband and I had to consider what this would mean for us, as JobKeeper would not be enough. We had no income from the hotel and the restaurant, but we had ongoing costs for the business and us personally. Then, there was the emotional loss; a loss of sense of purpose and self-worth, especially as time went on.

But we got through that and in South Australia, in some ways, it seems a lifetime ago. However, we are the lucky ones. Since the National shut down, we have been spared the extended lock downs that have decimated businesses, cost jobs and crushed economies across the east coast.

I welcome this report and recommendations aimed at supporting small business and their employees in to the future.

Nikki Govan
Owner - Star of Greece
ACCI Director
Chair of ACCI WHS Policy Committee
Chair, Business SA
Workplace Regulations and Mental Health

The management of mental health in the workplace is a complex area. While wanting to be supportive and do the right thing by employees’, businesses also need to manage legal risks including safety and health. There are also practical difficulties that come with managing employees who are genuinely not well, and who may not attend work or not respond to reasonable requests and directions.

Increasingly, employers are required to manage workplace issues with regard to more than one piece of legislation and in the case of mental health, looking beyond legislation to ‘good practice’.

These intersecting obligations and expectations add layers of complexity and can make acting in the context of mental illness more difficult, particularly for small businesses where owners are managing competing priorities.

Over the last few years, mental health in the workplace has been positioned through the lens of Work Health and Safety legislation (WHS) and/or Workers’ Compensation legislation (WC) with significant activity at both the national level through Safe Work Australia and the Productivity Commission Inquiry, and State and Territory WHS Regulator activity.

In focusing solely on WHS and WC as the applicable workplace regulation relevant to mental health, governments have failed to give due regard to the broader statutory framework that governs the employer/employee relationship, and the range of regulatory regimes that are potentially triggered when mental health concerns emerge. This is to the detriment of both the individual experiencing mental health issues and the business.

Workplaces not only have to comply with WHS and WC obligations in relation to mental health and psychological safety and injury, they must also comply with the Fair Work Act 2009 (Cth), federal and state anti-discrimination laws and the Privacy Act 1988 (Cth).

While the volume of law does not necessarily indicate that law is complex, significant volume is proportionately harder for small businesses to digest than large businesses, because of the time necessary to access and understand whether regulation is relevant. More complex laws will also increase the costs of understanding whether regulations apply to a business, and if so, how to comply. Whereas larger businesses may be able to hire expert advisers where the cost is relatively small compared with overall turnover, small businesses can rarely justify the cost and may instead seek to comply on a ‘best endeavours’ basis (Douglas and Pejoska 2017). This may result in small businesses doing more than is required in an effort to avoid being found non-compliant resulting in increased costs or alternatively, not understanding the full range of actions needed to be compliant and inadvertently breaching the law.
Mental Health and the Small Business Challenge

For a **small business owner** there are three important mental health priorities:

**Looking after their own mental health**

In a MYOB survey in (pre-covid) 2019 which aimed to understand how mental health issues such as depression and anxiety affected small businesses and the extent to which this directly affected the functionality and continuation of a business. It was found that 43% of owner/managers reported experiencing some mental health condition or symptom of mental ill-health since starting a business. For those aged under 40, this statistic increased to 52%.

**Their employee’s general mental health**

“As a small business we are aware of mental health and monitor how our employees are doing in the workplace, as poor performance at work from a usually good employee means there are issues we need to be addressing.”

**Their workplace legal obligations**

“Let us use our care, good-will and common sense to manage our employee’s well-being. Please don’t give us any more regulations or administrative red tape. The amount of government red tape our business has to endure to operate is almost insurmountable. It’s getting nearly impossible.”

Ninety-eight percent of Australian businesses are small businesses employing over 4.7 million people being 41% of the workforce (ASBFEO 2020). Their capacity to support their workers’ and their own mental health, ability to implement health initiatives and comply with workplace regulation needs to be given full and serious consideration.

The fundamental differences in structure and operations between small, medium or large organisations are not often explicitly recognised or proactively addressed. The diverse nature of the small business, and the large proportion of organisations that are either non-employing “nano” organisations, or micro-businesses comprising small teams of fewer than five employees, requires specialised assistance with specific material, education and regulatory approaches.
Small Business Owner Mental Health – COVID-19 Impacts

The outbreak of COVID-19 and the ensuing health crisis resulted in an economic crisis that is unprecedented both in its scale and speed. Australian businesses across all industries and regions have endured sizeable supply side and demand side shocks in response to this extraordinary event.

While some businesses have fared well and others are surviving by fundamentally changing the way they operate, there are many that have closed, many that will not last and many which will barely hang on.

Lockdowns have had a significant impact not just financially but also on the mental health of small business owners and staff. The combination of reduced revenue, the pressure of ongoing costs and anxiety about the future plays heavily on the minds of business owners.

A large majority of small business owners have reported feeling higher levels of stress in comparison to pre-COVID-19 times. Mental health and wellbeing is one of the biggest challenges faced by their businesses over the last 12 months.

Most of our staff are the most stressed than ever before in our 30+ years in existence.

Loss of sleep, thoughts of suicide. Loss of business and income. The bills don’t stop. The future holds how to pay bills, how to survive, how to worry about the financial side of things.

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In a survey of 435 business owners and managers in July 2021, 73 per cent experienced a mental health impact from the lockdown on their staff and/or themselves (Business SA 2021). SMEs were the most impacted, with four out of five small businesses with turnover under $250,000, and three out of four small businesses between $250,000 and $1,000,000 turnover stating mental health impacts of a moderate nature (a 2.13 average out of 3).

Although there are a number of financial support mechanisms and new resources targeting small business (and their mental health), it is not always getting through:

The general sentiment from Industry Associations and Chambers of Commerce is that previously there was an overwhelming focus on employee/individual assistance and not small business owner needs. It’s only recently that awareness is increasing for programs specifically targeted towards small business owners but take up can be patchy and hard to quantify.

Recommendations:

- Greater certainty is needed on what the roadmap out of the current conditions caused by COVID-19 looks like and our ‘living with COVID’ responses.
- Making sure that there is adequate financial funding to support small businesses where there are bills and overheads, yet they are unable to trade due to government restrictions.
- Easily accessible support to clearly communicate current compliance requirements given the current complexity of COVID rules and the speed of change. Supporting peak associations to provide this service.
- Funding and a mechanism to better train industry association/chamber call centre personnel (HR/Safety/Business advisors) to provide appropriate referrals and consistent information to small business owners to better support mental health.

I am unaware of any payment or support scheme available for my industry or business.

Disaster payments – lots of confusion and I feel they are an afterthought.

There are NO resources available for small employers that took the brunt of the mental health stress related to Covid. Everything you look up is how to help your employees. NOBODY give a damn how employers are coping. My mental health declined rapidly dealing with all our staff and their issues, but nothing was available to help me.

... psychological services are limited or non-existent. In excess of 6 months wait time for mental health support services.

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A Complex Landscape to Navigate

Businesses across Australia fundamentally want a strong economy that fosters safe, healthy, rewarding and productive work.

Mental health (and inversely mental ill-health) is an important public health issue, which impacts not only on individuals and families, but also on the workplaces that form an important part of our community, social and economic lives. As significant part of the workforce is likely to be affected by mental health at any one time, primarily due to the prevalence of mental ill-health in the broader community, it is important for employers to be supported in their efforts to reasonably respond to these issues within their means and areas of control.

For small business owners the picture is even more complex where they experience unique stressors themselves as the heart of the business, are highly attuned to their employee’s general mental health and are conscious of a myriad of legal obligations but lack the time and expertise to set up comprehensive systems and policies.

Experiences of managing mental health in the workplace

ACCI WHS Business Survey 2020

In February 2020, ACCI conducted a WHS business survey within our member network. The survey was designed to capture experiences of managing and supporting mental ill-health at work, understanding WHS duties and workers’ compensation stress claims. The data and quotes used below, unless otherwise referenced, are from this business survey. The data relates to small businesses responses (19 employees or less) which totalled 82, including seven sole-traders, twenty-one micro businesses (1-4 employees) and fifty-four small businesses (5-19 employees).

In your business, who is best placed to manage mental health concerns?

46% of small businesses surveyed stated that they have had to manage or support a worker experiencing mental health issues in the workplace.

- Owner: 66%
- Consultant/HR Partner: 3%
- Safety: 6%
- HR: 11%
- Line Manager/Supervisor: 12%
- Payroll: 2%

Small business owners typically are the central point of call for managing any matters relating to mental health.
For those that said yes, six out of the 38 said that the mental health issue was work-related (e.g. work-related psychological injury, due to workplace conflict or work load etc)

Some examples of the issues included:

- Managing conflict, difficulty in coping with additional duties including supervising others, work load.

Other issues that small business owners helped support a worker with that were non-work related included:

- Aspergers Syndrome
- Family life / work balance
- external life issues and pre-existing conditions
- loss of a child

Small businesses have limited resources and time to (formally) prioritise health. That’s not to say that it is unimportant to them with a large number recognising that creating healthy work and healthy lives for workers and themselves is part of creating a healthy business which is profitable and sustainable (McKeown and Mazzarol 2018).

The smaller the size of the organisation the more informal systems become. Further, for the micro-enterprises (with 1 to 4 employees) and the non-employing, workplace policies and detailed implementation systems, while not irrelevant, are either uncommon or informal in nature (ibid.).

If you have managed or supported a worker experiencing mental health issues, did your business have an existing process or policy in place?

- 15% said yes, they had an existing process or policy in place.

If you did not have an existing process or policy in place, why not?

- As a small business we didn’t have policy approach for everything, only general WHS policy.
- As a sole business owner with a small (mostly junior) team, I don’t have policies covering every eventuality. I have a very small number of important policies to keep my team focussed on those.
- Mental health issues arise in many different ways. A one-size-fits-all doesn’t apply. We are a close family business and anyone facing any health or mental health issues can seek assistance from management.
- captured in HR policies
Continued
A Complex Landscape to Navigate

Understanding the difference between mental health and psychological risk

Work Health and Safety Legal Obligations

The model WHS Act defines ‘health’ to include ‘psychological health’. This means that the primary duty of a Person Conducting a Business or Undertaking (PCBU) is to ensure, so far as is reasonably practicable, that workers and other persons are not exposed to risks to psychological health and safety arising from the work carried out by the business or undertaking.

The model WHS laws have been implemented in all jurisdictions, except for Victoria which has occupational health and safety (OHS) laws which are broadly similar and Western Australia who will be moving to the model laws in January 2022.

The duty generally requires employers to:

- eliminate risks to (psychological) health and safety, so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to (psychological) health and safety, minimise those risks so far as is reasonably practicable.
- identify certain things a PCBU must do in order to satisfy this duty such as ensuring, so far as is reasonably practicable the provision and maintenance of safe systems of work.
- consult with workers on matters relating to psychological health (i.e. identifying hazards, deciding on controls etc).

Small businesses, due to their size and the typically informal nature of interactions amongst workers can often describe themselves as a work family. They are finely attuned to the health and wellbeing of workers as interaction and communication is often based on very individualised, one-on-one relationships (ibid.).

Prior to COVID-19, there was a significant increase in mental health related promotional activity from organisations such as Beyondblue, as well as the emergency of terms such as ‘psychosocial safety’ and ‘psychosocial hazards’ and an increase in WHS Regulator activity in regard to the regulation of ‘mental health’.

In November 2020, Safe Work Australia Members’ agreed to develop a model Code of Practice on psychosocial hazards at work and in May 2021, WHS Ministers agreed to a recommendation to develop model WHS Regulations on psychosocial risks. Since then, NSW has released a new Code of Practice on Managing Psychosocial Hazards at Work, VIC and ACT governments have announced intent to introduce Psychological Regulations and the ACT, QLD and WA are progressing their own plans for Codes of Practice.

The purely legislative response in the WHS arena however fails to address the core issues restricting improvements: confusion between mental health promotion activities and WHS risk compliance activities, lack of ‘how to’ guidance small businesses can translate to their own context, lack of expertise and training opportunities to assist small businesses on WHS risk management approaches (versus public health promotion), too many varying regulator models and a lack of organisational capability (ACCI 2019).

“I am just a micro size business, it is very easy for me to personally keep track (and manage accordingly) most day to day issues. Based on this, I feel I do not need to write down every little thing and as to communication with my staff, we regularly talk about all kinds of things.”

– Micro Business Owner, SA.
Getting the language right

‘Mental Health’, ‘Mental ill-health’ and ‘Psychological risk’ are often understood synonymously in workplaces and this is likely attributed to the common cross-promotion of public health strategies targeting ‘mental health’ with that of Work Health and Safety (WHS) risk management and compliance-based approaches that has been prevalent for the last several years (ibid.)

WHS Regulators and government agencies have previously conflated psychosocial risk and risk reduction through risk management activities to that of workplace mental health interventions and improvements to the mental health (or reduction of mental ill-health symptoms) of workers at a workplace. **Health and wellbeing initiatives are not a substitute for compliance with WHS duties or other workplace regulation.**

The majority of small business respondents conflated the issues of ‘mental health’ and work-related ‘psychological risk’, as demonstrated below:

> Mental health relates to anything in the employee’s life not just work. Work related is just that.

> The same as the person brings it and takes it HOME each day.

> I don’t know or understand the difference.

> There is no difference.

> Mental health encompasses many things including work related psychological safety and health.

The use of inconsistent language creates confusion. Terms such as ‘mentally healthy workplaces’, ‘mental health’, ‘psychological risk’, and ‘psychosocial risk/hazards’ are increasingly used interchangeably and without consistent definitions.

This distinction is critical as health promotion activities are optional whereas risk management duties are legal duties.

In order to better support small businesses to navigate the complex legal landscape and untangle and distinguish between managing and supporting general mental health in a workplace setting and ensuring compliance with legal duties to WHS and other workplace regulation, it is critical that we understand small businesses knowledge of these terms, their experience of these matters and how they currently address these issues.
Those that were able to distinguish between general ‘mental health’ and WHS risk management/duties still demonstrated confusion as to their duties as an employer (or PCBU) under the WHS Act:

When asked if they had anything currently in place to identify and manage risk associated with psychological health in the workplace, those that responded stated:

- **Communication.** If we feel that an employee shows signs of mental health issues, our managing director will sit him/her down and talk with them. We have had employees with mental health issues, and these were ongoing even before we employed them.
- **External counsellors.** Yes, external counsellors. Beyondblue.
- **Onboarding a new employee.** As part of onboarding a new employee, their form asks them to list health issues. Open conversations are important about this issue. We have a small team and are observant of any changes in situation and also have open communication with everyone.
- **Communication.** Communication. If we feel that an employee shows signs of mental health issues, our managing director will sit him/her down and talk with them. We have had employees with mental health issues, and these were ongoing even before we employed them.

A person’s mental health is their own responsibility and includes their whole of life situation, where work related psychological safety and health is partly the responsibility of the workplace to provide a positive and supportive place of employment free of harassment.

Their own mental health issues can affect their work and, in our experience, regularly do. But it shouldn’t be our responsibility to manage or help with it unless our workplace or work is affecting their mental health.

A Complex Landscape to Navigate

Continued
The majority of responses focused on activities designed to identify and manage mental health symptoms and issues such as use of counsellors or Employee Assistance Providers, onboarding forms to identify pre-existing medical conditions and open communication policies.

However, when we followed this up with a question on what would help the most with WHS compliance, responses included:

- Easy to follow simplified information that makes compliance easy. Not make you feel like you are unsure of what to do.
- Money to engage a consultant more regularly and time to implement.
- Less ambiguity with legislation and clear-cut answers. In the construction industry it is not clear.
- Going to one place to receive the information required.
- Industrial Specific practical guidelines for owner operator type businesses.
- Simple guide on what are as a small business.
- To reduce the red tape or the need to read screeds and screeds of info.
- Fairness with costs and accountability of staff to be careful and obey safely rules.
- Financial grants to assist SME to ensure they are compliant.
- A self-audit checklist.
We then asked them, what is the one thing that you believe would best assist you to manage risks associated with work-related psychological (mental health) injuries?

1. **Customised support.**

2. **A toolkit** - toolkit and information on how to undertake and manage risks, information to help identify the signs of mental health issues, a tool kit with specific information for me in it.

3. **Training**
   
   Free training for small business owners and their managers, training with follow up support.

In the WHS space there is currently a lack of information targeted specifically at small businesses to assist them to manage work-related psychological risks. The SWA national guide and progress on Regulations and a Code of Practice at the national and jurisdictional levels is a one-size-fits-all approach to regulation and targeted more towards the size and maturity of medium and large businesses.

**Recommendations:**

- Governments, Regulators and others operating in this space must seek to use consistent and defined terms. Terms need to consider the full context of managing mental health in the workplace and proactive work needs to be undertaken to educate and communicate small businesses on these terms.

- It is critical that any regulation is supported by practical, ‘how to’ guidance that is customised and targeted towards small business to support them to interpret and apply the legislation to their own personal context.

- Professional skills and capacity need to be developed through dedicated education pathways. Traditional WHS consultants do not typically have psychosocial risk management skills, nor do HR consultants and organisational psychologists who have particular training that operates independently to the WHS framework and principles. Most resources and programs that have been developed for workplaces require assistance to implement and tailor within businesses which is particularly difficult for small business and which is compounded by a lack of expertise to turn to when resourcing does permit.

- Targeted and brief education and training opportunities should be facilitated by Governments to assist small businesses on WHS risk management approaches to psychological health and safety (versus public health promotion).
The fear of discrimination and employing people with disability (mental health conditions)

**Disability Discrimination and Equal Opportunity Legislation**

The most detailed legislation relating to disability discrimination is the Disability Discrimination Act 1992 (Cth), which operates nationally. Each State and Territory also has its own anti-discrimination laws, which generally prohibit the same types of disability discrimination. These laws make it unlawful to discriminate against a person based on their disability, which can include a mental illness. These laws apply to employers and other people in the workplace.

In short, the Disability Discrimination Act prohibits discrimination on the ground of a failure to make ‘reasonable adjustments’. The adjustments available in a particular case may vary widely, depending on the circumstances. An adjustment is a ‘reasonable adjustment’ unless making the adjustment would impose ‘unjustifiable hardship’ on the employer.

The number of people with disability has increased. In 2018, there were 4.4 million people with disability (up from 4.3 million in 2015). Almost one-quarter (23.2%) of all people with disability reported a mental or behavioural disorder as their main condition, up from 21.5% in 2015 (ABS, 2019).

Labour force participation for people with disability has remained stable since 2015, in contrast to an increase in the participation rate for people without disability. In 2018, over half (53.4%) were in the labour force, compared with 84.1% of those without disability almost half (47.8%) were employed, compared with 80.3% of people without disability (ABS, 2019).

Small businesses represent a significant source of employment, with 39% of Australians employed in small sized businesses (1-19 employees) (ABS 2021). Despite this, research into small business employment of people with disability, particularly those with mental disorders, is scarce.

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**SMALL BUSINESSES**
(not including non-employing)

**EMPLOY**

**WORKING AUSTRALIANS**

What is well known is that smaller organisations tend to not have formalized HR functions and systems. This tends to result in business owners taking responsibility for a range of areas including finance, operations, marketing and customer service. Their approach to employing people with health conditions and with disability is framed by the imperative to minimise effort, energy and cost required to manage staff.
A Complex Landscape to Navigate

Research commissioned by the Department of Social Services in 2018 (Small Business Australia 2018) also indicated that:

- 64% of SMEs agreed that they were unclear what happens if the candidate is not a good fit and does not work out.
- 63% agreed that they are concerned about legal responsibilities in terms of duty of care, risk management, discrimination laws and occupational health and safety.
- 60% agreed it is difficult to interpret the relevant laws and obligations for employers in relation to employing a person with disability.

There were concerns raised over the risks to the business in relation to unfair dismissal claims, or discriminatory implications the business may face.

We don’t know what to say in a job ad to not be discriminatory

Legal responsibilities is a huge issue. We want to make sure our workers are safe and are in a safe environment

For most small business owners, regulatory paperwork and administrative obligations are key factors of time burdens. A lot of us are HR managers, sales people, site managers, employees, accountants etc, so any admin that could be perceived as adding to our already overloaded workload is definitely a barrier.

These concerns are not unfounded as data from the Australian Human Rights Commission 2019-20 Complaint statistics (AHRC 2020) indicated that 2,761 enquiries were made to the AHRC linked to disability discrimination and 1,015 formal complaints. Mental health was the type of disability with the greatest percentage of complaints at 27%, followed by physical disability at 19%.
These concerns lead to a hesitation to employ new staff members as it is difficult for a business to cease their employment if it is not suitable. When it comes to people with a disability, this concern is raised in terms of the legal aspect as well as ethically, including how the business owner would feel if they had to let go an employee with a disability and the public perception of this.

Even though there are a range of industry initiatives and government incentives, subsidies and supports available to assist businesses to recruit and employ a person with disability, many small businesses are not aware of them or accessing them.

This is typically compounded by the fact that many business owners were not clear what the definition of ‘disability’ is and whether a mental illness is even classified as a disability. There is generally limited knowledge and familiarisation with different types of disabilities.

“The fact that I didn’t even know if mental disability is known as a disability, if we don’t know what we’re talking about then we won’t venture there”.

Lastly, if a small business owner is comfortable with the risks and is aware of initiatives to support disability employment, there may still be concerns over workplace adjustments that might be required and the costs and time involved.

- 56% of small business agree that workplace adjustments that might be needed are a barrier to the recruitment of a person with disability (Small Business Australia 2018).

**Recommendations:**

- There is a need for further targeted education and clarity of skills, strengths and limitations in order to make it easier for small business owners to consider employing a person with a disability.

- Guidance materials should focus on capacity for work, not disability. Guidance should be developed for small business owners on what is possible job task wise for people with different disabilities and how work can be easily modified to accommodate this as needed.

- Recommend a long-term trial of a PaTH style program, where vocational preparatory training is delivered and then placements in workplaces focusing on areas of need.

- Work experience opportunities are more readily delivered by employers to people still at school. More work experience opportunities should be developed for young people with disability.

- A broader strategy for promoting engagement and participation is needed. There have been fragmented approaches to promoting employment for those outside the workforce based on the various categories of equity groups. A single comprehensive strategy should be developed to promote increased participation involving:
  - Targeted industry campaigns;
  - Broad communications to employers and the community; and
  - Welfare reforms and enhanced mutual obligation requirements.

- Disability employment services should be part of Jobactive to create a more integrated employer service.
Managing employees, performance and mental health

Workplace relations laws and privacy

The Fair Work Act 2009 (Cth) applies nationally, covering most workplaces and deals with a range of matters which may be relevant in relation to employees (and in some instances prospective employees) who have a mental illness or mental health condition, including:

- minimum employment entitlements (examples relevant to mental health include: sick, carers and compassionate leave and the ability to request flexible working arrangements)
- employee protection from dismissal due to temporary absence from work (an employer must not dismiss an employee if the employee is temporarily absent from work due to an illness or injury (i.e up to 3 months on sick leave due to mental ill-health)).
- abandonment of employment processes (case law has established an expectation that additional steps and time will be afforded those with mental health issues/conditions)
- restrictions on terms in modern awards and enterprise agreements (including that terms do not discriminate against an employee covered by a modern award or enterprise agreement because of, or for reasons including an employee’s ‘mental disability’),
- general protections (requirements that employers not take certain unlawful action against employees because of their ‘mental disability’),
- unfair dismissal laws (where the reason for dismissal is considered harsh, unjust or unreasonable).

Although the Fair Work Act applies to most employees across Australia, there are some employees who are not covered and instead covered by State workplace relations laws, specifically in WA some sole traders, partnerships, other unincorporated entities and non-trading corporations are covered by the Industrial Relations Act 1979 (WA).

An employer might become aware of an employee’s mental health issues or a diagnosed condition in a variety of ways. This includes through:

- recruitment processes and pre-employment screening
- active disclosure of an issue or condition by an employee
- performance issues or the performance management process
- fitness for work assessments
- long or regular absences
- mood/behaviour changes
- interpersonal issues and conflict
- colleague concern

Each of these ways in which an employer may become aware of a mental health issue or diagnosis requires specific responses from an employer in order to appropriately support and manage an employee and stay compliant with relevant legislation.
Considerations where an issue or condition is disclosed

If an employee chooses to disclose a mental illness (diagnosed condition), then an employer needs to consider privacy and confidentiality arrangements. This information should generally not be disclosed to others without their consent. Even then, you can usually only use this information for the purpose they disclosed it to you (e.g. to seek workplace adjustments). There are however some exemptions.

If an employer has a legitimate cause for concern as to the safety of the employee or others, the employee has disclosed their condition as part of returning to work from an injury or illness or reasonable adjustments are being considered (as examples) it might be appropriate to seek a medical assessment. The ability to request an employee to attend a medical assessment will vary from case to case. Some employers may be able to rely on terms in employment contacts, modern awards or enterprise agreements requiring medical examination or proof that an employee can perform the inherent requirements of their job. Where this does not exist, an employer may however still be able to require an employee to undertake a medical assessment where it would be considered under the common law to be a reasonable and lawful direction.

Based on the medical advice, an employer would then need to consider WHS requirements, reasonable adjustments, performance management processes and termination considerations (i.e. given the awareness of a medical incapacity that they not breach unfair dismissal or general protections provisions).

Performance management considerations

An employer may notice underperformance or poor performance and start a process of performance management. Mental ill-health can have a significant effect on the way a person thinks, behaves and responds to various situations. As a result of this, it is not uncommon for employees to cite mental health issues as a reason for their poor performance or unsatisfactory behaviour.

An employer may then seek more information by way of a medical assessment and then faces the complexities as detailed in the first example.

Where there is performance management occurring and mental ill-health is or should be reasonably suspected or is confirmed, and the process has led to a point of termination of employment, employers need to tread carefully and patiently, ensuring that a fair process is followed prior to making a decision to terminate the employment and where relevant, take all reasonable steps to get independent medical information in relation to an employee’s fitness for work and their ability to perform the inherent requirements of their role. Where a termination is not managed appropriately there is a risk that the decision may be challenged as an unfair dismissal claim or general protections claim that an employer would then need to navigate.
Responding to psychological injury and managing stress claims

Workers’ Compensation Legislation

Workers with a psychological injury can claim ‘no fault’ statutory compensation in all Australian jurisdictions and access common law damages under most workers’ compensation schemes.

In all jurisdictions an injury of any type is only compensable if it ‘arises out of’ or ‘in the course of employment’. For injury/illness relating to psychological injury, workers’ compensation laws qualify this further by stating that the employment must have been a ‘significant’, ‘material’, ‘substantial’ or ‘the major contributing factor’ to the injury. Across Australia, claims for psychological injury are not generally accepted if they are related to reasonable action taken by the employer in relation to dismissal, retrenchment, transfer, performance appraisal, disciplinary action or deployment.

There are a range of proactive requirements on the employer in regard to claims administration, payments to the injured worker, a return to work program and ongoing communication with the injured worker as well as ongoing engagement with various other stakeholders including: insurers/claims agents/managers, GPs/treating medical practitioners and workplace vocational rehabilitation providers.

Despite an increase in awareness of mental health issues over recent years, workplaces still struggle with understanding the impact psychological injuries can have on an individual, unlike tangible physical injuries. Complicating this further is that even with a formal diagnosis, symptoms experienced, treatment methods and recovery times vary significantly from person to person due to individual differences.

Serious conditions can keep an employee away from the workplace for many weeks or months and their return to work requires careful management. Psychological injuries are inherently more complex due to the nature of symptoms and interplay of psychosocial factors both outside of and within the workplace (ACCI 2019).

Psychological injury claims are complex from both an injury management perspective but also a claims management perspective. For small businesses, this complexity is compounded by the fact that most are unfamiliar with the Workers’ Compensation system as they rarely have to manage claims.
We asked a sample of small businesses have they ever received a stress claim from a worker or managed a worker with a stress claim?

- 14% of small business owners stated that they have either received a stress claim from a worker or managed a worker with a stress claim.
- Only 4 indicated that they had managed more than 1 claim in the last 12 months.

14% received stress claims. 4% more than 1 claim past 12 months.

For those small businesses who had interacted with the WC system in relation to a psychological injury claim, we asked what types of experiences they had with the various scheme stakeholders and what support they received to manage the claim and injured worker:

Experiences with your workers’ compensation insurer?

In general, they have been helpful and responsive. After 10 years of operation, I have not had to deal with a workers compo case.

Poor, mainly around communication. We have not had direct contact from any insurer for many years. Do not see anyone face to face anymore. Most communication is by email or phone.

In 20 years of working in this business we have only ever had 3 minor claims & 1 major claim (2 of which were pre-existing); if you had a good claims manager assigned to the claim the communication was generally excellent - otherwise communication was virtually non-existent on the claims manager behalf (presumably due to their case load); as a small business we were not well equipped or had the resources to adequately deal with a major claim - consideration needs to be given to allow small business to engage an independent third party to act/assist on the businesses behalf the cost of which is covered by the work cover premium.

They don’t seem to really understand our varied industry and I usually only hear from them when it’s time to pay our bill each year. It’s time they see us as the employee, not the enemy. I think the experience I had of the claims manager was particularly unpleasant.

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So far after 10 years of operation, I have not had to deal with one workers compo case.

They don’t seem to really understand our varied industry and I usually only hear from them when it’s time to pay our bill each year. It’s time they see us as the employee, not the enemy. I think the experience I had of the claims manager was particularly unpleasant.

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In general, they have been helpful and responsive.
Experience with GP’s?

Polite but generally not forthcoming with all the relevant information - usually had to request this through the claims manager as they are reluctant to deal directly with the employer.

Only ever had one claim - had no problem with the process.

Doctors are one-sided and DO NOT give EMPLOYERS any help on real time return to work.

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 Only ever had one claim - had no problem with the process.

 GP’s seemed to want to book the employee off longer than the employee wanted and they also wanted additional follow up appointments.

 Service was different to a standard consult.

 (based on employee discussing with us, Dr did not talk to us).
Recommendations:

- Develop tools and resources to support small businesses in understanding how to first respond to psychological injury claims when a claim is made, both from a claim’s management perspective and an early intervention injury management perspective. This may include a tool to identify local support services and referral pathways for workers to access during a claim’s determination period.

- Assess the availability and usefulness of current resources for small businesses in relation to making reasonable adjustments for workers with a psychological injury or mental health condition.

- Develop information for small businesses on how to engage the various stakeholders relevant to a workers’ compensation claim for psychological injury i.e. how to work with your insurer/claims agent and what to expect, how to work with the GP, rehabilitation provider etc.
We need to acknowledge that regulations surrounding the management of mental health in Australian businesses are complex and daunting for employers, particularly small business.

Work is done in siloes without consideration of the holistic framework of laws employers operate in which adds to complexity and confusion and results in poorer outcomes for businesses and individuals.

For small businesses, growth in the number of separate pieces of regulation addressing mental health, coupled with the increasing pressure COVID has created on small business owners and their employees is not sustainable.

In rebuilding the economy after the damage COVID has inflicted over the last two years, support for small business will be vital, as will increasing overall workforce participation.

The ambition of Government and for the community generally, should be that more people with mental illness or ill-health (disability) are in work. Increasing the workforce participation and support of Australians with a disability will deliver broad social and economic benefits as well as direct social, economic and health benefits to individuals.

ACCI has played an active role in promoting the business case for employing people from a broad and diverse pool of Australians including people with a disability. As the employment landscape and the nature of work change with the development of new technologies and the emergence and decline of certain industries, coupled with the pressures of growing skill and labour shortages, these changes will present challenges, but also opportunities.

In order to embrace these opportunities and for employers, particularly small business employers, to be able to draw from a broad and reliable supply of labour including people with disability, the existing barriers to employing people with disability within the current workplace regulation (Disability discrimination laws, workplace relations laws, work health and safety laws, workers’ compensation laws and privacy laws) need to be addressed.

**Next Steps**

**Recommendations:**

- Develop a practical guide for small businesses that assists them to navigate the relevant workplace regulation relating to mental health/disability/psychosocial risk and psychological injury.

Historically there have been fragmented approaches to addressing mental health in the context of a workplace and in relation to workplace regulation. It is extremely encouraging that the Mentally Healthy Workplace Alliance is working on a Blueprint that provides a single comprehensive approach for developing ‘mentally healthy workplaces’ in Australia. Here they use the term to encompass both legal obligations to ‘protect’ (WHS) and ‘respond’ (WR, DD, WC) to mental health as well as ‘promote’ good practice additional activities to promote positive mental health.

- Any future Inquiries/Reviews or proposed new or amended workplace regulation must contemplate the full context of managing ‘mental health’ in the workplace as articulated above and not look in isolation at one piece of legislation or one aspect of work. There needs to be consideration of any potential duplication or contradictory regulation.

- Streamline and simplify the workplace regulation applicable to small businesses in the context of managing mental health/disability/psychosocial risk and psychological injury.
Sources


This document addresses the themes of a ‘smarter Australia’ and ‘fairer Australia’, goal 2 and 9 in Better Australia: Securing the foundations for a stronger and smarter future.