

GIEC GLOBAL Australia Raises Access-to-Justice Concerns for Small Businesses

GIEC GLOBAL Australia examines whether corporate representation rules create an access-to-justice gap for financially stressed small businesses.

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“

A justice system is only fair when both sides can afford to be heard. No small business should be priced out of defending itself simply because it is incorporated.”

Suman

As Australia Plans a New Fair Work Court, Should Small Businesses Get a Fairer Right to Represent Themselves?

Australia's corporate representation rules raise a growing access-to-justice question: should a business employing only two or three people face the same default requirement for legal representation as a large corporation?

As Australia prepares for a new Fair Work Court, there is an important issue that deserves to be part of the national conversation: whether very small incorporated businesses should have greater flexibility to represent themselves when they genuinely cannot afford private lawyers.

On 23 July 2026, the Australian Government announced plans for a new specialist Fair Work Court, acknowledging that the existing system can be costly, complex and slow for both workers and small businesses. The Government specifically recognised that some workplace cases can take more than two years and that parties should not face situations where the legal cost of a case exceeds the value of the claim itself.

That acknowledgement raises a broader question:

If access to justice is intended to be fair for both workers and employers, should Australia's rules governing legal representation distinguish between a large corporation and a micro-business with only two or three employees?

The Current Corporate Representation Rule

Under rule 4.01 of the Federal Circuit and Family Court of Australia (Division 2) (General Federal

Law) Rules 2025, an individual may appear through a lawyer or remain unrepresented, while a corporation is generally required to proceed through a lawyer.

A similar rule applies in the Federal Court of Australia, where rule 4.01(2) of the Federal Court Rules 2011 provides that a corporation must not proceed other than by a lawyer.
There is an important qualification.

The requirement is not absolute. The Federal Circuit and Family Court has power under rule 1.10 to dispense with compliance with its Rules, while the Federal Court has a comparable dispensing power under rule 1.34. Therefore, the legal position should not be described as saying that every corporation must hire a lawyer in every circumstance.

The more accurate position is this:

Legal representation is the default requirement for corporations, and a company wanting its director or another non-lawyer to represent it generally needs the Court to allow an exception.

But What Does “Corporation” Really Mean in Practice?

The word “corporation” can create an impression of financial strength.

It may bring to mind a national company with hundreds of employees, an internal legal department and substantial financial resources.

But a corporation can also be a small family business.

It might employ:

- two or three people;
- one working director;
- a bookkeeper or administrator; and



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- perhaps one additional employee.

There may be no HR department.

There may be no company lawyer.

There may be no litigation budget.

The director may personally manage clients, accounts, staff, rent, suppliers, tax obligations and day-to-day operations.

Yet once litigation begins, that micro-business starts from essentially the same corporate representation rule as a company worth hundreds of millions of dollars.

The rule itself does not create different representation categories based simply on turnover, employee numbers or whether the company can realistically afford a solicitor. Instead, relief depends on the Court exercising its available powers in the circumstances of the particular case.

That raises a genuine access-to-justice issue.

Is This Legal Bias?

A rule applying to corporations is not automatically evidence that a judge, registrar or court is biased against employers or small businesses.

The more important policy question is whether a facially neutral rule can produce structurally unequal consequences.

Consider two parties.

An individual can ordinarily represent themselves.

A small company cannot ordinarily do the same through its director merely because the director owns or manages the business.

For the company, therefore, exercising its right to defend itself may first require paying a lawyer or persuading the Court to dispense with the ordinary representation rule.

That procedural difference can become financially significant.

When an Employer Has Only Two or Three Employees

Employment disputes show why the issue deserves closer examination.

Australian employment law properly provides substantial protections for employees.

Those protections are important.

Employees can experience genuine power imbalances, particularly when dealing with large employers with greater financial and organisational resources.

But the word “employer” does not necessarily mean “powerful corporation.”

An employer may also be a company with two or three employees whose directors are working every day simply to keep the business operating.

The financial reality of those two employers is entirely different.

The justice system should therefore be capable of recognising actual circumstances rather than relying only on labels such as “employee” and “employer.”

The Legal-Assistance Gap

There is another practical issue.

An employee may, depending on their circumstances, obtain assistance through a union, community legal service, university law clinic, pro bono lawyer or another support service.

Small employers are not completely excluded from free assistance.

The Fair Work Commission operates a Workplace Advice Service, which can arrange free legal assistance for qualifying employees and small-business employers. For a small-business employer to qualify, it must generally have fewer than 15 employees, lack in-house legal, workplace relations or HR staff, have no lawyer or paid agent, and satisfy other eligibility requirements.

However, the service is limited to particular types of matters, including dismissal, general protections, workplace bullying and sexual harassment, and assistance depends on appointment availability.

That is very different from having a lawyer available to conduct an extended Federal Court proceeding involving pleadings, evidence, interlocutory applications, mediation and potentially a final hearing.

This is where a representation gap can emerge.

A micro-business may find itself:

too commercial for traditional legal assistance, too small to comfortably fund prolonged private litigation, yet legally incorporated and therefore subject to the corporate representation rule.

The result can be particularly difficult where an individual on the other side has obtained free or institutionally supported legal representation.

There is nothing wrong with that individual receiving legal support.

Indeed, access to legal assistance should be encouraged.

But fairness requires asking whether the other party also has a realistic opportunity to participate.

Prejudice Can Operate in Both Directions

Employment law discussions understandably focus heavily on the potential prejudice suffered by employees.

However, prejudice should be assessed from the evidence and circumstances of both parties.

Imagine an employee receiving professional legal assistance at little or no personal cost while a three-person company is required to pay private commercial legal fees from money otherwise required for wages, rent, tax and suppliers.

That small business can suffer genuine prejudice too.

The answer should not be to remove assistance from employees.

The better question is:

Should the justice system provide a more accessible mechanism for a financially stressed small corporate employer to participate?

Fairness cannot operate in only one direction.

Protecting employees and ensuring procedural fairness for employers are not competing principles.

A properly designed justice system should be capable of achieving both.

Legal Costs Can Change the Economics of the Case

Fair Work litigation creates an additional issue because legal costs are treated differently from many other types of litigation.

Section 570 of the Fair Work Act 2009 restricts the circumstances in which one party can be ordered to pay another party's legal costs. Costs may be ordered in specified circumstances, including where proceedings were instituted vexatiously or without reasonable cause, or where an unreasonable act or omission caused another party to incur costs.

There are sound reasons for this policy.

Workers should not be discouraged from pursuing legitimate workplace rights merely because they fear a substantial adverse costs order.

But the practical consequence for a small corporate employer may be significant.

A business might spend tens of thousands of dollars obtaining legal representation to defend a claim and, even if it ultimately succeeds, generally remain responsible for its own legal expenses unless one of the statutory grounds for a costs order applies.

That creates an uncomfortable commercial reality.

A business can win the legal dispute but still lose financially because of the cost of defending itself.

The Government's July 2026 announcement about the proposed Fair Work Court appears to recognise this broader problem, noting that cases should not cost more to resolve than the underlying claim is worth.

Even the Federal Court Has Recognised the Access-to-Justice Problem

This broader concern is not limited to small-business commentary.

In February 2026, Federal Court Chief Justice Debra Mortimer publicly discussed the growing number of litigants representing themselves and specifically identified situations where company directors seek to represent their companies.

Her Honour also recognised that the cost of legal services can create a barrier for people and the corporations they have formed, and referred to the patchwork availability of legal aid and publicly funded legal assistance.

At the same time, the Chief Justice explained why professional legal representation remains important to the administration of justice: lawyers are trained, regulated, subject to professional obligations and officers of the Court.

That balance is important.

The solution should not be to abolish professional representation requirements.

The question is whether the system can become more proportionate.

The Law Already Allows Corporate Self-Representation in Some Fair Work Cases

There is strong evidence that a more flexible model is possible.

Under rule 31.12 of the 2025 General Federal Law Rules, an authorised officer or employee of a corporation may represent the corporation in a Fair Work small claims proceeding, despite the general corporate representation rule.

That exception is important.

It demonstrates that Australian procedural law already accepts that, in appropriate circumstances, an authorised company representative can participate without a lawyer.

The principle is therefore already established.

The reform question becomes:

Why should there not be a similarly structured pathway for financially distressed micro and small businesses outside the small-claims procedure, particularly for preliminary and procedural stages of litigation?

A Possible Small-Business Representation Model

Reform does not need to give directors an unrestricted right to conduct complex trials.

A more balanced model could provide a presumption of limited representation for qualifying small businesses that demonstrate genuine financial hardship.

An authorised director could potentially be allowed to:

- file a Defence and procedural documents;
- file affidavits and documentary material;
- participate in directions hearings;
- attend case-management conferences;
- participate in mediation;
- make straightforward interlocutory applications; and
- communicate with the Court and opposing representatives.

The Court could retain full authority to require professional lawyers where necessary.

For example, legal representation could still be required for:

- complex questions of law;
- substantial evidentiary disputes;
- expert evidence;
- cross-examination;
- lengthy final hearings; or
- cases where the proposed representative is unable to conduct proceedings appropriately.

Permission could also be conditional and revocable.

This would protect the administration of justice while avoiding an unnecessarily rigid all-or-nothing approach.

Financial Hardship Should Be Explicitly Considered

The law already recognises proportionality as an important objective.

Section 190 of the Federal Circuit and Family Court of Australia Act 2021 states that civil practice and procedure should facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible. It specifically includes resolving disputes at a cost proportionate to their importance and complexity.

That principle could be reflected more directly in decisions concerning corporate representation.

A future reform could expressly require consideration of:

- number of employees;
- annual turnover;
- available operating funds;
- estimated legal fees;
- amount actually in dispute;
- complexity of the litigation;
- knowledge and capability of the proposed director;
- whether the director will be an important witness;
- prejudice to the opposing party; and
- whether conditions can adequately manage any procedural risk.

The question should not simply be:

“Would having a lawyer be better?”

In most litigation, professional legal representation will naturally be preferable.

The additional question should be:

“Is requiring full professional representation proportionate and realistically affordable in this particular case?”

Representation Applications Should Also Be Fast

There is another issue that deserves attention.

A financially stressed company may have to prepare an interlocutory application, financial evidence and legal submissions merely to obtain permission for its director to participate.

If permission is disputed or refused, further procedural steps may follow.

Meanwhile, deadlines for filing a Defence or other documents can continue.

The company can therefore become involved in a legal dispute about its ability to participate in the original legal dispute.

A reformed procedure could provide expedited decisions for small-business representation applications and temporary permission allowing an authorised director to protect the company's procedural position until the representation issue is determined.

Access to justice should not be lost while a party is waiting for a decision about how it can access justice.

The New Fair Work Court Creates an Opportunity

The proposed Fair Work Court presents an important opportunity.

The Government has said the objective is to create workplace justice that is simpler, fairer and faster and to address a system that can presently be costly and difficult for workers and small businesses.

That reform discussion should include the way micro and small corporate employers are represented.

Australia does not need to choose between employee protection and small-business access to justice.

Both matter.

Employees should have access to unions, community organisations, legal clinics and affordable legal representation.

At the same time, a company employing two or three people should not automatically be

assumed to possess the financial resources of a major corporation simply because it has “Pty Ltd” after its name.

A Fair Opportunity for Everyone

The corporate representation rule exists for legitimate reasons.

Qualified lawyers protect clients, assist Courts and contribute significantly to the proper administration of justice.

But rules should also remain proportionate to the people and organisations affected by them.

Australia already permits corporate officers to represent businesses in certain Fair Work small claims proceedings. The Courts also possess powers to dispense with ordinary representation requirements.

The question for reform is whether those principles should become clearer and more accessible for micro and small businesses experiencing genuine financial hardship.

The objective should not be to give employers an advantage.

It should be to ensure both parties reach the justice system with a meaningful opportunity to be heard.

An employee should not lose a legitimate claim because an employer has greater financial power.

Equally, a small business should not lose the practical ability to defend itself simply because it cannot afford prolonged private legal representation.

Justice should assess the real circumstances of the parties before it—not merely whether one is labelled an “employee” and the other an “employer”.

As Australia considers the future of workplace justice, this is a reform question worth asking.

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