Government of Western Australia

Productivity Commission Inquiry into the Workplace Relations Framework

SUBMISSION BY THE WESTERN AUSTRALIAN GOVERNMENT

March 2015

INTRODUCTION

The Western Australian Government (WA Government) welcomes the opportunity to make a submission to the Productivity Commission as part of the inquiry into the workplace relations framework.

The federal workplace relations framework is of considerable interest to the WA Government, as a significant proportion of Western Australian employers and employees are covered by the national industrial relations system created using the corporations power in the Commonwealth Constitution. Approximately two thirds of Western Australian employees are covered by the national industrial relations system. The remainder (mainly those employed in unincorporated businesses and the public sector) are covered by the State industrial relations system.

The industrial relations system has a key role in supporting the performance and competitiveness of the State's economy and encouraging employers to sustain and create employment. In Western Australia (WA), the economy is currently in a period of transition as the State's resource sector shifts from a phase of intense construction activity and a number of large resource projects have moved into the operational phase. This means that exports are taking over from business investment as the key driver of growth in the State's economy.

The Western Australian labour market has performed exceptionally well in recent years. However, employment growth in WA has eased since early 2013 and the State's unemployment rate is gradually increasing. This partly reflects the less labour intensive nature of the operational phase of major resource projects. The average unemployment rate for the State over the year to February 2015 was 5.3 per cent, compared to 4.7 per cent over the year to February 2014.

Growth in WA's Wage Price Index (WPI) has slowed significantly, from an annual average increase of 3.3 per cent in December 2013 to an annual average increase of 2.4 per cent in December 2014. Annual average Consumer Price Index growth for Perth to December 2014 was 2.8 per cent, meaning WPI fell by 0.4 per cent in real terms.

The links between the industrial relations framework and outcomes in the labour market are complex and difficult to measure. However, it is evident from international examples that different approaches to regulation can either facilitate or inhibit the efficient functioning of the labour market and wider economy.

While there is a degree of consensus in Australia that certain minimum standards should be maintained to protect the vulnerable, employers have legitimate concerns that some aspects of the current system, for example penalty rates, excessively inflate labour costs and discourage job creation. In the present economic climate, it is particularly important that minimum and award rates of pay do not unduly constrain the ability of employers to retain staff or hire new employees.

The WA Government believes maintenance of an appropriate safety net for employees must be balanced with consideration of the capacity of employers to meet labour costs and incentives to generate new employment.

The impact of the workplace relations framework on small business is of particular concern to the WA Government. Negative impacts of the workplace relations framework (such as increased labour and compliance costs) can be disproportionate on smaller businesses, which typically do not have the same resources and/or expertise as larger businesses.

Small businesses (that is, those employing between 0 and 19 workers) make a significant contribution to the WA economy. As at June 2013, small businesses in WA were estimated to have employed 513,795 workers, which was 38.9 per cent of the 1.322 million workers employed by all businesses in the State.[1] Further, it is estimated that small businesses contributed approximately $43.9 billion to WA's Gross State Product (GSP) in 2012-13, compared with $41.9 billion for medium-sized businesses and $108.4 billion for large businesses.[2]

[1] ACIL Allen Consulting, "Report to the SBDC – Economic Significance of Small Businesses in Western Australia", September 2014, pp. 9-10.
[2] Ibid, p.16.

2.3 NATIONAL EMPLOYMENT STANDARDS

ADDITIONAL PUBLIC HOLIDAYS

An issue that has been raised with the WA Government by employers since the introduction of the National Employment Standards (NES) in the *Fair Work Act 2009 (Fair Work Act)* is the combined effect of the NES and the *Public and Bank Holidays Act 1972* (WA) *(PBH Act)* in WA.

The *PBH Act* provides for additional public holidays where New Year's Day, Anzac Day, Christmas Day or Boxing Day falls on a weekend. For example, where Anzac Day falls on a Saturday, the Saturday and the following Monday are both public holidays. This has been the case since the enactment of the *PBH Act* in 1972.

The *Fair Work Act* defines public holidays to include all those days prescribed as public holidays under a State law.[3] As a consequence, where a State law provides for an additional public holiday where the primary public holiday falls on a weekend, both the primary and additional day are recognised as public holidays pursuant to the *Fair Work Act* definition.[4]

Entitlement to be absent on a public holiday

The NES provides that an employee is entitled to be absent from his or her employment on a day that is a public holiday under a State law.[5] As the primary public holiday is on a weekend, there are no practical implications for employees who work Monday to Friday (as they would be absent on the primary public holiday because it is a weekend), however there are implications for employees who would ordinarily work the primary and additional day.

While the NES specifically states that where a State law provides for a substituted day, the substituted day is the public holiday for the purposes of the NES,[6] the *Fair Work Act* is silent on additional public holidays.

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[3] Section 115(1)(b) *Fair Work Act.*

[4] Other jurisdictions have similar issues. For example, in South Australia there is an additional public holiday where certain public holidays fall on a Sunday (for example, New Year's Day, Australia Day, Anzac Day, Christmas Day or Proclamation Day 26 December) or Monday (Proclamation Day, that is, 26 December): ss.3 and 3A *Holidays Act 1910* (SA); in NSW when New Year's Day, Christmas Day or Boxing Day falls on a weekend there is an additional public holiday: section 4 *Public Holidays Act 2010* (NSW).

[5] Section 114 *Fair Work Act.*

[6] Section 115(2) *Fair Work Act.*

Under the NES an employer may make a reasonable request for an employee to work on a public holiday and the employee may make a reasonable refusal.[7] Arguably, an employee's refusal would not be reasonable if the employee were seeking to be absent from work on both the primary public holiday and the additional public holiday. That could constitute an "other relevant matter"[8] to be taken into account in determining whether the request or refusal to work on a public holiday is reasonable. However, that is presently an uncertain situation.

The WA Government supports amendment of the NES to require consideration of whether an employee will have the benefit of a primary or additional public holiday in determining whether a request or refusal to work on a public holiday is reasonable. For example, if an employee does not work on the primary day (for a certain public holiday) even though they ordinarily would work that day of the week, that should be taken into account in determining whether a request or refusal to work on the additional day (that relates to the same public holiday) is reasonable.

Payment for work on a public holiday

The NES also provides that an employee is entitled to payment for absence on a public holiday if the employee would ordinarily work on that day.[9] However, the NES does not deal with payments to an employee where an employee works on the public holiday.

The *PBH Act* also does not deal with payment for work performed on a public holiday. Payment for work on public holidays is dealt with by industrial instruments. State industrial instruments override the *PBH Act*.[10]

Additional public holidays generally do not cause difficulties for employers in the WA industrial relations system. Many State awards provide for substitute public holidays where certain public holidays fall on a weekend. State industrial instruments can provide for payments (usually penalty rates) on either the primary public holiday or the additional public holiday where an employee works on that day.

In the national industrial relations system, however, the issue of public holiday rates has been complicated by the introduction of the NES and modern awards. Depending on the terms of the relevant industrial instrument, employers may be required to pay penalty rates on the primary public holiday as well as the additional public holiday, thereby incurring increased labour costs.

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[7] Section 114(2)-(4) *Fair Work Act.*
[8] Pursuant to section 114(4)(h) of the *Fair Work Act.*
[9] Section 116 *Fair Work Act.*
[10] Section 3 *PBH Act.*

However, it appears that provisions in modern awards and enterprise agreements can limit the payment of penalty rates to either the primary public holiday or the additional public holiday. While the NES must not be excluded by a modern award or enterprise agreement,[11] modern awards and enterprise agreements may include terms that are ancillary, incidental or supplementary to the NES (so long as the terms are not to the detriment of an employee when compared to the NES).[12] As the NES does not deal with payments for working on public holidays, it is apparent that terms for payments when public holidays are worked would be supplementary to the NES and would not be to the detriment of the employee when compared to the NES.

It is appropriate that modern awards and enterprise agreements deal with payments for work where a primary public holiday and an additional public holiday both fall within the definition of a public holiday for NES purposes. Industrial instruments are tailored to specific industries (awards) and individual employers (enterprise agreements) and can deal with payments for working on public holidays in a way that is appropriate for the industry or employer.

LONG SERVICE LEAVE

The long service leave standard that is part of the NES is based on old (pre-modernised) federal award long service leave provisions that applied as at 31 December 2009. If an old federal award applied to an employer at that time, then the award's long service leave provisions continue to apply.

In the absence of an old federal award applying (or a federal agreement with long service leave provisions), then the *Long Service Leave Act 1958* (WA) *(Long Service Leave Act)* applies in WA.

The long service leave standard in the NES was only ever intended to be transitional as stated in the Explanatory Memorandum to the Fair Work Bill 2008:

> *"This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories."*[13]

The long service leave standard has now operated for 5 years. A working party consisting of Commonwealth, State and Territory officials was established to progress a national long service leave standard. However, the issue has not been resolved by the working party and it no longer convenes.

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[11] Section 55(1) *Fair Work Act.*
[12] Section 55(4) *Fair Work Act.*
[13] Explanatory Memorandum to the Fair Work Bill 2008 at page 73.

In practice, the transitional long service leave standard in the NES causes confusion and complexity from a compliance viewpoint. It can be difficult to ascertain whether an employer was bound by an old federal award due to:

- respondency lists in old awards not being up to date;
- a change of business name not being reflected in respondency lists;
- awards applying where there has been a transmission of business but this is not evident in the respondency lists; and/or
- old awards not being readily accessible.

Industrial inspectors at the WA Department of Commerce have encountered several such cases. The following example is illustrative of the difficulties.

Case example

An employer represented by an industrial association was unaware that an old federal award containing long service leave provisions had applied as at 31 December 2009. The employer had refused to pay long service leave entitlements on termination of an employee's employment and the employee made a complaint to the WA Department of Commerce, in the (mistaken) belief that long service leave entitlements arose from the *Long Service Leave Act*.

Pursuant to the NES, the long service leave entitlement arose from the old federal award and the non-payment had to be pursued in the federal jurisdiction by the Fair Work Ombudsman. Investigation of the employee's claim was delayed while jurisdiction was being established.

This case illustrates that ascertaining long service leave entitlements and the relevant jurisdiction for enforcement is complicated, even where an employer has industrial representation. This unnecessarily complicated and frustrating process for determining long service leave obligations and entitlements is a significant burden on the resources of the relevant enforcement agencies as well as employers, employees and their representatives.

In addition, the old federal award provisions are generally outdated compared with State long service leave laws and comparatively disadvantage employees.

The WA Government supports repeal of the transitional long service leave standard in the NES. State and Territory long service leave laws would instead apply unless an employer has a federal enterprise agreement which deals with long service leave, given that federal agreements override State laws to the extent of any inconsistency. This would remove the current complexities and inequities of the transitional standard, while enabling employers that operate nationally to negotiate one set of long service leave conditions for their workforce.

2.4 AND 3.2 INDIVIDUAL FLEXIBILITY ARRANGEMENTS

The express intention of the individual flexibility arrangement (IFA) provisions of the *Fair Work Act*[14] was to "*ensure that the needs of employers and employees are met*" and to "*assist employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce.*"[15]

It is timely for the Productivity Commission to assess whether IFAs are achieving these stated objectives and providing employers and employees with the desired flexibility.

The WA Government considers that the ability for IFAs to be terminated by the employer or employee with 28 days' notice reduces their utility and appeal as they do not offer sufficient certainty. The ability for either party to unilaterally withdraw at such short notice is particularly problematic where the IFA concerns rosters and hours of work, where termination could create serious operational disruptions for an employer or significant issues for an employee who has arranged childcare accordingly. It is undesirable for employers and employees alike that IFAs be underpinned by such uncertainty.

The proposed amendments to the *Fair Work Act* contained in items 7 and 15 of the Fair Work Amendment Bill 2014 extend the notice period for a party to terminate an IFA from 28 days to 13 weeks. While 13 weeks is an improvement on 28 days, the WA Government is of the view that the *Fair Work Act* should be amended to require a party to give 6 months' (or 26 weeks') notice to unilaterally withdraw from an IFA.

Furthermore, the WA Government submits that in the interests of consistency and ensuring the content of IFAs are not restricted by the terms of an enterprise agreement, the *Fair Work Act* should be amended consistent with items 11 and 12 of the Fair Work Amendment Bill 2014 to prescribe the minimum matters about which a flexibility term in an enterprise agreement must permit IFAs to be made.

It is also important that the views of the employee and employer are taken into account in determining whether the employee is better off overall under the IFA. The amendment to the *Fair Work Act* contained in the Fair Work Amendment Bill 2014[16] to allow an IFA to confer a non-monetary benefit on an employee in exchange for a monetary benefit, is supported by the WA Government. Indeed, it is the WA Government's view that the amendment is necessary to ensure IFAs can achieve their stated objective of providing genuine flexibility.

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[14] *Fair Work Act* sections 144-145 and 202-204.

[15] Explanatory Memorandum, Fair Work Bill 2008, page xxviii.

[16] Items 9 and 13 of Schedule 1 to the Fair Work Amendment Bill 2014 propose to insert notes after sections 144(4)(c) and 203(4) of the *Fair Work Act* that: "Benefits other than an entitlement to a payment of money may be taken into account …".

2.5 PENALTY RATES

The WA Government supports the Productivity Commission considering appropriate penalty rates and ordinary hours, particularly in the retail and hospitality industries. There is a need for penalty rates to be updated and reformed to improve productivity and increase employment opportunities.

The Small Business Development Corporation (SBDC), an independent statutory authority established under the *Small Business Development Corporation Act 1983* (WA), recently undertook a survey of small business operators in WA for the purposes of establishing the views of small business in relation to the workplace relations framework and the impact of penalty rates.[17] Responses to the survey were received from 74 small businesses that employ staff in WA. Despite the limited number of responses as a consequence of the time limitations required to ensure inclusion of the results in this submission, the responses are still insightful.

The WA Government is particularly concerned that penalty rates have a disproportionate impact on small businesses, and that those businesses have limited resources to implement industrial arrangements to ameliorate the effects of prohibitive penalty rates.

BACKGROUND - SMALL BUSINESS IN WA

According to the most recent available Australian Bureau of Statistics (ABS) data for the number of businesses by employment size range in each State, as at June 2013 there were 209,926 actively trading small businesses in WA, out of a total of 215,972 businesses in the State.[18]

Small businesses represent 96.7 per cent of all businesses in the State, compared with a share of 97.4 per cent nationally. The vast majority of small businesses in WA were non-employing (62.3 per cent), while micro-businesses (that is, employing between 1 and 4 persons) accounted for 24.7 per cent and businesses employing 5 to 19 persons accounted for 9.8 per cent of the sector.[19]

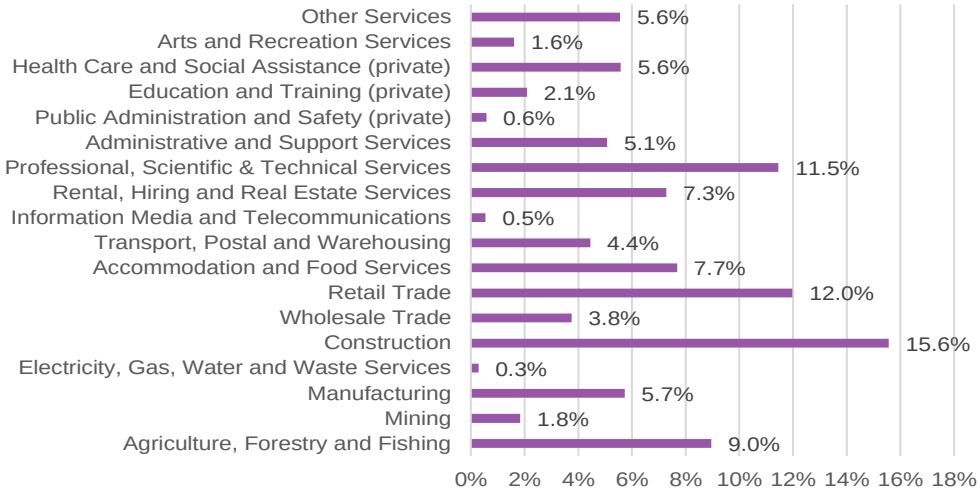
[17] The SBDC sent details of the survey via email to 1,500 small businesses on its "Have your Say" database. Of this cohort 426 small businesses opened the survey link and a total of 111 completed the survey. Participation in the survey was non-mandatory. The full survey is attached as an Appendix.

[18] ABS Cat. No. 8165.0, "Counts of Australian Businesses, including Entries and Exits, June 2009 to June 2013".

[19] Ibid.

Employment by small businesses in WA is concentrated in a few key industries. The breakdown of employment by WA small businesses across industries as at June 2013 is shown in Figure 1. Small businesses in the Construction industry employed the highest number of workers (79,988 workers, or 15.6 per cent of the total across all small businesses), followed by the Retail Trade industry (61,562 workers, or 12.0 per cent) and the Professional, Scientific and Technical Services industry (58,837 workers, or 11.5 per cent).[20]

Figure 1: Share of WA small business employment by industry June 2013



Across all industries in WA, it is estimated that small businesses contributed approximately $43.9 billion to WA's GSP in 2012-13. This compares with $41.9 billion for medium-sized businesses and $108.4 billion for large businesses.[21]

It is well understood that the burden of compliance falls most disproportionately on the small business sector. This is because small businesses are not as likely as larger business to employ dedicated staff to manage their operational and legislative responsibilities, with much of this responsibility generally falling upon the small business owner.

The SBDC's survey of small business revealed that small businesses overwhelmingly do not support penalty rates for employees working outside standard business hours.[22] Of those small businesses that supported payment of penalty rates for working outside standard business hours, two thirds thought penalties should be the same on Sundays as on Saturdays and two thirds supported the

[20] ACIL Allen Consulting, "Report to the SBDC – Economic Significance of Small Businesses in Western Australia", September 2014, p.10.
[21] Ibid, p.16.
[22] 70.3 per cent did not support penalty rates.

Saturday penalty rate being 50 per cent of the ordinary rate or less. Over half of the employers who supported weekend penalty rates thought Sunday penalty rates should be 50 per cent or less.

However, on the issue of penalty rates for public holidays 100 per cent of respondents supported penalty rates for working public holidays although again, more than half considered the penalty rate should be 50 per cent of the ordinary rate or less.

The vast majority (70 per cent) of employers did not think that removal of penalty rates would result in difficulty attracting staff to work weekends and public holidays. It is apparent that at least some employers would operate additional hours if penalty rates did not apply. A majority of employers considered penalty rates had both negatively impacted their decisions to employ more staff and to expand or grow their business in the last 12 months. Over 60 per cent of survey respondents indicated penalty rates had negatively impacted their decision to trade on weekends and public holidays. It seems many small businesses limit employment (and consequently payment of penalty rates) in respect of public holidays by working those days themselves, limiting opening hours and rostering staff with the least financial impact.

WA GOVERNMENT RECOMMENDATIONS

The modern awards objective in section 134 of the *Fair Work Act* was amended by the *Fair Work Amendment Act 2013* to include a requirement for the Fair Work Commission (FWC) to take into account, in ensuring modern awards and the NES provide a fair and relevant minimum safety net of terms and conditions, the need to provide additional remuneration for employees working overtime; shifts; weekends or public holidays; and employees working unsocial, irregular or unpredictable hours. The Explanatory Memorandum to the Fair Work Amendment Bill 2012 described the objective of new section 134(1)(da) of the *Fair Work Act* in the following terms:

> *"This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work."*

As the modern awards objective already requires the FWC to ensure that modern awards provide a "fair and relevant safety net", taking into account "relative living standards and the needs of the low paid", even without section 134(1)(da) the FWC is required to take the needs of employees into account in considering penalty rates or any other terms and conditions in modern awards.

Consequently, the modern awards objective in section 134(1)(da) appears to require the FWC to give greater emphasis to the needs of employees than those of employers in the context of considering appropriate levels of penalty rates in awards.

The modern awards objective also requires the FWC to take into account:

- the need to promote social inclusion through increased workforce participation;
- the likely impact of any exercise of modern award powers on business including on productivity, employment costs and regulatory burden; and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

While these factors must also be taken into account in considering penalty rates, section 134(1)(da) specifically emphasises the need for additional remuneration for employees. Removal of section 134(1)(da) would lead to a more balanced consideration of appropriate levels of penalty rates in modern awards.

For this reason, it is recommended that section 134(1)(da) of the *Fair Work Act* be deleted.

There is no mention in the modern awards objective of the impact of the exercise of modern award powers on small business. Given that the impact on small business can be disproportionate, it is recommended that the modern awards objective be amended to require the FWC in exercising modern awards powers to take into account the impact on, and the needs of, small business.

The *Fair Work Act* already identifies small business as having distinct needs in the context of unfair dismissal and redundancy.

The *Fair Work Act* provides for a Small Business Fair Dismissal Code, which commenced on 1 July 2009 and provides different rules for dismissal of employees of small business employers. The Small Business Fair Dismissal Code protects small businesses against unfair dismissal claims as long as an employer follows the Code and can provide evidence accordingly.

Employees working for small businesses have to be employed for at least 12 months before they are protected from unfair dismissal, whereas all other employees only have to be employed for 6 months.

Further, in determining whether a dismissal was harsh, unjust or unreasonable, the FWC must take into account "*the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal*"[23] and "*the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal*".[24]

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[23] *Fair Work Act* section 387(f).
[24] *Fair Work Act* section 387(g).

Similarly, the redundancy provisions in the NES exempt small business employers from the requirement to pay redundancy pay.[25]

The *Fair Work Act* clearly takes into account the needs of small business in other contexts and it is recommended that a similar approach be taken in the exercise of modern award powers by way of amendment to the modern awards objective.

[25] *Fair Work Act* section 121(1).

3.3 PROTECTED INDUSTRIAL ACTION

In February 2012 the WA Government submitted to the Federal Government's review of the *Fair Work Act* that it supported changes to the taking of protected industrial action in bargaining and amendment of the *Fair Work Act* to enable the WA Minister responsible for workplace relations matters (the Minister for Commerce) to make applications to the FWC to suspend or terminate industrial action.

The WA Government reiterates its support for implementation of those changes in full (which have been sought to be implemented in Bills currently before Federal Parliament or have been implemented by regulation).

The WA Government supports:

- limitation of protected industrial action in circumstances where bargaining has not formally commenced as included in the Fair Work Amendment Bill 2014;
- the provisions of the Fair Work Amendment (Bargaining Processes) Bill 2014 that seek to amend section 443 of the *Fair Work Act* to require the FWC, before making a protected action ballot order, to have regard to a range of non-exhaustive factors in assessing whether an applicant for a protected action ballot order is genuinely trying to reach an agreement;
- the provisions of the Fair Work Amendment (Bargaining Processes) Bill 2014 that will provide the FWC must not make a protected action ballot order where it is satisfied that the claims of an applicant are manifestly excessive or would have a significant adverse impact on productivity at the workplace;
- enshrining in legislation (rather than regulation as is currently the case[26]) the capacity for the WA Minister responsible for workplace relations to make application to the FWC to suspend or terminate protected industrial action pursuant to section 424 of the *Fair Work Act*.

The WA Government welcomed the *Fair Work Amendment (Protected Industrial Action) Regulation 2014*, which gave the WA Minister responsible for workplace relations the capacity to make an application pursuant to section 424 of the *Fair Work Act.* Prior to the commencement of that Regulation, WA was the only State that did not have the capacity to make such an application. However, the impact of industrial action on WA businesses, workers and their families and the economy is the same whether or not WA had referred its industrial relations powers for the unincorporated private sector.

[26] The *Fair Work Amendment (Protected Industrial Action) Regulation 2014* commenced on 1 July 2014.

The WA Government has a significant and legitimate interest in ensuring that protracted industrial action does not unduly impact on WA and its economy. The WA Minister's right to make an application pursuant to section 424 of the *Fair Work Act* should be enshrined in the Act rather than implemented by regulation.

3.5 DISPUTE RESOLUTION

The WA Government supports a less adversarial workplace relations system for small business, with a focus on mediation to resolve workplace disputes. While the FWC has mediation powers under section 595 of the *Fair Work Act*, they can only be exercised in the expressly prescribed circumstances. There is no general capacity for an employer or employee to refer a dispute to the FWC for mediation. The FWC is limited to exercising its mediation powers in resolving disputes pursuant to a dispute settlement procedure in an award or agreement or disputes arising during bargaining.

By contrast, the *Employment Dispute Resolution Act 2008* (WA) (*EDR Act*) provides a free and informal employment dispute resolution service through the Western Australian Industrial Relations Commission (WAIRC). The *EDR Act* provides dispute resolution for employers, employees and organisations. It is a consent jurisdiction, where parties to a dispute determine the extent of the WAIRC's dispute resolution powers/functions.

In the 2013-14 financial year, 17 mediation applications were lodged in the WAIRC pursuant to the *EDR Act*. The Annual Report of the Chief Commissioner of the WAIRC notes that:

> *"… the EDR Act has been utilised by parties to industrial disputes which would not be within the jurisdiction of the Commission pursuant to the [WA] Industrial Relations Act. This includes disputes in industries of significance to the State's economy, which highlights the importance of the EDR Act."*[27]

A general mediation role in dispute resolution by the FWC could assist small business in a less formal manner before disputes escalate, in a similar way to the WAIRC's role pursuant to the *EDR Act*.

[27] At p.32.

4.3 ANTI-BULLYING LAWS

In WA, the WorkSafe Division of the Department of Commerce (WorkSafe) has been involved with addressing workplace bullying for several decades. WorkSafe's current focus is on preventing bullying and responding to workplace bullying reports.

WorkSafe's approach to investigating bullying complaints is to establish whether the employer and the employee have met their obligations under the *Occupational Safety and Health Act 1984 (WA)* (*OSH Act*). WorkSafe's role, in this context, is distinct from that of the FWC as WorkSafe does not mediate, conciliate, or become involved in the specifics of workplace bullying. The *OSH Act* does not empower a WorkSafe inspector to issue an order to stop bullying.

However, both WorkSafe and the FWC define workplace bullying similarly, leading to the prospect that the same allegations of bullying conduct could be dealt with simultaneously in the two jurisdictions. To establish whether a worker was bullied at work, the FWC has to find an individual or group of individuals has repeatedly behaved unreasonably towards the worker, and that behaviour creates a risk to health and safety. If there is also a risk that the worker will continue to be bullied at work, the FWC may make an order.

The FWC has a broad discretion to make any orders it considers appropriate (other than those requiring a payment), including requiring:[28]

- the individuals or group to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's anti-bullying policy;
- the provision of information and additional support and training to workers;
- a review of the employer's workplace bullying policy.

There is the potential for a FWC finding of bullying at work or issue of an order to conflict with the results of an investigation and/or enforcement action by WorkSafe. Given the FWC's jurisdiction to make orders to stop bullying only commenced on 1 January 2014, it is too early to assess the extent of possible overlap or inconsistency between the jurisdictions. At this stage, the WA Government would note the prospect of issues arising from the overlap in jurisdiction to deal with bullying in the workplace.

[28] FWC Anti-bullying Benchbook, p.52.

4.4 GENERAL PROTECTIONS

The WA Government has previously indicated its concerns with the breadth of the "adverse action" provisions of the *Fair Work Act*, which enable employees to claim discrimination on a wide range of grounds.[29] These concerns remain. While there are issues with duplication of State and other federal discrimination laws and resultant complexity, the WA Government's primary concern is potential liability and uncertainty for business.

Where applications relate to contraventions involving the dismissal of the person, there is a 21 day time limit for making an application.[30] This is consistent with the time limit for making an unfair dismissal application.[31] If reasonable attempts to resolve the dispute (other than by arbitration) are unsuccessful, the FWC issues a certificate pursuant to subsection 368(3). Notifications for the FWC to arbitrate the dispute (by agreement) or applications for the court to determine the dispute must be made within 14 days of the FWC issuing the certificate.

These relatively short timeframes for making applications where there has been a dismissal contrast with the lengthy six year timeframe for making an application relating to contravention of the general protection provisions where the contravention does not relate to dismissal.

Section 361 of the *Fair Work Act* provides that where an application relating to a contravention of the general protections provisions alleges that the action was taken for a reason or with an intent that would constitute a contravention of the provisions, there is a presumption that the action was taken for that reason or with that intent unless the person proves otherwise. This reversal of the onus of proof justifies limitation of the timeframe for making applications that do not involve dismissal, as the effluxion of time can render it increasingly difficult to disprove the presumption.

The current six year timeframe for bringing an adverse action claim (not involving dismissal) is unduly long and creates unnecessary uncertainty for business. This can be contrasted with the 12 month timeframe for making a complaint under the *Equal Opportunity Act 1984* (WA).[32]

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[29] WA Government submission to the *Fair Work Act* Review.
[30] Section 366 *Fair Work Act*.
[31] Section 394(2) *Fair Work Act*.
[32] Section 83(4), although the Commissioner for Equal Opportunity may accept a complaint out of time where there is good cause.

A shorter timeframe is justified taking into account:

- the reverse onus of proof for adverse action claims;
- that a person may be held liable notwithstanding they had multiple reasons (including lawful reasons) for taking certain action;
- that there is no cap on the amount of compensation that can be ordered as a result of adverse action, including compensation for non-economic loss such as distress, hurt or humiliation.[33]

In the circumstances, and given the significant potential liability for employers, the WA Government considers it reasonable that there be a significantly reduced timeframe for bringing an adverse action claim (not involving dismissal) under the *Fair Work Act*.

The latest FWC Annual Report shows that in 2013-14 there was a 40 per cent increase from the previous year in general protections applications not involving dismissal.[34] The concerns that the WA Government has previously raised remain, particularly in light of the increasing number of applications being made under these provisions.

[33] *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333.
[34] FWC, Annual Report 2013-14, p.37.

5.5 STATE PUBLIC SECTOR EMPLOYMENT

The Productivity Commission has sought comment on State public sector employment, which is largely regulated by the States. The WA Government strongly holds the view that the WA public sector should remain in the State industrial relations system.

The WA Government has successfully managed public sector labour relations within the State jurisdiction, and has no intention of referring its constitutional powers in this respect. The ability of the WA Government to legislate and maintain an industrial relations system appropriate to the industrial and political circumstances of the State is of fundamental importance.

It is the WA Government's view that maintenance of the State public sector in the State industrial relations system is an appropriate division of industrial relations governance given:

- the differing nature of public and private sector employers – particularly in respect of revenue streams and business objectives;
- different productivity assessments for the public/private sectors;
- the risk to finances and local economies where State Governments are unduly constrained in the management of their public sector workforce and associated costs; and
- the potential for impact on the WA Government's ability to deliver public services.

The uncertainty surrounding the coverage of the workplace relations framework under the *Fair Work Act* (and previously the *Workplace Relations Act 1996*) and how it intersects with State public sector employment has significant implications for the WA Government. This uncertainty arises from the use of the corporations power in the Commonwealth Constitution to determine coverage of the *Fair Work Act*. Whether an employer is a constitutional corporation or not is often unclear, particularly where an employer is a government entity. Judicial consideration of individual cases does not always shed light on the constitutional status of another employer. Furthermore, the extent to which an implied limitation on Commonwealth legislative power impacts on coverage adds an additional layer of legal complexity and uncertainty.

The definition of "national system employer" in section 14 of the *Fair Work Act* provides scope for a State law to declare that certain employers are not national system employers for the purposes of the *Fair Work Act*. However, the employer is only excluded from the operation of the *Fair Work Act* if the Federal Minister then endorses the declaration. Such endorsement can be revoked or amended at the

Minister's will. Accordingly, even if a State declares an employer to be excluded from the operation of the *Fair Work Act*, the declaration is subject to the Minister endorsing the declaration and possibly revoking the endorsement at any time. This process does not provide sufficient certainty.

The WA Government supports an amendment to the *Fair Work Act* to clearly delineate the coverage of State public sector employers. It is the WA Government's view that public sector employers should remain in the State industrial relations system and it is important that coverage of the *Fair Work Act* clearly excludes these employers. The present uncertainty and ambiguity, which has significant implications for public sector employees and employers along with the ability of the WA Government to manage its public sector, is an unsatisfactory situation that requires resolution.

Additionally, the WA Government recognises that some federal employment provisions have direct application to non-constitutional corporations (including public sector entities). That being the case, careful consideration is required before amending those provisions recognising the potential impact on public sector employment arrangements. The WA Government would therefore recommend that States are consulted through the appropriate mechanisms when the Commonwealth is contemplating change with the potential to impact on State industrial relations arrangements.

5.7 BUSINESS TRANSFER FROM STATE PUBLIC SECTOR EMPLOYER

The WA Government does not support the *Fair Work Act* provisions in Chapter 6 Part 6-3A relating to transfer of business from a State public sector employer. These provisions were inserted by the *Fair Work Amendment (Transfer of Business) Act 2012* (*Transfer of Business Act*).

The WA Government made a submission in March 2013 to the Federal Government's review of the *Transfer of Business Act* (after its enactment) opposing the provisions on the basis that they unduly interfere with the State's ability to effectively manage its financial affairs and deliver public services. Specifically, concern was raised that the provisions have a detrimental impact on the viability of outsourcing service and infrastructure delivery.

Consistent with the previous WA Government submission to the Federal Government's review of the *Transfer of Business Act*, the WA Government continues to oppose the provisions relating to transfer of business from a State public sector employer because they:

- have a significant detrimental impact on the viability or efficiency of alternative models of service and infrastructure delivery in WA and consequently limit the ability of the WA Government to achieve value for money for taxpayers;

- may not achieve their intended purpose of protecting the interests of employees, who are already offered a degree of protection by the *Public Sector Management Act 1994* and the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*[35] if transferred from the public sector to the private sector and/or made redundant;
- may, perversely, provide a disincentive to a private sector employer taking on public sector employees because:
    - the terms and conditions of their employment differ from existing or other prospective (non-transferring) employees of the private sector employer which creates inequities and complexities;
    - the terms and conditions of their public sector employment are not suitable for efficient private sector service delivery;
    - the inflexibility of employment conditions may override the value of existing skills and knowledge;
    - unlike other prospective employees, a transferring employee has no say in whether they wish to accept different terms and conditions of employment, leading to a greater likelihood of redeployment or redundancy;
    - there may be issues of representational rights by public sector unions.

The Federal Government's "Asset Recycling Initiative" [36] could potentially be undermined by the transfer of business provisions in the *Fair Work Act*. The Federal Government initiative encourages (by incentive payments) asset sales by State Governments and reinvestment of the proceeds to fund infrastructure projects. However, as WA Government assets may employ public sector employees, the transfer of business provisions could have implications for the sale of certain assets to the private sector, potentially making asset sales less attractive and less profitable to State Governments and private investors.

The transfer of business provisions present ongoing issues for the WA Government with respect to both outsourcing and asset sales and the WA Government reiterates support for their repeal.

[35] These Regulations are scheduled to commence 1 May 2015 and replace the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* from that date.

[36] http://www.budget.gov.au/2014-15/content/glossy/infrastructure/html/infrastructure_04.htm

APPENDIX

SMALL BUSINESS DEVELOPMENT CORPORATION SURVEY RESULTS

1. Do you currently employ staff in Western Australia?

	Response Percent	Response Count
No	33.30%	37
Yes	66.70%	74
	Answered questions	111

2. How many staff do you currently employ (including casual staff)?

	Response Percent	Response Count
1 to 4	31.10%	23
5 to 10	41.90%	31
11 to 20	17.60%	13
20+	9.40%	7
	Answered questions	74

3. Which industry category best describes your business?

	Response Percent	Response Count
Accommodation and food	14.90%	11
Administration and support services	1.40%	1
Agriculture, forestry and fishing	1.40%	1
Arts and recreation	0%	0
Construction	4.00%	3
Education and training	8.00%	6
Electricity, gas, water and waste services	1.40%	1
Financial and insurance services	4.00%	3
Health care and social assistance	5.40%	4
Information media and telecommunications	1.40%	1
Manufacturing	9.50%	7
Mining	1.40%	1
Other services	12.00%	9
Professional, scientific and technical services	5.40%	4
Public administration and safety	0%	0
Rental hiring and real estate services	1.40%	1
Retail	21.60%	16
Transport, postal and warehousing	5.40%	4
Wholesale Trade	1.40%	1
	Answered questions	74

4. How is your business structured?

	Response Percent	Response Count
Company	54.10%	40
Partnership	12.10%	9
Sole trader	13.50%	10
Trust	20.30%	15
	Answered questions	74

5. Which workplace relations system do you operate in?

	Response Percent	Response Count
Don't know	13.60%	10
Federal	43.20%	32
State	43.20%	32
Answered questions		74

6. Which employment instruments do you use in your business? (please tick all that apply)

	Response Percent	Response Count
Award	42.10%	40
Enterprise or industrial agreement	4.20%	4
Individual agreement	34.70%	33
National minimum wage	11.60%	11
Other	4.20%	4
Not sure	3.20%	3
Answered questions		95

7. Why did you choose this employment instrument/s for your business?

“Simplest. Most transparent”.

“We use individual agreements to build on the award. To attract and retain staff in a remote regional town we need to tailor individual agreements to create packages that address issues faced by people living here”.

“It is a guideline to minimum requirements. We are small business”.

“We base our wages on the award to ensure minimum standards are met and enhance conditions wherever possible”.

“Simple and straightforward for small business without the current capacity of a legal and corporate team to assist in developing own awards”.

“Wageline has a very broad and structured info package that I can use”.

“To start with we didn’t have too many employees and wanted to make sure we were paying them what they were entitled to”.

8. Do you think there is a need for a minimum wage?

	Response Percent	Response Count
Don't know	1.40%	1
No	13.50%	10
Yes	85.10%	63
Answered questions		74

9. Who should be responsible for setting minimum wage rates? (please tick all that apply)

	Response Percent	Response Count
Don't know	0.90%	1
Federal Government	39.60%	42
Industry	24.50%	26
State Government	26.40%	28
Unions	4.70%	5
Other (please specify below)	3.80%	4
Answered questions		106

10. How often should minimum wages be reviewed?

	Response Percent	Response Count
6 mths	4.10%	3
12 mths	60.80%	45
2 yrs	24.30%	18
5 yrs	4.10%	3
Don't know	4.10%	3
Other	2.70%	2
Answered questions		74

11. Do you employ staff that are covered under an award?

	Response Percent	Response Count
No	28.40%	21
Yes	71.60%	53
Answered questions		74

12. Please rate your experience of the award system:

	Response Percent	Response Count
Extremely negative	17%	9
Negative	20.80%	11
Neutral	43.40%	23
Positive	17.00%	9
Extremely positive	1.90%	1
Answered questions		53

13. Briefly outline the aspects of the award that contribute to your experience:

“It’s great to have a guideline and a reference centre.”

“It’s accountable and transparent. Fair for the employees and a clear guideline for employers. It avoids conflict and work disruption. Everyone knows where they stand.”

“Archaic provisions that belong in another world and do not recognise the realities of modern business and the people they employ.”

“The penalties are parochial and extremely outdated! To assume that a person’s time is more valuable on a Saturday or a Sunday is presumptuous and limiting. We do not charge more for our customers to dine on a weekend, so why should we pay more for staff wages? It is virtually impossible for me to operate on a public holiday, as I would be paying my adult dish hand in excess of $40/hr!! The 10% public holiday surcharge that we charge does not cover this.”

“It can be difficult to calculate overtime, penalty rates etc. Some employee roles are between 2 or 3 awards, so unsure which to use. Most staff are employed well above award wages so as to retain employees, so award becomes irrelevant.”

“Complete disincentive, it isn't about the performance of the employee as everyone gets the same pay regardless of how well they do the job. The employee cannot even bargain for a better pay rate or conditions. Far too rigid and does not reflect what is happening in business. Penalty rates cripple business and the employee's ability to earn.”

“Award updates only come out after the date they are in effect. They should be released prior to the date so that back pays don't have to be done every year there is an increase. Awards are not clear at all when it comes to Saturday, Sunday and public holiday rates. I have rung the labour relations department many times over the years and have been told different things on the same items asked. If the staff are not clear on the award and the award is not clear, how is the employer supposed to be correct. It is very difficult and frustrating for a small employer to waste so much time on this.”

“Because we are a 7 day tourist based business the retail award is antiquated and does not reflect current business practice in our sector.”

14. Please rate the level of flexibility available to you as an employer under the award system:

	Response Percent	Response Count
Very rigid	30.20%	16
Rigid	30.20%	16
Neither rigid nor flexible	24.50%	13
Flexible	13.20%	7
Very flexible	1.90%	1
Answered questions		53

"Because my staff are paid above award wages, when it comes to overtime, the rates are just too much for a small business. I believe small business should be able to negotiate a wage for all overtime that suits the employee and employer."

"We are unable to employ staff on the weekends as the penalty rates are too onerous. This is why we, the proprietors, work every weekend and public holiday."

"Awards advantage less efficient and inexperienced staff and do not offer enticements to improve. Experienced staff members with a passion are not addressed."

"Restaurants commonly open on weekends and public holidays. However with the penalty rates plus public holiday rates, it is very discouraging and not profitable for a small business."

"No allowance for employing someone on say a Sunday and paying them just a normal weekday award rate - when this might be the only day that person wants to work!"

"The new (modern) awards are not specific enough. I find the employer is most often the party who is not looked after."

15. Do you think it is necessary to retain an award system given that minimum wages and minimum employment standards are in place as safety nets for employees?

	Response Percent	Response Count
Don't know	7.50%	4
No	26.40%	14
Yes	66%	35
Answered questions		53

"Yes, I agree that workers need protection, however I don't understand how or why multi-nationals are able to get away with paying their employees less (i.e. McDonalds), yet we, a much smaller business, seem to be footing the bill and paying our staff a premium. I don't have the legal background or ability to negotiate like these big businesses do; it is an uneven playing field."

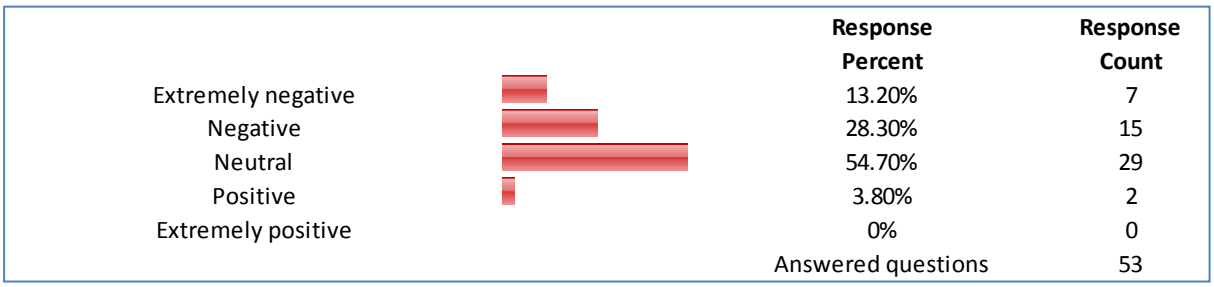
"Like it or not there are employers who will exploit weaknesses in employees' situations. Particularly when trading conditions or bad management cause difficulties. Those who are vulnerable are just as capable of working and should be treated equally. The Award system protects them. I have always found I get the best results from my staff by respecting them and treating them fairly."

"We live in 24 hour busy highly competitive world; if we do not change we cannot compete with other countries and will lose out."

"Productivity is penalised. It is impossible to compete internationally. People should be allowed to work wherever they wish."

"I am a kiwi ex HR Manager both here and in New Zealand. The Employment Relations Act works very well in NZ and has done since 2000. Yes there were a lot of people upset when it came into force but in the long run they are more than happy with it. Penalty rates went, hourly rates and salaries went up, employees and employers had the ability to run their business at times that suited their operational needs, businesses became more competitive in the market place and productivity increased. Employees were able to work more, if they wanted and the employer cannot contract out of the employment standards."

16. Excluding wages and penalty payments, rate the impact of other aspects of awards (such as allowances) on your business productivity and profitability:



	Response Percent	Response Count
Extremely negative	13.20%	7
Negative	28.30%	15
Neutral	54.70%	29
Positive	3.80%	2
Extremely positive	0%	0
	Answered questions	53

17. Briefly indicate the type of award provisions which impact on your productivity or profitability:

"Working hours, how long rosters can have people working, time to be taken for breaks, etc."

"Uniform allowance and Remote living allowance."

"Northwest living allowances... Sunday penalties given we are a 7 day a week business. Flexible rostering should treat Sat & Sun as normal hours if employees are happy with weekend work and weekdays off."

"All the different shift allowances, tool allowances, laundry allowances etc."

"Tool allowances, meals allowance etc. are archaic and old fashioned."

“Employees are entitled to onsite allowances, tool allowances and overtime allowances. Overtime is usually a killer on the profitability as Saturday is most common for overtime and it is paid at up to double time, also productivity can slow down as employees are in weekend mode. We try to ensure that work loads are completed within Monday to Friday to keep overtime costs to a minimum.”

18. **Does your business typically operate outside standard business hours (Mon-Fri 9am-5pm)?**

	Response Percent	Response Count
No	14.90%	11
Sometimes	21.60%	16
Yes	63.50%	47
Answered questions		74

19. Do you think staff should be paid a penalty rate for working outside standard business hours?

	Response Percent	Response Count
Don't know	5.40%	4
No	70.30%	52
Yes	24.30%	18
Answered questions		74

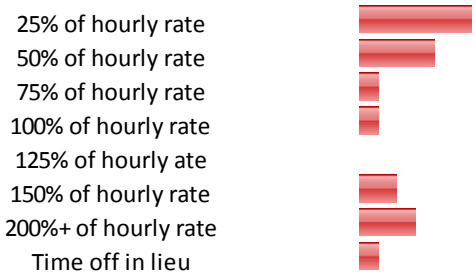
20. Should Sunday penalty rates be the same as Saturday?

	Response Percent	Response Count
Don't know	0%	0
No	33.30%	6
Yes	66.70%	12
Answered questions		18

21. What penalty rate is appropriate for working on Saturday?

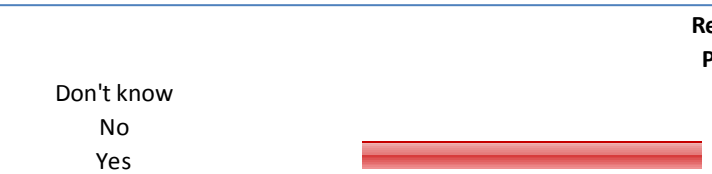
	Response Percent	Response Count
25% of hourly rate	55.60%	10
50% of hourly rate	11.10%	2
75% of hourly rate	0%	0
100% of hourly rate	5.50%	1
125% of hourly ate	0%	0
150% of hourly rate	27.80%	5
200%+ of hourly rate	0%	0
Time off in lieu	0%	0
Answered questions		18

22. What penalty rate is appropriate for working on Sunday?



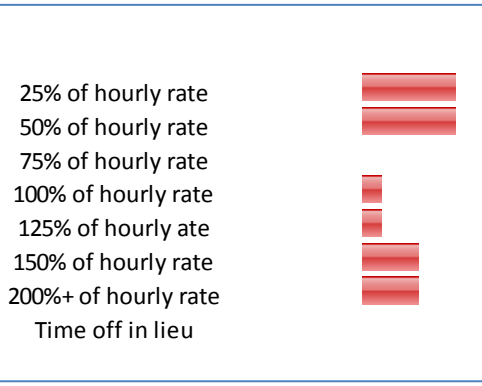
	Response Percent	Response Count
25% of hourly rate	33.30%	6
50% of hourly rate	22.20%	4
75% of hourly rate	5.60%	1
100% of hourly rate	5.60%	1
125% of hourly ate	0%	0
150% of hourly rate	11.10%	2
200%+ of hourly rate	16.70%	3
Time off in lieu	5.60%	1
	Answered questions	18

23. Do you think staff should be paid a penalty rate for working on public holidays?



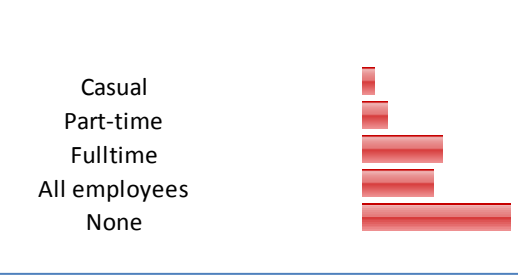
	Response Percent	Response Count
Don't know	0%	0
No	0%	0
Yes	100%	18
	Answered questions	18

24. What penalty rate is appropriate for working on public holidays?



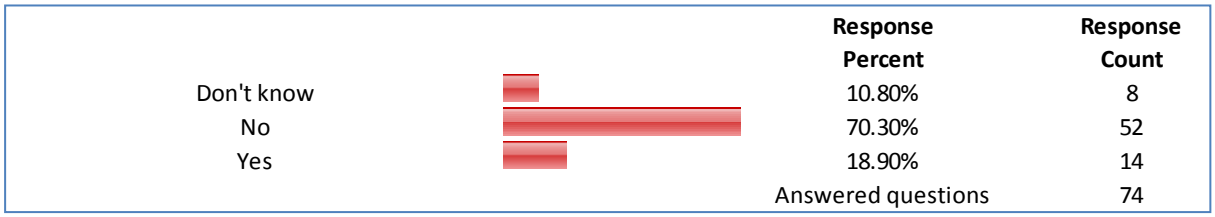
	Response Percent	Response Count
25% of hourly rate	27.80%	5
50% of hourly rate	27.80%	5
75% of hourly rate	0%	0
100% of hourly rate	5.60%	1
125% of hourly ate	5.60%	1
150% of hourly rate	16.60%	3
200%+ of hourly rate	16.60%	3
Time off in lieu	0%	0
	Answered questions	18

25. Which employees should be eligible to receive penalty rates? (please tick all that apply)



	Response Percent	Response Count
Casual	3.80%	3
Part-time	7.50%	6
Fulltime	23.70%	19
All employees	21.20%	17
None	43.80%	35
	Answered questions	80

26. If penalty rates were removed, do you think you would find it difficult to attract staff to work weekends and public holidays?



	Response Percent	Response Count
Don't know	10.80%	8
No	70.30%	52
Yes	18.90%	14
Answered questions		74

"Let the laws of demand and supply operate. If businesses want to open on a public holiday and are unable to attract staff to work then it is only logical that by them increasing their wages they increase the attractiveness of such a vacant position. BUT it is not up to government to set such additional premiums over the basic wage, it should be up to the employer and employee to negotiate between themselves. In this digital age where anything is accessible anytime the same should be said for business opening hours, but the cost structure to deliver such a business should not be affected by law!"

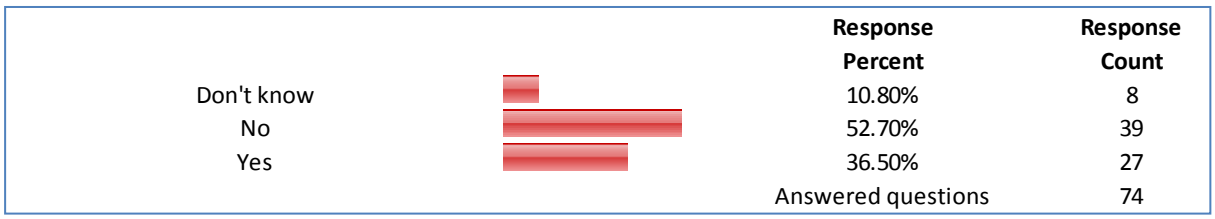
"Some staff actually are happy to work on a Saturday morning if they can have an afternoon or morning off during the week. It seems ridiculous to have to pay extra wages to open Saturday morning when it suits some staff to work then anyway."

"Definitely not! Staff want to work but sometimes cannot afford to open the shop, so instead of anyone getting paid a standard wage, no one gets paid as we do not open. Staff wants to get paid standard so at least making some money but we cannot do that as it is not allowed."

"We have lots of people who would want to work, I cannot afford to operate and shop remains closed."

"There are lots of people wanting work. Would employ more if I didn't have to pay overtime or weekend extras."

27. If penalty rates were removed altogether, do you think you would need to pay a higher rate of pay to attract people to work weekends, public holidays and outside standard business hours?



	Response Percent	Response Count
Don't know	10.80%	8
No	52.70%	39
Yes	36.50%	27
Answered questions		74

Yes:

"A weekend is a weekend. Why is a Sunday paid at a higher rate than a Saturday? The ACTU and union movement will agree to a single penalty rate to be paid for all weekends and public holidays and this has been proven with the EBA with the

supermarket giants Coles & Woolworths. Small business like us aren't allowed to do that because it hasn't been signed off by the ACTU or relevant union."

"Only marginally higher, not the time and a half and double time it is now."

"A bit higher than normal is ok. But presently the increase is prohibitive."

"Yes, but the flexible working hours will suit some people. I can understand a 20% premium, but not the current 150%, 200% or even the 300%, it's just not viable. Maybe there needs to be some flexibility in the hours worked, so that 35/38 or even 40 hours can be done in say 3 days if they want."

No:

"Restaurants are generally a 6 or 7 day operations. To suggest it is a penalty to work on weekends and public holidays, then should we as operators charge a higher price on our food for these periods?"

"We run on a very tight public holiday budget, simply to cover costs. Even with a 10% surcharge, it is very tough."

"Working extra-long hours on every weekend and every public holiday is very detrimental to the small business owner. There is no consideration for the small business owner. All emphasis is on protecting the employee with no regard for the negative impact on the owner. The current system gives gives gives and gives to the employee and takes takes takes takes everything from the small business owner."

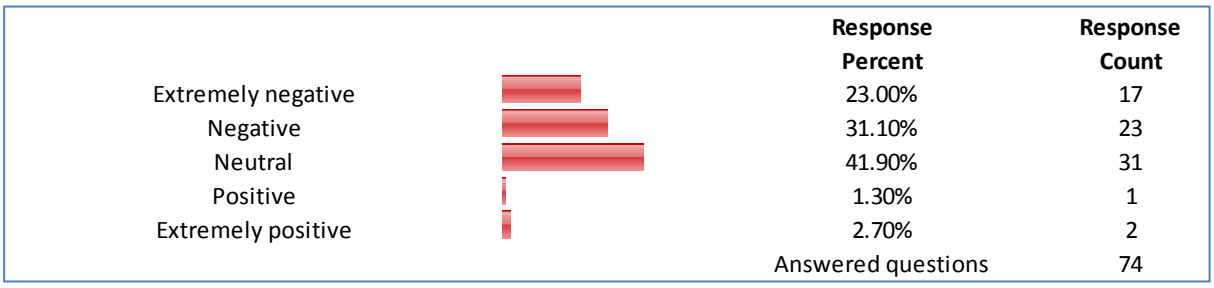
"Currently assessing closing for business on Sundays."

"We close the shop on evenings, weekends and public holidays as it is unaffordable to have staff."

"Reduction of services provided during public holidays. We also defer non-essential activities to the following day."

"As long as you provide good conditions of service and look after your staff you will find that many people prefer to work weekends and after hours so that their spouse can look after children etc."

28. During the past 12 months, what influence have penalty rates had on your decision to employ more staff?



	Response Percent	Response Count
Extremely negative	23.00%	17
Negative	31.10%	23
Neutral	41.90%	31
Positive	1.30%	1
Extremely positive	2.70%	2
Answered questions		74

29. During the past 12 months, what influence have penalty rates had on your decision to expand or grow your business?

	Response Percent	Response Count
Extremely negative	23.00%	17
Negative	32.40%	24
Neutral	39.20%	29
Positive	2.70%	2
Extremely positive	2.70%	2

30. During the past 12 months, what influence have penalty rates had on your decision to trade on weekends?

	Response Percent	Response Count
Extremely negative	29.70%	22
Negative	31.10%	23
Neutral	35.10%	26
Positive	1.40%	1
Extremely positive	2.70%	2
	Answered questions	74

31. During the past 12 months, what influence have penalty rates had on your decision to trade on public holidays?

	Response Percent	Response Count
Extremely negative	37.80%	28
Negative	27.00%	20
Neutral	29.80%	22
Positive	2.70%	2
Extremely positive	2.70%	2
	Answered questions	74

32. During the past 12 months, what influence have penalty rates had on your decision to pass on additional costs to your customers?

	Response Percent	Response Count
Extremely negative	17.60%	13
Negative	24.30%	18
Neutral	44.60%	33
Positive	5.40%	4
Extremely positive	8.10%	6
	Answered questions	74

33. Which of the following have you used to address the impact of penalty rates on your business? (please tick all that apply)

	Response Percent	Response Count
Modifed opening hours	21.60%	27
Rostered staff who had the least impact	24.80%	31
Worked weekends/public holidays yourself	39.20%	49
None	8.80%	11
Other	5.60%	7
Answered questions		125

34. During the past five years have you encountered any issues with regards to unfair dismissal, including compliance requirements with regards to dismissing an employee?

	Response Percent	Response Count
Don't know	0%	0
No	78.40%	58
Yes	21.60%	16
Answered questions		74

What are the effects of unfair dismissal arrangements on your compliance costs, recruitment, employment and productivity?

“Changed way we employ people.”

“We have kept bad employees because we were too scared to get rid of them by bad I mean unsafe slack.”

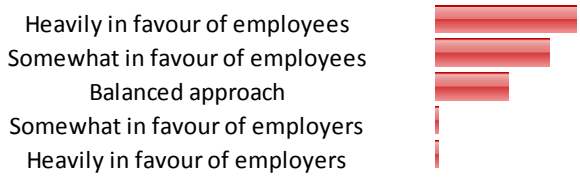
“The dismissal code has been formulated with "big business" in mind. Big business has the HR departments and resources to be able to wade through the regulatory framework. Small business doesn't have this available to them in most cases. Payouts being made to terminated employees as this is generally cheaper than having your day in court regardless of how strong your case is. A perception that Fair Work and the ombudsman will "ALWAYS" find in favour of the employee due to a small oversight of the relevant procedure on behalf of the employer.”

“Small business does not have the HR and formal processes in place. It is very stressful, time consuming and ridiculous that as a business owner it is almost impossible to dismiss someone as the worker has all the right (and they know it). Your face is literally rubbed in it and as a small business owner I have been ridiculed and abused by a past employee and their parents.”

“My employee was stealing and it took a long time to prove his theft. The emotional stress of his lies and actions took a toll on me. To be attacked by his parents, too, and falsely accused of unfair dismissal when I am one of the fairest bosses around was garbage.”

"It is on the back of your mind. I feel like every potential employee has the potential to blackmail me, i.e. I have become more suspicious and very cautious in hiring people."

35. How would you rate the current unfair dismissal arrangements?



	Response Percent	Response Count
Heavily in favour of employees	41.90%	31
Somewhat in favour of employees	33.80%	25
Balanced approach	21.60%	16
Somewhat in favour of employers	1.40%	1
Heavily in favour of employers	1.40%	1
	Answered questions	74

"Needs to change, it's hard to maintain business in current economic downturn."

"There should be financial penalties applied to vexatious claims by employees."

"They are good but can be exploited by unscrupulous employees. Not much to protect employers."

"Employers have little back up or assistance. Employees can gain access to many assistance on different platforms."

"Let's get it right. No matter if it's a job or not, if they are the wrong person for the job the business needs to be able to get rid of them. Easily, without fuss. 3 strikes? For the same issue? Come on."

"Current arrangements have created the most inefficient country in the world. It will cost much more to become competitive again."

"The onus of proof is on the employer. Enough said."

"Biased beyond belief."

36. What is your experience of anti-bullying laws?

"Definitions are too vague. Staff can pop the terms at will without knowing the difference between employers monitoring efficiency and bullying. Reminding staff to work according to job description and standards is considered bullying and harassment. Staff think employers are nasty and rich and they need to be 'milked'."

"It has been taken too far and has taken the common sense out of human existence. I understand why they are in but to have pathetic issues added to cover bulldust topics is getting too far. Grow up and stop being pedantic and nitpicky. Protect the genuine but take away the threats of breathing wrong etc."

"Sour, we have had employees use union bullying tactics against us to try and go for unfair dismissal to gain an unfair dismissal claim."

"I've been exposed to them. In some places there needs to be the proviso that, 'Being told how to do your job is not bullying'".

"Ridiculous that you cannot criticise someone doing wrong in your business for being seen as a bully. We also had false accusations by an employee they were being bullied, it went to mediation and it came out that the employee was lying. But he had all the rights; we still couldn't dismiss him for that."

Do any aspects of the workplace relations system represent a barrier to independent contractors?

		Response Percent	Response Count
Don't know		47.90%	35
No		26.00%	19
Yes		26.00%	19
		Answered questions	73

"The ATO checklist re whether someone is an employee or a contractor meant we had to convert a contractor to an employee. This doesn't suit her and it doesn't suit us but as a small business we can't afford the risk of the ATO penalising either her or us if we've got it wrong. More flexibility for contractors would be helpful."

"None that I am aware of basically we don't employ contractors because we feel they are deemed employees and it is a minefield but we still hear of a lot of people doing it and get told we are silly not to."

"Draconian tax laws pertaining to the definition of an employee. Once someone is working for themselves… the excessive time off, slacking off and general uselessness goes away because they do not have the fall back of sick leave, unfair dismissal etc. They just wouldn't last."

"It is easier to give a contractor work than to find an employee."

37. Are the current workplace relations provisions enough to discourage the practice of sham contracting (i.e.: where an employer attempts to disguise an employment relationship as an independent contracting arrangement)?

		Response Percent	Response Count
Don't know		53.40%	39
No		24.70%	18
Yes		21.90%	16
		Answered questions	73

38. During the past five years have you purchased a business that resulted in employee entitlements and conditions being transferred to you?

	Response Percent	Response Count
No	87.80%	65
Yes	12.20%	9
	Answered questions	74

39. During the transfer did you encounter any problems from a workplace relations perspective?

	Response Percent	Response Count
No	33.30%	3
Yes	66.70%	6
	Answered questions	9

"Calculating the long service leave entitlements of casuals. Casual should not have this entitlement."

"Training - staff left due to awards and rates and hours."

"I had to pay out an employee who was sacked by the previous owner $6,000 for breach of contract. The contract was indeed written lousy, but the employee used drugs at work, did not attend work according to files and we still had to pay him. I had never seen that person or worked with that person."

40. Which of the following workplace relations compliance costs have you encountered in your business? (please tick all that apply)

	Response Percent	Response Count
External experts/consultants	20.40%	28
Management time	33.60%	46
Training	32.80%	45
Other	2.90%	4
None	10.20%	14
	Answered questions	137

41. Have the compliance costs and requirements of the current workplace relations system influenced your decision to not employ people?

	Response Percent	Response Count
No	59.50%	22
Yes	40.50%	15
	Answered questions	37

“Partly it is too confusing and the assistance given relating to this is minimal making it a minefield. I prefer now to contract other businesses or hire from overseas (virtual assistance) rather than a local admin given that it is simpler. When you are starting out you need to have the process made simpler to encourage you to grow rather than making it "too hard" and being nasty about it (which is the rude, nasty responses I got in trying to get assistance). No wonder so many small businesses don't bother.”

“I have been crucified by tax, costs, import costs, and other non-direct costs. In addition to this, there is nothing to protect me from the vicious attacks from large businesses and corporations and even government employees who feel I threaten their livelihood. Whoops! Australian fair go principles and economic competitiveness have just gone out the window! I am working ‘round the clock for nothing. If I could employ a person I would, simply to work for a better economy but at the moment I have been totally crushed.”

“Too time consuming & too costly!”

“Given the range of imposts (government and other) required by an employer to employ anyone, I have determined that I will never employ anyone. I will only engage people on a formal contractual basis to perform specific work - and where the contractor will be required to have relevant capabilities: 1-necessary expertise (with or without formal qualifications) and experience, and where there is a mutual rapport between myself and the contractor; 2-required current insurance cover (public liability, personal sickness and accident); and, 3-a mutual formal agreement to cover the terms and conditions of engagement.”