

# Workplace Relations Framework

**SUBMISSION by the OFFICE OF THE AUSTRALIAN SMALL BUSINESS  
COMMISSIONER**

**March 2015**

This is a submission by the Office of the Australian Small Business Commissioner (the ASBC)<sup>1</sup> to the Productivity Commission Issue Papers into the *Workplace Relations Framework*.

The content of this submission is informed by our ongoing engagement with the business community, including dealings with individual small businesses and their representatives and, as such, our submission is focused on the areas of:

- information and communication;
- compliance and deregulation;
- dispute resolution;
- institutions in the workplace relations system; and
- specific issues (awards, penalty rates, minimum wage, and unfair dismissal).

Further to our submission, the ASBC would welcome the opportunity to be involved in additional consultation in regard to this inquiry, particularly in relation to its impact on small business.

## 1. GENERAL COMMENTS

The ASBC is supportive of initiatives and efforts that have been made by government to provide essential information and assistance to small business on workplace relations. In this regard, we commend both the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) for their efforts to assist small business and provide tailored information and resources.

Recently, we have been working with the FWC regarding its website and resources for small business. We are pleased to assist and look forward to working with the FWC into the future.

We work closely with the FWO and have been impressed with its approach to small business, as well as the range of resources they provide such as its tailored small business web page, free online education, Pay and Conditions Tool and helpful guides.

Despite these resources, feedback has revealed the workplace relations system to be an area of confusion and apprehension for small business. We have found that small business is wary of seeking help from regulators due to a fear of unintentional non-compliance and penalties. As a consequence of this, many do not access the assistance and resources that are available.

In addition, small businesses have also told us that the cumulative burden of regulation is a serious issue, the modern award system is confusing, penalty rates are “stifling business”, and unfair dismissal is a barrier to taking on employees.

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<sup>1</sup> The ASBC provides information and assistance to small business, represents small business interests and concerns to the Australian Government, and works with industry and government to promote a consistent and coordinated approach to small business matters. The Australian Government is committed to transforming the ASBC into the Australian Small Business and Family Enterprise Ombudsman that will be a:

- Commonwealth-wide advocate for small businesses and family enterprises;
- Concierge for a dispute resolution service;
- Contributor to the development of small business friendly Commonwealth laws and regulations; and
- Seamless link with the Government’s Single Business Service to help small businesses easily find out about other Government services and programmes, including general business advice.

The family business sector faces unique workplace relations challenges. Research has shown that only 10 per cent of family businesses make it through to the third generation,<sup>2</sup> with a key reason for this attributed to intra-family business conflict.

Given the important role family business plays in Australia's economic and social prosperity it is important that the inquiry consider how the workplace relations system and the family business sector currently interact, improvements that could be made, and the potential implications of recommendations. In this regard, the Productivity Commission may wish to engage with Family Business Australia, the peak body representing the family business sector.

We have identified that a multifaceted approach will be needed to address concerns with the workplace relations framework and the regulatory environment more broadly. Some actions may require legislative change, whilst others relate to regulator behaviour or improving small business understanding.

## 2. INFORMATION AND COMMUNICATION

It is our view that government has a key role in improving the business environment, with two enduring core responsibilities – access to justice (see dispute resolution) and provision of information. These two pillars are critical to the productivity and profitability of business.

At the ASBC, we have a saying:

***No small business should fail through lack of access to information.***

Government has a core responsibility to educate small business about laws and regulations to help them to understand what they have to do and to get better at doing it. This is particularly important in a complex area such as workplace relations, especially given the potential for non-compliance to impact safety and well-being.

The ASBC works closely with the FWO in relation to information and communication. We assist the FWO to disseminate information, promote tools and resources, and participate in collaborative events. We are supportive of the emphasis the FWO places on providing information, assistance and education to the small business community.

Last November, the ASBC and FWO hosted a Small Business Roundtable with industry participants and business advisors to discuss effective communication with small business and reducing the regulatory burden. In relation to effective communication, a change in regulator behaviour, rather than to the workplace relations framework, was identified by participants as the key way to address communication issues.

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<sup>2</sup> Lansberg, I (1999), *Succeeding generations: Realising the dream of family in business*, Boston MA: Harvard Business School Press

The roundtable identified that there is scope for improving communication in regard to timing, language and communication channel. In particular, participants identified that the current language used by regulators, especially in media releases and letters, creates a perception that they are enforcers and punishers, rather than facilitators and educators. We are aware that a number of regulators are in the process of proactively addressing this, including the FWO.

### **3. COMPLIANCE AND DEREGULATION**

It is our experience that small business is often disproportionately affected by regulations and the way in which they are enforced. This is due to a combination of factors, including regulatory requirements specified under the law, the processes and behaviour of regulators and a lack of small business resources and understanding.

Small business owners wear many hats and have many responsibilities. It is not feasible to be an expert in all areas of business management; a small business operator is rarely a lawyer, accountant, HR professional, marketer and strategist all in the one package.

It is important to look for opportunities to reduce compliance burdens, including addressing regulator processes and behaviours to ensure practices are as simple as possible and delivered in a facilitative manner.

#### **3.1. REDUCING THE COMPLIANCE BURDEN**

As mentioned above, small business owners have a variety of roles. They are usually responsible not only for day-to-day operation, but also for accounts and bookkeeping, payroll, health and safety, superannuation, registration and licences, workplace relations and more.

One regulation on its own may not be difficult to comply with. However, meeting the cumulative regulatory compliance requirements of many different laws across the three tiers of government is a complicated and time consuming process.

In this review, consideration could be given to identifying ways to reduce the duplication across institutions and tiers of government. For example, conducting regulatory compliance activities in partnership with other government institutions where it is appropriate to do so.

The Government has identified a need to improve connectivity across institutions and has established the Digital Transformation Office to drive this process. This inquiry provides an opportunity to reiterate the importance of reducing duplication and improving connectivity.

Another useful approach to reducing the compliance burden is to examine the policy rationale behind legislative reporting and licensing requirements, for examine the frequency with which a business must interact with a government institution. This approach is beneficial in examining regulatory schemes, particularly those that require annual renewal or other frequent periodic

contact. For example, a present requirement for an annual renewal of a licence could be changed to a three or five year licensing period.

### **3.2. REGULATOR PROCESSES AND BEHAVIOUR**

The way in which regulatory requirements are delivered, i.e. the processes and behaviours of regulators, can also greatly influence the regulatory impact on small business.

Procedures established by regulators influence the complexity and burden of meeting regulatory requirements. Participants at the FWO/ASBC Small Business Roundtable, raised concerns about the perception that government requests large amounts of information when conducting compliance activities without giving full appreciation to the burden this places on small business.

The Government is attempting to address this. Last year the Regulator Performance Framework (Department of Prime Minister and Cabinet) and the Regulator Audit Framework (Productivity Commission) were introduced. These frameworks aim to improve administrative efficiency and regulator behaviour in order to lower compliance costs and simplify regulation.

In regard to behaviour, the easy approach for a regulator is to concentrate effort on enforcement, rather than educating businesses to comply. However, the majority of businesses want to comply with the laws that regulate their industry. Non-compliance, especially among small business, is often associated with inexperience, lack of understanding or poor management practices.

In our experience, small business is more responsive to a facilitative approach to regulation, one that is underpinned by understanding and education. For example, dealing with non-compliance by explaining the breach and providing an opportunity to rectify the situation, rather than immediately issuing fines or prosecuting the business.

In working with the small business area of the FWO, we have found its approach to be facilitative and aimed at identifying and implementing opportunities to reduce the burden on small business. This has included developing free online small business training courses to improve understanding of the workplace relations framework, engaging with industry and business to improve services and communication, and adopting an educative approach to non-compliance.

## **4. DISPUTE RESOLUTION**

As mentioned earlier, government has a core role in providing access to an appropriate system of justice. Previously, provision of justice focused on putting wrongdoers in prisons. Refinements and sophistications over time have developed various means of providing systems of justice, including alternative dispute resolution.

The cost of a dispute for small business is not just the financial cost of the lost business and the cost of pursuing resolution (such as legal costs), but also the opportunity cost and emotional

stress involved. Opportunity cost includes what would have otherwise been achieved for the business in terms of their time and effort.

Effective alternative dispute resolution, such as mediation, is speedy, low cost, informal and collaborative. Mediation has been found to be particularly useful in resolving business-to-business disputes as it reduces the time spent away from the business and in many cases preserves the commercial relationship. In fact, mediation conducted or organised by the State Small Business Commissioners consistently exceeds a success rate of 80%.

It is pleasing that both the FWO and FWC offer alternative dispute resolution services. However, a key issue for small business is identifying which service is the most appropriate to assist in their situation. This can be particularly confusing when there is more than one official body providing dispute resolution services in a specific area, as is the case with the FWO and FWC.

According to the FWO and FWC websites, both institutions are able to assist with workplace disputes arising under the Fair Work Act 2009, including anything covered by an award or enterprise agreement. The FWC also provides dispute resolution for enterprise agreement bargaining, discrimination and bullying. This apparent duplication can be confusing for both employees and employers. It can also lead to forum shopping whereby if a suitable result is not achieved with one institution the issue is taken to the other. This review could consider the need for both dispute resolution services.

## 5. WORKPLACE RELATIONS INSTITUTIONS

In our experience, many small businesses fail to recognise that the FWO and FWC are different institutions and often refer to them collectively as Fair Work Australia. We have also found that those who do know there are two discrete institutions often lack awareness of what each does and how they are different.

Issues Paper 5 provides an overview of the roles of the FWC and the FWO as well as other institutions in the workplace relations system. The Issue Paper specifically asks “*Are any additional institutions required?*” It does not question whether the roles and functions of the seven institutions in the workplace relations system should or could be consolidated.

The Government has made it clear that it wants to reduce duplication and the number of institutions. In this regard, the inquiry could consider whether or not the seven institutions genuinely need to be independent of each other and whether there is scope for consolidation.

## 6. SPECIFIC ISSUES

ASBC engagement with small businesses and their representatives covers the entire scope of business operation. In regards to workplace relations, we have found that some matters are frequently raised. In particular, small businesses have highlighted issues with modern awards, penalty rates, wages and unfair dismissal.

## **6.1. MODERN AWARDS**

A common issue raised with the ASBC by small business operators is the cost and compliance of the modern award system, including penalty rates (discussed in 6.2).

Many small business operators find the system to be complex and a major impediment to employing more staff or transitioning from being a sole trader to an employer.

Small business owners, particularly those who have never taken on an employee, find navigating the modern award system challenging. There are over 120 different awards, within each award there are a range of positions, and within each position there are a range of classifications.

This is further compounded as employees in small businesses often wear many hats, and have a range of positions with varying levels of responsibility. In this situation it can be confusing to work out which modern award, position and classification an employee should be paid at.

The system is also confusing as different employees within the one business may be on different modern awards. For example, a carpenter in a building business would be covered by the Building and Construction Award, whilst office staff come under the Clerks Award.

Employees on different awards, as well as wages that vary based on age and the day of the week can create an administrative burden for small business both in terms of payroll requirements and having to keep informed of the latest changes.

This inquiry could consider opportunities to further simplify the award system, including the number of awards, positions and classifications.

## **6.2. PENALTY RATES**

Another common area of complaint raised with our Office by small business relates to wages and penalty rates, which they tell us are stifling business competitiveness.

There is an argument that employee wages, including penalty rates and other costs, can be viewed as a business cost and should be treated that way by small business. Some argue that if a small business is not able to operate on a weekend due to penalty rates paid to employees, then that is a business decision that the small business needs to make.

A former Sunshine Coast café operator has told us that when they ran their business they wanted to open on Sundays and recognised that this was a busy trading day, however, remained closed due to the cost of employing staff. They instead took a lower turnover option and operated at a local market as overheads were lower and additional staff were not required.

Although operating days and hours is a decision to be made by the business owner and is based on a range of factors, it is disappointing to think that Australia is in a situation where business turnover and employment opportunities are reduced due to penalty rates. This is not advantageous for employment levels, productivity or the economy.



In some industries such as the franchising sector, there may be contractual requirements to have specific operating hours, which can include weekend and public holiday trading. Penalty rates can make it financially unprofitable for a business to open at these times, particularly for businesses in regional Australia that lack the customer base of metropolitan areas.

For example, we were recently made aware of a Canberra pizza franchisee that is required under their franchise agreement to trade on Sunday. This is despite not turning a profit on a Sunday in over four years.

Many small businesses and industry associations have also made the case to our Office that the rationale for penalty rates has diminished. Seven day trading is now standard for many sectors, including hospitality, retail, tourism, and even some health and trade sectors. Given this, they reason that the unsociable hours argument for penalty rates is no longer valid. Further, the rapid growth of online retailing operating globally is a phenomenon that questions the modern relevance of penalty rates.

To improve economic prosperity and productivity in Australia, the review could consider if the policy rationale behind existing penalty rates remains valid and whether the current rates facilitate or hinder business and employment. This could include investigating the international environment. In New Zealand, for example, penalty rates are 1.5 times standard wages on public holidays and are optional on weekends.

### **6.3. MINIMUM WAGE**

In regard to minimum wages, the ASBC is supportive that wages in the National Employment Standards and modern awards are standardised across jurisdictions.

One area that the review could consider in relation to minimum wage relates to the age at which adult wages commence. For all other purposes, an adolescent becomes an adult at the age of 18 and bears the responsibilities associated with this, such as voting and consequences for breaching the justice system. The ASBC therefore questions the rationale behind the workplace relations system deeming adulthood to commence at 21, not 18.

The ASBC encourages the Productivity Commission to consider aligning the adult age in the workplace relations system with the legal adult age in Australia, i.e. 18. This will likely reduce the administrative complexity of the workplace relations system in regard to wages as it will remove the pay levels for 18, 19 and 20 year olds across the various modern awards.

### **6.4. UNFAIR DISMISSAL**

The ASBC has been told that former employees have the idea that if they threaten to challenge a dismissal they will get money, i.e. “money to go away”. The Small Business Fair Dismissal Code has been developed to help small business employers lawfully terminate employees and provides protection against unfair dismissal claims. The information in the Code is easy to understand and the checklist provides practical steps to follow. In our opinion, the Code is a valuable resource



which assists small business employers and should remain part of the workplace relationship system.

The FWO has an educative approach to helping small business employers to terminate employees lawfully and fairly. In addition to the Code there is a free online short course to help employers have difficult conversations in the workplace and template letters for termination of employment to help small businesses follow correct procedures.

Despite this, there remains a perception among the small business community that the FWO exists to assist and represent employees. We are aware that the FWO has been working hard to break down this misconception and educate small businesses about the assistance that it can provide. The ASBC encourages this approach and will continue to work with the FWO to increase awareness of its services, including those relating to termination of employment and unfair dismissal.

## **7. CONCLUDING REMARKS**

We are supportive of initiatives that make it easier for small business to employ staff and meet relevant regulatory requirements. The FWO's commitment to helping small business is encouraging and we commend it for its facilitative and educative approach to regulating.

Our submission focused on the aspects of the workplace relations system relevant to small business, including communication and information, regulatory requirements, dispute resolution, institutions, family business, modern awards, penalty rates, minimum wage and unfair dismissal. Some of the key areas we recommend be considered are below.

### **Compliance and deregulation**

- Investigating the policy rationale behind regulatory compliance requirements in legislation is a useful way to identify obsolete requirements. Where there is no sound rationale there may be opportunity to remove the requirement or reduce its complexity or frequency. This is an approach the inquiry may wish to explore.
- In considering ways to reduce duplication, there is scope for government institutions to work better together. For example, Workplace relations compliance activities could be conducted in conjunction with another institution where it is appropriate to do so. The inquiry may seek to amend legislation that potentially prohibits this cooperation and information sharing.

### **Dispute resolution**

- The ASBC is supportive of alternative dispute resolution being available to resolve workplace disputes. However, there appears to be duplication in the services offered by the FWO and FWC. The inquiry could consider if this is appropriate and, if not, how it might be addressed.

### **Institutions**

- There are currently seven institutions in the national workplace relations system. The inquiry could consider whether these institutions genuinely need to be independent of each other and whether there is scope for consolidation.

### **Penalty rates**

- Economic and social prosperity requires trade and employment (amongst many other things). Penalty rates that negate the value of opening a business on a particular day do not facilitate business or employment. The inquiry could consider if the policy rationale for existing penalty rates remains valid and if the current rates facilitate or hinder business and employment.

### **Minimum wage**

- In other areas of law and regulation, 18 is the age at which adulthood commences. However, in the workplace relations system it is 21. Aligning the adult age with other areas would likely reduce some of the administrative complexity of paying employees as it would remove the pay levels for 18, 19 and 20 year olds across the various modern awards.