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26th of March 2015

Workplace Relations Inquiry

Productivity Commission

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Inquiry into the Workplace Relations Framework**Submission from the Australian Newsagents Federation Ltd (ANF)**

The ANF welcomes this opportunity to provide our members' views on the Workplace Relations Framework and to respond to this Productivity Commission Inquiry.

The Newsagent Industry in Australia

The Australian Newsagents' Federation (ANF) is the peak industry body representing Newsagents in Australia in every state and territory, including through our Association partners, the Newsagents Association of NSW and the ACT (NANA) and the Victorian Association for Newsagents (VANA).

The Newsagent industry is made up of some 3500+ small businesses, with a newsagency in almost every rural town, regional centre, urban and metropolitan shopping centre. Approximately 2.4 million Australians shop at their local community newsagent every day. Newsagents' are well known and trusted within their local communities and make a significant contribution to Australia's economy. Newsagents' are one of the largest and most trusted independent retail channels in the country.

Newsagents are subject to a number of cost pressures that are distinct from those that affect large corporations and even many other small businesses. They are characterised by modest profit margins linked to fairly inflexible contracts. They are particularly vulnerable to increased costs, as their margins are mostly set externally and change infrequently, consequently they have limited capacity to absorb large cost increases.

The newsagency sector employs some 20,000 employees nationally. Newsagencies in Australia employ an average of seven staff members. The majority of staff (62 per cent) are employed on a part-time or casual basis¹

Newsagents are an important, familiar and integral part of the local community and most shopping centres and high streets. They offer friendly service, convenience, paper goods, lotteries, prepaid products, gifts, cards, parcel services and more, alongside traditional news dissemination services. They are significant traffic generators to their location.

Their core products: Magazines, Greeting Cards, Newspapers, Lottery products make up 80% of newsagents sales and these products must be sold at the maximum retail prices set by the products supplier.

Newsagents do not have the same level of control over commercial levers in different parts of their business as some other retailers. Consequently, leading newsagents are working hard diversifying and building up other areas of their businesses that give them greater margins. The Newsagent Associations work hard negotiating with our large industry partners to ensure sustainable and timely adjustments in prices are made to ensure newsagents can manage rising costs and grow their businesses.

¹ Australian Retailers Association, State of the Independent Retail Sector 2010, p. 29

Historical Interaction between the Fair Work Act, Regulators and the Newsagent industry

The timing of the introduction of the Fair Work Act coincided with newsagents having to deal with a challenging retail environment due to the unstable global economy. Challenges like digital disruption of core product lines also lead to challenges in important categories. These issues along with increasing costs in retail required targeted responses. This required all of our newsagent's skills as small business managers to succeed. Over the last few years things have stabilised a little and many of the better newsagents are managing to prosper through working hard with their staff to diversify and grow their businesses.

Employment in newsagencies over the period was affected not only by the broader economy and industry change, which resulted in some newsagents having to let go of staff or reduce hours, but also through the effects of the introduction of the Fair Work Act and Modern Awards. These changes whilst bringing some sensible reforms had other consequences that made it more difficult in a constrained economy to successfully manage a small business. For example, our members report it is complex, more expensive, less flexible and harder to employ staff. Many newsagents report that the Fair Work system is the most, or a major, significant challenge to their business.

An example in QLD, is that prior to the introduction of the Modern Awards, Newsagents in QLD under the state retail award did not have to pay penalty rates on Saturdays and only paid time and a quarter on Sundays. Their delivery drivers were recognised as Award Free and were not entitled to penalty rates. Since the introduction of the Modern Awards, QLD Newsagents have seen their wage costs skyrocket. Since 2010 one hundred and forty five (145) QLD Newsagents have walked away from their business. Though there are many factors which influenced these Newsagents to make that decision, increased wage costs was cited as a significant and contributing factor in sixty eight percent (68%) of the cases. For the eight hundred and seventy seven (877) who continue to trade, eighty four percent (84%) have reduced the number of hours they employ their staff since 2010 and have increased the number of hours they themselves work, particularly on weekends. Newsagents in QLD have been over time a stable business. Between 1991 and 2009 there were only fifty-three (53) Newsagents who closed their businesses and walked away.

As another example; during the bridging period of the Fair Work Act 2009 the ANF applied on behalf of a group of community newsagents for the approval of several single-enterprise agreements ([2010] FWA 415), which were subsequently declined on the basis of not having passed the No Disadvantage Test in relation to a “preferred hours” provision.

We and our members were very disappointed with the interpretation of policy in the approval of these enterprise agreements by the Commissioners of Fair Work Australia at the time. Whilst the ANF accepts the discretion of Commissioners in interpreting these matters, we were at a loss to explain to our members how it was possible their application for approval of their agreements had been dismissed, having relied on advice from staff of Fair Work Australia in relation to the matter of “preferred hours” as it was contained in the no disadvantage test policy guide.

The following steps were followed by our IR Partner:

- It was confirmed by phone with Fair Work Australia prior to drafting the agreements that the no disadvantage test still applied during the bridging period (1/7/09 to 31/12/09). Our IR partner was advised that the no disadvantage test did apply.
- It was confirmed by phone with Fair Work Australia prior to drafting agreements that preferred hours of work could be used in agreements. The answer our IR partner received was that preferred hours of work could be used in agreements as it was contained in the no disadvantage test policy guide. *It stated in the agreements the following ‘In accordance with the No Disadvantage Test Policy Guide clause on Preferred Hours – Collective Agreements, employees may seek to work preferred hours of work.’*
- No agreements for ANF members were lodged until our IR partner had conducted appropriate due diligence and had received an approval of these flexibilities contained within a similar agreement, she deemed it very important to ensure that an agreement was approved before any others were lodged.

The Federation on the basis of the advice provided by Fair Work Australia and in accordance with the No Disadvantage Test Policy Guide lodged numerous single enterprise bargaining agreements on behalf of our small business member newsagents.

We were shocked by the disparity between the initial policy advice we received and the ultimate interpretation of the FWA Commissioners, particularly with respect to the flexibility provisions. This was especially difficult for newsagents to reconcile in light of the other similar agreement with these provisions having been passed shortly before the lodgement of these agreements. It was also difficult for them to accept a process that sets precedents with no time frame to adapt to the new interpretation.

The decision prevented small business from being able to cater for that class of employee, including students and mothers returning to work, who genuinely required increased flexibility in working arrangements to more fully participate in the workforce. Given that such arrangements could only be entered into at the instigation of the employee and without duress or coercion, we were at a loss as to why the capability to enter into such arrangements was denied.

As a further example; we have experienced considerable difficulty during the transitioning period of awards and some inconsistency of Fair Work advice. The only guidelines Fair Work provide small businesses on how to use IFA's is the Best Practice Guide on Flexibility (including the use of IFAs), but the onus still comes back to the small business, and it can be difficult to assess Better Off Overall comparison against the award when the guidance material is vague as to the nature of offsets. Small Businesses need something more substantial to enable them to accurately interpret the intent of the model flexibility clause. They also have not provided a quality education program to support industry associations so that we can assist member's to implement IFA's properly in their workplace. The ANF spent considerable time and money developing information for members on the use of IFA's but ultimately with no way to be sure they would pass the BOOT test it is difficult for employers to use them.

The Fair Work Ombudsman through its telephone service make it very clear that the information they give you may not be correct and that you should seek separate legal advice. This does not give employers or industry bodies any faith in any educative role the FWO may have, as the advice cannot be relied on.

The ANF have experienced a number of situations where advice has proven to be inaccurate as was borne out in our experience with advice we were given on the EBA's. This was borne out again when the Fair Work Ombudsman admitted that a number of errors were found on their pay

rate calculator.

Calls to the Fair Work Information Line elicit conflicting answers to the same question, to the point where we sometimes do not trust the service to provide answers to any but the most basic questions. We frequently find that members who have called the Fair Work Information Line independently are being given incorrect advice, sometimes because the advisor has not asked the correct questions – which in turn, can cause the member to distrust the advice we give them, and to feel that they have nowhere to go for straight answers.

The creation of the Transition Assist team to specifically liaise with associations in relation to transitional issues was a very good idea and we congratulate the Fair Work Ombudsman on this initiative and on work since to address other issues. However, they did not have enough resources – we would sometimes wait weeks (or months) for an answer to a question, this was unacceptable. The referral of industrial relations powers from the States to the Commonwealth threw up many questions that required in-depth examination of transitional legislation. While the association provides industrial relations assistance for members on a regular basis, we are not in a position to retain lawyers to interpret legislation – and frankly, nor should we have to.

Lastly, the ANF would have liked to be able to better utilise flexibility arrangements like Collective Bargaining Agreements and Individual Flexibility Arrangements with Newsagents and their staff over this time so both could benefit from a less rigid relationship. Unfortunately, inconsistent advice received early on from Fair Work stymied successfully utilising collective bargaining. This resulted in a loss of trust, which has also hampered the use of IFA's over this period. The overall result has been an incredibly low take-up of these flexibility tools in our industry, which is unfortunate.

Our historical experiences with the Act and regulators have been costly and not provided our members with the certainty we are looking for from a modern workplace relations system.

Overall view of the Workplace Relations System by our Industry

The ANF and our members are strongly of the view that we need a Workplace relations framework that is firstly fair, but that is also 'fit for purpose' for small businesses and our staff. This inquiry provides a tremendous opportunity for timely discussion about fundamental issues in our workplace relations system like complexity and over-regulation.

Small business owners have to be experts at a lot of things to effectively run their businesses, they have to be good financial managers as well as marketing & customer service specialists. They also need to be good operationally, managing their team in harmony and resolving disputes, whilst at the same time managing risk and being compliance aware. When you generally only employ a few people like in a Newsagent, you cannot delegate much of this responsibility or expertise, this is a lot to expect of anyone.

In our experience, and despite our best efforts to keep them well informed, our members comment that they never feel fully across or understand every detail of their compliance obligations in relation to their workplace relations system. The system is incredibly complex, built by experts for experts, and it is irrationally complicated for a small business person to understand and navigate, even when the government through regulators offer a network of support to inform and assist.

Consequently, our members report that the workplace relations system is one of the great stresses for them in operating their business and a source of enormous anxiety. It does not incentivise them to employ more people. Its complexity is overwhelming for small business owners, and even their employees that it seeks to protect. It is this complexity that often scares employers, and makes them feel uncomfortable or unsure of their rights and obligations when faced with workplace relations issues. They are naturally time poor managing the day to day operational issues in their business, unlike a big business who would employ an HR manager to specialise in managing this compliance, they have to do this themselves. When workplace relations issues arise in a small business, complexity can lead to unnecessary conflict between employers and employees, where a little information rather than a complete understanding can become a real problem.

The Fair Work Act is intended to deliver outcomes that are fair, flexible, co-operative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear (s. 3). It also provides for special arrangements for small businesses; preference for collective bargaining; balance between family and workplace responsibilities; minimum wage and employment standards; and the right of freedom of association. It is our view that in family enterprises in particular, the Act is not currently delivery on achieving these outcomes equitably and it certainly is not simple or clear or benefitting productivity. The Productivity Commission in its report findings on the “Economic Structure and Performance of the Australian Retail Industry” commented, “*Workplace relations regulations may not provide sufficient workplace flexibility to facilitate the adoption of best practice productivity measures in the retail industry.*”

We believe that for small businesses with less than 15 employees, like the Small Business Fair Dismissal Code, a more streamlined and modest system must be achieved. For this to succeed, it needs to be much simpler and easier to understand and comply with. It needs to be flexible, so it can support the day to day issues of families who often run small businesses, as well as employees and their families who work in them. Lastly, it needs to promote innovation, productivity and growth, so small businesses can grow into bigger businesses and employ more people.

To achieve this, we argue that a simplified Small Business Award Compliance Code should be introduced to apply to businesses in Australia who employ less than 15 people. This would still maintain appropriate safety nets and fairness but could provide a much simpler approach to each award for small business employers and employees to operate within and therefore understand. As an example: Issues like hours of work and rostering provisions could be made less complex under this code. This would improve certainty and confidence in the workplace relations system for Small Businesses.

Issues considered by this inquiry

Minimum Wage

The ANF is supportive of maintaining a minimum wage and is not proposing any changes that would create uncertainty.

Penalty rates

The subject of Penalty Rates is a very emotive one, fundamentally we have no issue with penalty rates to reward an employee for working at an unsociable hour of the day or week. The issue for our businesses is generally the 'rate of the rate' and the quantum of the reward and its affordability for the business. This has the effect of determining when Newsagents and their families work, the availability of hours to employees, and the rate of pay the hours that are available attract. Underemployment and job creation are influenced by this.

The 24/7 economy issue

Increasingly, there is more pressure for Newsagents to open on Sundays and Public Holidays. This comes from two areas, shopping centres where landlords now expect this, but most importantly it comes from online. Online retailer websites are open 24/7 and often it is the newsagents own suppliers like lotteries whose sites may attract consumers on Sundays and Public Holidays if they are not open and this then changes consumer habits. Newsagents who are responding to this by opening at these times incur significant additional costs to do so, unless they or their family work these hours, which in the majority of cases is what we find is happening.

Example - ANF survey

The ANF surveyed over three hundred and fifty (350) of our two thousand five hundred plus (2500+) members over the Easter weekend in 2014 to find out how many are working

penalty rate shifts themselves to reduce costs. We also asked, if they would increase available hours to existing employees, or employ new staff, if the 'rate of the rate' for penalty rates were more moderate at these times? The results of the survey were as follows:

- 92% regularly worked every Saturday
- 87% (of those open, 4% closed) regularly worked every Sunday
- 92% (of those open, 3% closed) regularly worked every Public Holiday
- 57% regularly started work before 5am
- 63% regularly worked after 6pm.

When asked if Newsagents' would give more work to existing employees or increase employment if penalty rates were more moderate:

- 96% said they would give more shifts that include penalty rates to existing employees.
- 85% said they would employ more staff.
- 66% said they would employ two or more staff.

The results of the survey indicate that there are issues with the affordability of penalty rates on Sundays and Public Holidays in particular. The ANF's view is that the workplace relations system should provide an equitable and productive workplace for our members and their employees. The current workplace relations system is not adapting as our business model is changing. If we are to increase employment in our member businesses. We feel that applying some moderation to certain penalty rate settings in small businesses at certain times, would balance out these issues. The system requires reform to achieve this. A repeal of Section 134 (1) (da) of the Fair Work Act (2009) would address this and allow for Fair Work Commissioners to use their discretion to make informed decisions about the appropriate weighting of penalties based on the evidence in applications. The workplace relations system needs to acknowledge that individuals and families, who are very different from big businesses, run small businesses. They do not have HR departments, and cannot de-staff on a Sunday like a bigger business can, the system must recognize this and support simplified flexibility and fairness for small business owners as well as their employees. Individuals and families who run these businesses feel that they are not dissimilar to employees in many respects and should

have an equal right to equity in their workplace and the current system lacks this. We believe this needs to be addressed. This is fundamental if there are to be productivity gains in small businesses like Newsagents.

Individual Flexibility Arrangements and Bargaining

The Australian Newsagents' Federation and members previous experience with bargaining arrangements has had an effect on the industry's faith in the Fair Work system to be consistent in its approach to flexibility and damaged their trust in relying on advice from Fair Work. This has resulted in members being nervous about further utilising collective bargaining and agreement making such as the use of Enterprise Agreements and IFA's to improve flexibility.

There is also a sense amongst members that the current interpretation of the 'Better Off Overall Test' by Fair Work Australia is so restrictive that it is not possible to gain the significant flexibilities that would be required to make going through the involved process of getting an agreement approved worthwhile.

Making it easier for small business to make collective agreements with improved flexibility would lead to better workforce utilisation and workforce participation. This would provide genuine benefits including in particular, that young people who are studying and people with caring responsibilities would have improved flexible access to employment opportunities.

The current situation where individual flexibility arrangement provisions cannot be reasonably applied for both fair and common sense requirements needs to be reviewed. When Fair Work was introduced IFA's were trumpeted as the way employers would still be able to access flexibility in the workplace. The Explanatory Memorandum (EM) accompanying the Fair Work Bill 2008 explained section 144 of the proposed Bill would require that all modern awards contain a flexibility term. The example provided at paragraph 570 of that EM was as follows:

"For example, an individual flexibility arrangement might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer."

The same section of the Bill though, also required that the employee be better off overall than the employee would have been if there had been no individual flexibility arrangement. This left employers in the invidious position of attempting to assess the value of a particular flexibility arrangement to a particular employee, and risking prosecution for breach of the award should a third party later decide the employer got it wrong.

Part 1, clause 7, Award Flexibility in the General Retail Industry Award has the potential to allow employers and employees to negotiate beneficial outcomes for employee and employer. However, the clause provides too much room for interpretation by the employer, employee and the Fair Work Ombudsman.

On the face of it, IFA's can provide employers and employees with opportunities to negotiate flexibilities in the workplace that suit both parties. Under these clauses in modern awards, the employer must bear the legal burden of determining whether the employee is Better Off Overall. Some of the flexibilities under an IFA offer employees non-monetary benefits such as time off at a time that is suitable for their family life. Therefore, it can be very difficult for an employer to conclusively determine that the employee is, in fact, Better Off Overall.

Part of the problem with IFAs is that if the employer is later found to be mistaken in their assessment of the employee's position under the IFA, the employer can be prosecuted for breach of the modern award – a prospect which renders the use of IFA's a risky proposition, particularly for smaller employers who simply do not have the resources to challenge adverse decisions. Equally the allowance for both parties to terminate IFA's with only 4 weeks' notice does not provide a great deal of surety to the process for either party.

For this reason, collective agreements would be a better solution for smaller employers, but inconsistency in interpretation of 'preferred hours' clauses, as discussed in this submission, has meant that the largest source of flexibility for a newsagent is in doubt, and has, in fact, previously been rejected.

Recommendations

- The Fair Work Commission needs to provide a number of industry specific examples of IFA's to make it easier to use them, especially for small businesses.

- This inquiry should consider recommending changing the model flexibility clause in modern awards so that IFAs can be used to adjust any aspect of the employment relationship.
- The Fair Work Commission should review the allowing of four weeks' notice to terminate an IFA by either party as a longer period would provide more surety in the process for both parties while not materially harming the level of protection for employees when making Individual Flexibility Arrangements.
- Parliament should introduce a registration system for approving IFA's to make sure they pass the better off overall test in relation to modern awards or enterprise agreements. This way small businesses can have faith in the system and that they are doing the right thing.
- The current interpretation of the Better Off Overall Test needs to be reviewed as it is so restrictive that it is not possible to gain the significant flexibilities that would be required to make going through the involved process of getting an agreement approved worthwhile.
- Issues like improvements in workforce utilisation and workforce participation should be considered as some genuine benefits that could flow from making it easier for small businesses to make collective agreements with improved flexibility. This would ensure in particular that young people who are studying and people with caring responsibilities have flexible access to employment opportunities.
- FWC is only interpreting what they believe are the requirements of the Act. The government should change the law so that it is easier for small businesses to make collective agreements, this way genuine flexibility might be possible.

Unfair dismissal

The ANF is supportive of the Small Business Fair Dismissal Code. However we feel resources including case studies for associations to distribute to members on how to use it more effectively

would be beneficial. There should be more emphasis on education of small business owners about how to use the SBFDC – rather than just read it, people need to know that they should complete contemporaneously, sign it and date it, and then they can present it as evidence. Conciliators at the FWC need to have a greater understanding of the way the SBFDC may affect a case and actively bring it up during conciliation and FWO need an open door policy for employers to seek assistance without fear of further ramifications.

Compliance costs - Complexity

The complexity and compliance costs of an employer meeting all of their obligations under the current Framework is too high. A thorough review of compliance requirements, duplication and unnecessary complexity in awards etc. needs to be undertaken with a view towards wholesale simplification. Small Business owners do not have the resources to comprehensively address and understand the cumulative regulatory compliance requirements of the current framework.

Modern Awards

There are currently over 120 different awards, with a range of positions, and inside each position a scale of classifications. Despite these being industry based, the question of award designation comes up too as there are circumstances where multiple awards need to be used in one industry. Each award is extensive in its detail and it is irrational to expect time poor small business owners to manage this level of complexity and compliance like an HR manager in a big business.

Consequently, and as we have suggested earlier in this submission, we are in favour of a simplified 'Small Business Award Compliance Code' which could be introduced to apply to businesses in Australia who employ less than 15 people. It could maintain appropriate safety nets and fairness but could provide a much simpler approach to each awards compliance load for small business employers and employees to operate within and therefore understand. As an example: Issues like hours of work and rostering provisions could be made less complex under this code. This would improve certainty and confidence in the workplace relations system for

Small Businesses.

To also reiterate our comments earlier in our submission, like the Small Business Fair Dismissal Code, a more streamlined and modest system should be created under a 'Small Business Award Compliance Code'. It might be a document they could print out and agree to and sign with employees covering flexibilities and streamlined conditions of employment. It would need to be much simpler and easier to understand and comply with. It needs to be flexible, so it can support the day to day issues of families who often run small businesses, as well as employees and their families who work in them. Lastly, it would need to promote innovation, productivity and growth, so small businesses can grow into bigger businesses and employ more people.

This needs thorough consideration as part of this inquiry.

Independent contractors

In this industry, it is common for delivery drivers to be hired as independent contractors. The current immense grey area around "employee vs contractor" does not help our members clearly identify whether their workers are genuinely independent contractors or employees. This distinction has a significant impact on entitlements for both parties, and potentially a revolutionary impact on a business' cash flow.

The fact that different State, Territory and federal jurisdictions define a 'contractor' differently depending on the legislative context only makes it harder for a small business to get it right.

Additionally, some rogue employers are clearly paying employees as independent contractors, and paying less than would be required under the relevant modern award. With little to no enforcement action from a State, Territory or Federal statutory body, in an industry where costs are shaved to the bone, those employers gain a financial advantage with negligible risk of prosecution.

Other Issues

Transfer of Business

- Improved educational material on transfer of business and how to work out what terms and conditions apply, particularly in WA where the State industrial relations system still exists, would benefit small businesses.
- Clarification for employers and their legal and financial advisers around what happens to entitlements on transfer of business

Education and consistency of Fair Work advice

- More support to associations with case studies and industry specific information for people – e.g. down to the level of 'a newsagent engages a driver to deliver newspapers, starting at 4am ... shift penalties etc.
- Better questioning of callers to the Fair Work Information Line to elicit information that will dramatically affect the advice that should be given, e.g. good questioning can throw up award coverage issues, there are also many 'grandfathered' issues that don't get covered by Fair Work Information Line – this would help stop people being given incorrect advice.

Conclusion

Ultimately for small businesses like our members' businesses, we need a simplified model for employer obligations that is equitable, accessible, affordable & practical while fairly protecting employee rights.

The Federation would like to thank the Productivity Commission for taking on board our concerns, experiences and suggestions for your inquiry into the Workplace Relations Framework.