

# **Draft Report of the Productivity Commission on the Workplace Relations Framework**

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

**OCTOBER 2015**

## Introduction

This submission contains observations from the Office of the Australian Small Business Commissioner (**ASBC**)<sup>1</sup> on the draft report of the Productivity Commission (**PC**) that was released in August 2015 - "*Workplace Relations Framework*". We commend the PC on its work and support the general thrust of its recommendations, subject to our comments below.

These observations are informed by the ASBC's ongoing engagement with the business community, including dealings with individual small businesses and their representatives. During these discussions, small business has repeatedly raised issues relating to the complexity of modern awards, the impact of penalty rates and the costs imposed by unfair dismissal laws.

Further to our submission, the ASBC would welcome the opportunity to be involved in further consultation with the PC on the impact of the Workplace Relations (**WR**) system on small business.

## General observations

The ASBC's ongoing liaison with small business has shown the WR system to be an area of apprehension, confusion and expense for small business. We have found that:

1. The **complexity of the modern award system** is confusing. Small business is wary of seeking assistance from regulators due to a fear of unintentional non-compliance being discovered and penalties being levied. Consequently, many small businesses do not access the assistance and information resources available.
2. The cumulative effect of WR regulation imposes a **disproportionately heavy burden on small business** operators, who are not equipped with specialist human resource skills of larger firms. Small business feels that this regulatory burden is a serious issue and restricts their ability to compete.
3. The **penalty rates adversely impact** small business employment and profitability. Owners report that penalty rates reduce the flexibility of small business and "stifle business activity", particularly on weekends.
4. The **unfair dismissal laws impose unnecessary costs** on small businesses and are a barrier to taking on new employees.
5. The **Junior Award Rates system benefits** both small business and young people. Any replacement system would need to retain the advantage of a large differential between

---

<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 transforming the ASBC into the Australian Small Business and Family Enterprise Ombudsman that will be a:

- Commonwealth-wide advocate for Small Business 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 Business easily find out about other Government services and programmes, including general business advice.

experienced and inexperienced worker, to retain the incentive for small business to employ young, unskilled workers.

## The need for reform

While accepting the PC's overall finding that Australia's WR system is not "systemically dysfunctional", we believe that greater efforts should be made to relieve a range of adverse impacts on small business. In particular, our observations take into account the high level of youth unemployment (currently about 13% for Australians aged 15-24<sup>2</sup>) and the need for productivity growth to maintain and improve living standards (which is linked in part to labour market flexibility). We believe that removing rigidities in the WR framework would, in particular, assist with youth unemployment and productivity more generally. Changes that reduce the compliance burden on small business, permit greater flexibility in operating hours and employment conditions and allow business to "work smarter" are the keys to accomplishing this.

The ASBC would therefore encourage the PC to emphasise in its final report:

- Reducing the regulatory burden of the WR system, which weighs more heavily on small business than big business;
- Simplifying award conditions, while increasing flexibility within awards, for firms and employees to negotiate mutually beneficial variations;
- Alleviating the adverse impacts of penalty rates on small business, particularly the stifling of business activity and employment on weekends;
- Reducing the unnecessary costs of unfair dismissal laws, for example, by addressing the ability of employees to demand 'go-away money' by exploiting technical flaws in an employer's case; and
- Ensuring that any movement from age-based variations in minimum wages to a system based on competencies and experience preserves the same pay rate differentials between unskilled/inexperienced and competent/experienced workers that exist in the current system.

## Regulatory burden

Our Office is committed to the Australian Government's program for deregulation and cutting red tape. We believe that WR reform should be consistent with this agenda. While labour market regulation is important for economic, safety and social reasons, it must also be effective, efficient and 'light touch'. Governments need to be aware of the disproportionate weight and cumulative compliance burden that their regulations have on small business.

In our experience, small business faces disproportionately high compliance costs from regulations and their enforcement. This is due to factors including the processes and behaviour of

---

<sup>2</sup> Australian Bureau of Statistics, Labour Force, Australia.

regulators and a lack of small business understanding. Compared to large firms which often have specialised workplace relations staff, a small business, with limited resources, has a poorer understanding of how to comply.

The centralised approach to collective bargaining promoted by the Fair Work Act 2009 is better suited to large employers with unionised workforces than to small business with non-unionised employees (as is typical in many services industries). Small business needs a more decentralised system that allows greater flexibility. In this way, firms can improve their productivity and competitiveness, which in turn contributes to higher employment and economic growth.

WR compliance costs are impacted by many factors, including:

- The administrative processes of the major WR institutions;
- Small business uncertainty about where to get advice;
- The need for employers and employees to understand a complex system when disputes occur, or in trying to comply with laws and regulations; and
- Constant changes to the system.

Given the high fixed cost and complexity of compliance, there is a perceived barrier to the transition of a business from being a non-employer to an employer. The very complexity of a system that leads to high compliance costs may also lead to non-compliance – people make mistakes in complex systems.

Many small businesses lack the dedicated internal resources for understanding and managing compliance with the workplace relations system. Moreover, there is an irreducible minimum cost of compliance with the workplace relations system. Small business cannot amortise these costs across a large number of employees, as can big business. If the workplace relations system is seen as too complex (obligations, paperwork, managing employees, dismissal, etc.):

- Some small businesses may decide that it is cheaper not to invest in compliance, but to use simple rules of thumb about how to behave (and hope for luck).
- Other small businesses may choose not to expand. Better information and simpler systems may help overcome this perception.

High compliance costs can cause stress and health problems for small business operators who must personally carry WR compliance costs. 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, human resource professional, marketer, IT specialist and strategist all in the one package.

These personal complications can degrade the operator's ability to conduct business. The tendency of the regulatory compliance burden to increase once the business reaches a certain size acts as a disincentive to growth. We are aware that some small business owners decide to stop growing their business before it reaches a threshold size in order to avoid the extra compliance burden. Reducing compliance burden of the WR regulatory system could deliver

tangible economic benefits in the form of improved business efficiency, international competitiveness, productivity, employment and growth.

We would encourage the PC to look for further opportunities to improve efficiencies in regulator processes to ensure practices are as simple as possible and delivered in a facilitative manner.

### Reducing the compliance burden

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

One regulation may not be difficult to comply with but the cumulative burden of compliance with regulatory requirements across three tiers of government is a complicated and time consuming process. The PC could give further consideration to reducing small business compliance costs by reducing duplication across institutions and tiers of government. Where possible and appropriate to do so, Commonwealth and State authorities should consider regulatory partnerships with each other and other government institutions. For example: the Commonwealth Government has identified a need to improve connectivity across its institutions and has established the Digital Transformation Office to drive this process. This WR review 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 requirement for an annual renewal of a licence could be changed to a three or five year licensing period to significantly reduce the compliance burden.

### Simplifying 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. Many small business operators find the complexity of the system to be 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 particularly 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 business 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 awards. For example, a carpenter in a building business would be covered by the Building and Construction Award, whilst office staff may be covered by the Clerks Award.

The PC could consider opportunities to further simplify the award system, including the number of awards, positions and classifications. Employees on different awards, as well as wages that vary based 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.

### Improving regulator behaviour and processes

The manner of delivery of regulatory requirements, i.e. the processes and behaviours of regulators, can greatly influence the regulatory impact on small business.

Procedures established by regulators influence the complexity and burden of meeting regulatory requirements. Participants at a recent Fair Work Ombudsman (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 has attempted to address these problems by introducing the Regulator Performance Framework (Department of Prime Minister and Cabinet) and the Regulator Audit Framework (Productivity Commission). 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 a 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.

## **Penalty rates**

Probably the most common complaints raised with the ASBC by small business relate to penalty rates. Firms regularly report that penalty rates stifle business competitiveness:

- For example, a Sunshine Coast café owner told us he was choosing not to open on Sundays, despite the fact that it is a high turnover day. He chose a low turnover, low employment option due to the high cost of employing staff on Sunday due to penalty rates.

- 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. A Canberra pizza franchisee told us he is required under his franchise agreement to trade on Sunday despite not turning a profit on a Sunday in over four years.

Penalty rates are a serious impediment for small business, particularly in the restaurant and catering, tourism and hospitality, and retail industries. Customers expect that businesses in these industries are open every day. Restrictive regulations governing penalty rates and shopping hours severely limit the ability for these businesses to operate efficiently and at the times that customers expect.

Many small businesses and industry associations have also made the case to our Office that the rationale for penalty rates has diminished as the notion of 'unsociable hours' is losing its relevance. Seven day trading is now standard for many sectors. The PC draft report acknowledges this with the finding that one third of employees currently work a Saturday or Sunday each week. The historical tradition of the working week being 9:00 am to 5:00 pm, Monday to Friday, is becoming an anachronism for small business in the modern world.

The rapid growth of online retailing operating globally is another phenomenon that questions the relevance of penalty rates. If people can shop online 24 hours a day the retail sector must be able to offer greater amenity to customers in order to remain competitive. Being open when customers want to shop is one such convenience. Penalty rates that restrict the ability of businesses to operate profitability at times when consumers wish to shop place the retail sector at a marked disadvantage relative to their online competitors. Penalty rates should be adjusted to enable businesses to open late or on weekends when their customers want to access them, without losing money.

We acknowledge the significant work that the PC has done in examining the policy rationale for existing penalty rates and suggesting that the Sunday penalty rate could be lowered to the level of the Saturday penalty rate. We support this approach as it would encourage more cafes and restaurants and retail stores to remain open on weekends. This would inject more life into our cities, improving amenity for their inhabitants and enhance the tourism experience of visitor. It would also increase employment for young people (by up to 40,000 in the restaurant and catering industry alone according to one study cited by the PC)<sup>3</sup> and improve small business profitability.

The ASBC believes that adoption of the PC's recommendation would be a major step in the right direction. However, we would encourage the PC to go further and consider lowering weekend penalty rates to the same level applying after hours. The PC's draft report finds that the health and social cost to the employee of overtime and shift work are higher than the costs of weekend work. Weekend penalty rates should be no higher than penalty rates for overtime and shift work.

---

<sup>3</sup> Jetty Research 2015, although we note that the research was conducted around a "reduction in penalty rates" without specifying the extent of that reduction – regardless the impact is expected to be sizable.



## Unfair dismissal

Unfair dismissal laws are a serious burden for small businesses due to the time and training required to deal with issues. The ASBC has heard from small business that former employees often seek money to “go away” by threatening to challenge dismissals. In turn, the difficulty and expense of dismissing unsuitable staff makes small business reluctant to hire permanent staff and contributes to the casualisation of the workforce. The Australian Chamber of Commerce and Industry (ACCI) estimated in its submission to the PC that the cost to the economy of the unfair dismissal laws is around \$1.3 billion a year and amounts to the loss of 46,000 jobs.<sup>4</sup>

Previously, firms employing less than 100 people were exempt from unfair dismissal laws but this exemption has been removed. The Small Business Fair Dismissal Code was introduced to compensate for the removal of this exemption. It is intended to protect Small Business from vexatious unfair dismissal claims, provided that the firm complies with the Code. The Code provides a checklist of practical steps to follow and provides protection for compliant small business against unfair dismissal claims.

The Code is a valuable resource for small business within the WR system especially given its approach that is designed to be easy to understand and follow. However, we note the PC’s finding that many employers regard the Small Business Fair Dismissal Code as ineffective. This may in part be due to the potential ability to overturn the protection of the Code for the employer by an employee alleging that the employer did not abide by the Code and demanding the payment of “go away” money. The ASBC recommends that the PC consider ways to further strengthen the Small Business Fair Dismissal Code to ensure that it provides the protection that was intended to a complying small business that follows the procedures spelt out in the Code.

We also suggest that the PC consider the reintroduction of a broader exemption from the unfair dismissal laws for small business. In its consideration of the issue, the PC could examine whether this exemption should be returned for firms that employ fewer than 100 employees (which we note would be consistent with the definition of “small business” in section 5 of the Australian Small Business and Family Enterprise Ombudsman Act 2015).

In considering these matters, there may be scope for the PC to examine whether if the 100 employee exemption was reintroduced it could coexist with a Code customised to ensure the most reprehensible injustices are not perpetrated against employees. This would reflect a balance in reducing the burdens on small business but also recognising that the overall Australian business environment is enhanced by observance of fair workplace practices.

---

<sup>4</sup> Productivity Commission Inquiry into the Workplace Relations Framework – Australian Chamber of Commerce and Industry submission, March 2015.



## Junior Awards

The ASBC acknowledges that age based awards are a rough approximation for pay gradients that would reward workers as they accumulate skills and experience. Junior pay rates are also an important part of the business model for many small firms, particularly in the hospitality, catering and retail sectors. These industries employ and rely upon junior service staff, and this also affords an opportunity for unskilled young people to start their careers.

The ASBC appreciates the arguments for replacing youth wages with a more logical system based on skills and experience but, in doing so, cautions against steps that would reduce pay differentials and increase award complexity. The PC reports that 6 months on the job is often regarded as sufficient to acquire the competency of an experienced adult employee but we doubt this would be valid across all industries. Also, if a shift to a system based on skills and experience effectively increased junior pay rates to adult levels after 6 months, the advantages of the current system to both businesses and junior staff could be lost. Premature pay equalisation between junior and adult workers could lead to reduced employment opportunities for young people, restricted operating hours for some businesses and higher prices for consumers.

These adverse consequences might be avoided if the existing pay differentials between junior and adult workers could be retained in any move to pay rates based on experience level and if the time taken for a new starter to rise to the pay level of an experienced worker approximated the time needed to rise from a 16 year old junior employee to a 21 year old adult employee (five years).

Another important consideration in any redesign of the junior wage rate system is that any replacement award structure needs flexibility and simplicity. Great care should be taken in the design stage to reduce business compliance costs and ensure that new awards are easy to understand and administer, and can be consistently applied across all industries.

## Conclusions

Our submission has covered a broad range of areas that we believe could be addressed to improve competition, productivity, efficiency and simplicity in the WR system in Australia. In our view, any reform in these areas should be consistent with the Government's deregulation agenda. The particular reforms that we have addressed and believe should be priorities are:

1. Accelerating reform of the WR framework to promote greater flexibility and to reduce the disproportionately high compliance burden on small business;
2. Simplifying the structure of modern awards while allowing greater latitude within them for small business to negotiate adjustments with their employees;
3. Continuing the emphasis on making the processes of the Fair Work Commission and the Fair Work Ombudsman more small business friendly.

4. Reducing Sunday penalty rates to Saturday levels and consider reducing weekend penalty rates to the same level as overtime or shift work;
5. Strengthening the Small Business Unfair Dismissal Code and reintroducing the exemption from unfair dismissal laws for firms with less than 100 employees; and
6. Ensuring that any reform of junior pay rates retains the sharp differentials and long gradients the current system has for unskilled new starters and competent and experienced workers;

We believe that enhancements in these key areas would improve the overall Australian business environment and ensure a more flexible and adaptable small business sector that is better able to respond to ever-changing market challenges and opportunities.