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Submission By Australian Risk Policy Institute - Workplace Relations Framework

The Australia Risk Policy Institute notes that a number of Commonwealth jurisdictions expose business and community sector employers and employees to strategic risk by poorly framed intervention. ARPI invites the Commission to carefully consider the issues raised below.

Work Place Rules – Identifying and dealing with Strategic Risk

Operational risks are legion in employment arrangements. However, some of these arise from a basic failure to deal with strategic risk issues. The following example describes a significant strategic risk affecting one small business sector and describes how it arises and how it could be resolved. It demonstrates that if strategic risk is dealt with, there may be significant flow on advantages to the entire sector.

One of the most significant issues any small business has to deal with is that of taking on a new employee. A new employee may help business grow, give owners relief from long hours and may bring new skills and opportunities into a small business. Balanced against these possible benefits are a number of risks. Some of these risks – whether the new employee will work out – are also difficult to quantify. However, many businesses move through the employment process without ever quantifying those costs – and poor decision making here may ultimately lead to financial stress, litigation or collapse. Other businesses stall part way through the process, because of the reasons set out below.

One significant type of risk arises through Government regulation of different employment sectors. Government goals, to secure fair terms and conditions of employment, enjoy wide community support. However, in reality, present government intervention can create uncertainty. This type of risk – arising through faulty government intervention – creates strategic risk across the entire sector.

A typical example is employment in one of our largest service industries – hairdressers. Hairdressers engage a lot of young people entering the workplace, yet educators and industry observers say that many of these arrangements fail, to the cost of both parties.

The problem is simple. The rules dealing with employment in this industry are a mess. There is significant confusion of Commonwealth legislation and awards that govern the area. For a small business, with limited time to decide whether to engage an apprentice and the cost impacts – and for a young apprentice, just out of school – this is a serious problem. More than any other single issue, this strategic risk is one of the most serious regulatory problem facing small business – acting as a significant disincentive to employment.

One possibility is to simply repeal the rules and let the parties make up their own rules. No doubt this could work where the parties are reasonable people and are able to come to a fair deal. However, even if the agreement was fair, the parties still need to cover all the bases – the agreement still must be capable of dealing with a whole range of contingencies – some likely and others

unusual. Some of the unusual cases can expose either or both parties to considerable, and perhaps unreasonable, loss if the wrong option is chosen.

A reasonable employer can sometimes do unreasonable things. Sometimes this is not from thrift or short-sightedness. Sometimes it can be forced by the unreasonable actions of a third party, or because the business or personal interests of the employer come under pressure. In Australia at this time, a lot of small businesses operate out of large shopping malls that are open until late each night – and employers operating in the malls are required to trade for quite long hours. The requirement to keep open, even when trade is slight, can result in an employer seeking to get employees, particularly low paid employees, to work exceptionally long hours.

How is the strategic risk (uncertain Commonwealth rules) addressed? Let us imagine that we want to design a system that allows an employer to test fair options before employing an apprentice. Today, a simple graphic interface, could be built that allowed the employer to quickly work out when the employee could work, and the fair cost of engagement across those times. The interface could demonstrate all aspects of the employment, from superannuation, long leave, leave and termination, in a single screen able to be taken in – in a minute or so - with a minimum of text and no legal language. Prospective employees could be shown the page, test alternatives, with the confidence that they are negotiating within a fair framework that will deliver a contract that deals with all of the outcomes.

Sounds easy. It is easy. So why doesn't it happen?

Instead of a simple business-friendly framework, we have a cumbersome rules based system which forces both parties to learn a lot of irrelevant and confusing guff, and gives no assistance as to core issues such as work hours and cost impacts. Worse, because some of the rules span different rule makers, some of the rules are directly inconsistent. A detailed examination of the rules will take someone already familiar with the structure and scope of work-place rules about four hours to get across the rules in this sector. There are gaps and inconsistencies everywhere.

Small businesses have been asked whether they thought they understood the system. Most said they tried, but gave up because the rules didn't make sense. Employees have been asked whether they thought they understood the system. All said they did not. Testing the actual working arrangements in relation to apprentice hairdresser suggest that they are being systemically underpaid, asked to work outside reasonable times and denied basic conditions of service. In some cases, employers and employees had adopted unfair practices after discussions with government agencies. Testing the advice of the agencies showed them to be consistent wrong.

The existing system fails business and employees.

While the individual risk faced by an employee or employer can be ameliorated by one-on-one advice, the real problem here is that the systemic risk caused by a basic failure by the Commonwealth to ensure consistent and understandable rules. It is time to change the rules to make them consistent and to work on a way of delivering a simple employment solution to the parties.

Applying Risk Policy as defined and modelled by ARPI www.arpi.org.au - a Systemic Risk is defined as one which has multiple owners and can only be effectively managed through a formal collaborative partnership of the owners - further, if not successfully managed, the Systemic Risk may materialise into a live issue, in fact, become a Wicked Problem - which is almost impossible to manage without starting again and rebuilding the whole system.