

Inhibitors to employment for small businesses and disincentives to working for individuals

SUBMISSION by the OFFICE OF THE AUSTRALIAN SMALL BUSINESS COMMISSIONER

May 2015

This is a submission by the Office of the Australian Small Business Commissioner (the ASBC)¹ to the House of Representatives Standing Committee on Education and Employment's inquiry

into the inhibitors to employment for small businesses and disincentives to working for individuals.

This submission addresses the small business component of the inquiry and is informed by our ongoing engagement with the business community, including dealings with small businesses and their representatives.

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 small business.

1. GENERAL COMMENTS

The ASBC is supportive of initiatives and efforts to investigate and simplify the small business operating environment, and to reduce the barriers that inhibit small business operation and growth, including the challenges associated with hiring employees.

The ASBC works with and commends the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) for their efforts to assist small businesses and provide tailored information and resources. Despite available assistance and resources, feedback has revealed workplace relations remains an area of confusion and apprehension for many small businesses.

The ASBC is exploring the challenges to hiring employees through the latest Fix-it Squad², themed *Taking on an employee*. Some of the key small business concerns identified through this process include confusion about awards, pay rates, and WorkCover, inconsistent information and advice, and the difference between contractors and employees.

2. OVERVIEW OF SMALL BUSINESS CONCERNS

ACCI's 2015 National Red Tape Survey³ identified the top three areas for compliance complexities as:

- workplace health and safety and workers compensation,
- employee wages, conditions and superannuation, and
- industry specific regulation.

When hiring an employee small businesses must engage with many, and sometimes all, of these areas.

The survey also revealed that the regulatory burden had prevented nearly half of businesses from making changes to grow their business. One respondent was quoted:

¹ 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 (including providing its own, limited dispute resolution service); and
- Contributor to the development of small business friendly Commonwealth laws and regulations.

² Fix-it Squads are an ATO-led initiative that brings together small businesses, industry bodies, business advisers and government to work in a team to look at issues from a small business perspective. Squads aim to make it easier to run a small business, improve interactions with government, and identify and reduce red tape.

³ Australian Chamber of Commerce and Industry 2015, *2015 National Red Tape Survey*.

**“ We have... stopped employing more staff
because it has become uneconomic to do so ”**

Through our ongoing engagement with small business stakeholders we have identified a range of concerns that could discourage a small business from hiring employees:

- **Multiple agencies.** Employers must deal with multiple agencies at the state and national levels. There are numerous requirements, which are not straightforward and often are changing. Compliance can be onerous, obligations duplicative and there are multiple definitions of ‘employer’ and ‘small business’ resulting in complexity.
- **Information.** Information is spread across many places making it difficult to find what you need and to be confident you have not missed anything. In addition, regulator messaging can instill a negative perception creating a disincentive to engage and a fear of consequences for unintentional noncompliance.
- **Employee vs contractor.** The line between employee and contractor is grey. It can be time consuming to determine if a person meets the requirements of a contractor and getting this wrong can have a significant financial impact on a small business.
- **WorkCover.** Cross jurisdictional agreements do not cover a business that has an employee who is based in a different state or territory to the main business operation. This can result in small businesses facing additional costs and compliance requirements.
- **Awards.** Awards are often long and confusing. It can be difficult to identify the right award and to map roles and skills to classifications to identify the right pay rate. Additionally rates can make it economically unattractive to employ staff on weekends and public holidays.
- **Scale.** Economies of scale mean that the cost, compliance and liabilities per employee are greater for small employers than large employers. Of the 39 per cent of Australian businesses that employ staff, 69 per cent are micro-businesses with 1 to 4 employees.⁴

3. RED TAPE AND COMPLIANCE COSTS

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 the regulatory requirements, the processes and behaviours of regulators and a lack of small business resources.

Hiring a new employee is not just about finding the right person with the necessary skills and capabilities. A small business owner is also responsible for complying with the tax, superannuation, workplace relations, workplace health and safety and other regulatory requirements, as well as training the new employee and setting them up with what they need to undertake the role.

3.1 MULTIPLE AGENCIES

⁴ Australian Bureau of Statistics 2014, *Counts of Australian businesses, including entries and exits: June 2010 to June 2014*, cat no. 8165.0.

One regulation on its own may not be difficult to comply with. However, meeting the cumulative regulatory compliance requirements of many different laws across state and national governments can be complicated and time consuming. So much so that some businesses opt not to employ staff.

When hiring employees there are multiple agencies and requirements to comply with, such as:

- **Australian Taxation Office.** Tax File Number; superannuation; Pay As You Go,
- **Fair Work Ombudsman.** National Employment Standards and Awards; entitlements; payslips; record keeping, and
- **WorkCover.** Workers compensation; Workplace Health and Safety requirements.

In addition, a small business may need to engage with:

- **Department of Immigration and Border Protection** if the employee is on a visa,
- **Office of State Revenue** if payroll tax thresholds have been met, and
- **Portable long service leave authority** if in an applicable industry.

The definition of 'small business' and 'employee' vary across the above agencies, as do reporting and compliance requirements. For example the definitions of small business include:

Australian Taxation Office (ATO)	Aggregated turnover less than \$2m
Fair Work Ombudsman	Less than 15 employees (headcount)
Office of State Revenue	NT Treasury and Finance: up to 20 employees Revenue SA: payroll of less than <\$1.2m
WorkCover	NSW WorkCover: up to 50 FTE employees Qld WorkCover: less than 20 FTE employees

Developing a summary sheet of the key definitions used by different government agencies may reduce small business confusion and fear of noncompliance. Providing clearer information about the regulatory side of the hiring process may reduce the barriers to hiring additional employees.

RECOMMENDATION 1: STREAMLINE DEFINITIONS

The ASBC recommends a summary sheet be developed outlining varying government definitions and their impact on small business operation.

3.2 EMPLOYEE OR CONTRACTOR?

Building on section 3.1, there is also confusion regarding the definition of a contractor and a lack of certainty about when a contractor may actually be an employee. This is a cause of concern for small businesses and one that can be time consuming to resolve.

As mentioned above there is not a consistent definition of employee across government agencies. In addition, there is no one definition of a contractor. Instead are a number of factors which may contribute to determining whether a worker is an employee or a contractor.

Given the difficulty, there are a range of resources to help small businesses decide who is an employee and who is a contractor, including:

- the ATO's Employer/Contractor Decision Tool specifically designed to find out if a worker is an employee for tax and super purposes,
- Business.gov.au's Independent Contractors Decision Tool, and
- the FWO's Independent contractor and employees factsheet, just to name a few.

However, no one resource can provide certainty and if a worker is determined to be a contractor by one agency they are not necessarily a contractor for another agency's purposes. In addition, if you change answers you can get a different result, for example, changing the basis of payment in the ATO Tool from a quoted price with progress payments to a price per activity completed changes the results from a contractor to an employee. There is a need for greater clarity, particularly across government agencies.

RECOMMENDATION 2: EMPLOYEE OR CONTRACTOR?

The ASBC recommends aligning the definitions of employee and contractor across government agencies and developing a single decision tool to help small businesses correctly identify when a worker is an employee or a contractor.

3.3 WORKPLACE HEALTH AND SAFETY

In regard to workplace health and safety, the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety 2008* and the *Safe Work Australia Act 2008* were introduced to harmonise laws, regulations and codes of practice relating to workplace health and safety (WHS) and workers' compensation.

The new WHS framework took effect across jurisdictions (excluding Western Australia) on 1 January 2012. The harmonisation reduced red tape and compliance for businesses operating across borders by providing a nationally consistent framework.

Function 11b of the *Safe Work Australia Act 2008* relates to the development of national workers' compensation arrangements for employers with workers in more than one state. However, seven years later, a small business that has employees based in two or more jurisdictions must register and pay for WorkCover in each applicable state or territory.

This adds red tape and complexity to business operation and could operate as a barrier to business expansion. For example, if a small financial advisory firm in New South Wales (NSW) expands into the Australian Capital Territory (ACT) and, as such, moves one employee to Canberra to set-up and operate the office the employer now has to pay WorkCover premiums in NSW and the ACT, despite having the same number of employees.

RECOMMENDATION 3: WORKCOVER ACROSS JURISDICTIONS

The ASBC recommends that either:

- reciprocal arrangements be established for small business employers whereby the business only registers and pays for WorkCover in their principal jurisdiction of operation but receives employee coverage Australia-wide, or
- a national WorkCover arrangement be established enabling small businesses to opt for affordable national rather than state-by-state coverage.

3.4 MODERN AWARDS

One of the key issues regarding workplace relations is the modern award system. Small business concerns include the number, length and complexity of modern awards. Small businesses have told us that the complexity of the award system is too much and, as such, some prefer to remain non-employing businesses despite the potential for growth.

There are 122 modern awards. Some cover whole industry sectors, whilst others cover occupations. It can be difficult to determine the correct award, especially considering some awards have similar occupations to other awards, for example the *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010*. A business may also have to keep track of two or more awards as it is possible that employees with different roles are covered by different awards. Within the awards, there are a variety of job classifications which an employer must also navigate to determine the correct pay, conditions and entitlements.

Modern awards are legislative instruments and can be complex to unfamiliar readers, i.e. most small businesses. Although the system may appear complex, it is a vast improvement on the previous state-based system, which had over 3,715 awards and other industrial instruments.

There are several processes currently underway to review the award system and simplify engagement, for example:

- The FWC has commenced a comprehensive review of the modern awards, receiving significant input from interested parties.
- The Productivity Commission's inquiry into the performance of the workplace relations framework is underway. An issues paper was released in January 2015.
- The FWO will be releasing a new Pay and Conditions Tool in the coming weeks, making it easier for employers to quickly and easily work out wages, leave and other entitlements.

3.5 SCALE

Economies of scale mean the cost of compliance and liabilities per employee is significantly greater for small employers than large employers. Of the 39 per cent of Australian businesses that employ staff, 69 per cent have only 1 to 4 employees.⁵

⁵ Australian Bureau of Statistics 2014, *Counts of Australian businesses, including entries and exits: June 2010 to June 2014*, cat no. 8165.0.

RECOMMENDATION 4: BALANCE THE COSTS

The ASBC recommends research be undertaken to identify potential opportunities to better align compliance costs and liabilities with the number of employees a business has, with a focus on making it easier and cheaper for micro and small businesses.

4. INHIBITORS TO HIRING

In addition to regulatory complexity and compliance burdens potentially inhibiting small businesses from hiring new employees, another common area of contention is penalty rates, which small businesses tell us are stifling business competitiveness.

For example, a former Sunshine Coast café operator told us she had wanted to open on Sundays and knew it would be a busy trading day. However, she remained closed due to the cost of employing staff. Instead she 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 that situations arise where business turnover and employment opportunities are reduced due to penalty rates. This is not advantageous for employment levels, productivity or the economy.

Many small businesses and industry associations have also argued the rationale for penalty rates has diminished. Seven day trading is now standard for many sectors. Given this, they reason the unsociable hours argument for penalty rates is no longer valid. The rapid growth of online retailing further questions the modern relevance of penalty rates.

The Productivity Commission's inquiry into the performance of the workplace relations framework is considering penalty rates, including their relevance to the current business environment and the appropriateness of the current rates.

RECOMMENDATION 5: PENALTY RATES

The ASBC recommends the Inquiry feed any findings and recommendations relating to penalty rates into the Productivity Commission's inquiry into the performance of the workplace relations framework.

5. OTHER RELATED MATTERS

In addition to addressing laws and regulations that may impose red tape and compliance costs on business, or inhibit small businesses creating additional employment, the terms of reference requested other relevant information be provided. In this regard the ASBC raises regulator behaviour, accessibility of information and workplace relations institutions.

5.1 REGULATOR BEHAVIOUR AND APPROACHES

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. The challenges of hiring an employee could be reduced by taking steps to ensure the process is as simple as possible without adding complexity beyond what is legislatively required.

RECOMMENDATION 6: LEGISLATIVE REQUIREMENTS

The ASBC recommends assessing the requirements for hiring an employee with the aim of identifying which requirements are legislatively necessary and which are due to regulator processes. Where a requirement is due to regulator processes, the rationale behind this should be investigated and where possible the requirement removed.

In addition, government has a core responsibility to educate small business about relevant laws and regulations, to help them understand what they have to do and to how to do it. In our experience small businesses are more responsive to a facilitative approach to regulation that is underpinned by understanding and education, rather than crackdown enforcement.

In particular, we have found the small business area of the FWO to be facilitative and aimed at improving small business understanding of the workplace relations system, and identifying and implementing opportunities to reduce the burden on small business. The FWO has developed a range of helpful resources, including:

- a free online short course to help small businesses hire employees,
- tips for hiring new employees, and
- a guide to hiring new employees.

RECOMMENDATION 7: FWO SMALL BUSINESS TEAM

The ASBC recommends the Inquiry leverage the knowledge, insights and experience of the FWO small business team.

5.2 ACCESSIBILITY OF INFORMATION

The accessibility of information can greatly influence the complexity and burden of meeting regulatory requirements. In this regard, accessibility refers to both the ease with which information can be understood and located.

Currently information about hiring an employee is spread across many sources and is at times inconsistent. With dispersed and poorly connected information about hiring an employee, small businesses lack certainty and fear the consequences of unintentional noncompliance.

The first step to improving information accessibility is to identify the agencies a small business must engage with and the requirements which must be met when hiring an employee. From here content and language can be simplified, inconsistencies removed and linkages improved. The *Taking on an employee* Fix-it Squad is designing potential approaches to overcome this barrier.

5.3 WORKPLACE RELATIONS INSTITUTIONS

Many small businesses fail to recognise that the FWO and the FWC are different institutions. Although the institutions have different roles, there are also overlaps. For example, both institutions provide small business tailored information about modern awards and both are able to assist with workplace disputes arising under the Fair Work Act 2009, including anything covered by an award or enterprise agreement.

Further to the FWC and the FWO, there are an additional five institutions in the national workplace relations system as well as state and territory industrial relations commissions. The ASBC questions whether the current number of institutions may add complexity and therefore be an inhibitor to hiring employees.

RECOMMENDATION 8: INSTITUTIONAL CONSOLIDATION

The ASBC recommends the inquiry consider if the seven institutions in the workplace relations system genuinely need to be independent of each other, and if there is scope for consolidation or other mechanisms which could reduce complexity and duplication.

6. CONCLUDING REMARKS

The ASBC is supportive of initiatives to make it easier for a small business to employ staff and meet relevant regulatory requirements.

Our submission focused on the small business component of the inquiry. In summary, small businesses may be reluctant to hire employees for many reasons, including:

- complexity, particularly with modern awards,
- fear of unintentional noncompliance, and
- penalty rates making it uneconomical to open on particular days.

This submission makes eight recommendations for the Inquiry Secretariat to consider:

Recommendation 1: Streamline definitions. Develop a summary sheet outlining varying government definitions and their impact on small business operation.

Recommendations 2: Employee or contractor? Align the definition of employee and contractor across government agencies and develop a single decision tool to help small businesses correctly identify when a worker is an employee or a contractor.

Recommendation 3: WorkCover across jurisdictions. Establish reciprocal arrangements for small business employers whereby the business only registers and pays for WorkCover in their principal jurisdiction of operation but receives employee coverage Australia-wide, or establish a national WorkCover arrangement to provide small businesses affordable cover regardless of employee location within Australia.

Recommendation 4: Balance the costs. Undertake research to identify potential opportunities to better align compliance costs and liabilities with the number of employees a business has, with a focus on making it easier and cheaper for small businesses.

Recommendation 5: Penalty rates. Feed findings and recommendations relating to penalty rates into the Productivity Commission's inquiry into the performance of the workplace relations framework.

Recommendation 6: Legislative requirements. Assess the requirements for hiring an employee and where requirements are not legislatively required investigate the rationale and where possible remove the requirement.

Recommendation 7: FWO small business team. Leverage the knowledge, insights and experience of the FWO small business team.

Recommendation 8: Institutional consolidation. Consider if the seven institutions in the national workplace relations system genuinely need to be independent, and if there is scope for consolidation or other mechanisms which could reduce complexity and duplication.