



28 February 2024

Pay Equity and Awards Team

Fair Work Commission

PO Box 1994

Melbourne, VIC 3001

via email: awards@fwc.gov.au

Dear Sir/Madam,

Modern Awards Review 2023-24

The Australian Small Business and Family Enterprise Ombudsman welcomes the opportunity to provide input to the Fair Work Commission regarding the Modern Awards Review 2023-24.

Right-sized regulation is crucial to robust competition, productivity and employment

Small businesses provide jobs for approximately 5.2 million Australians (or two out of five private sector jobs) and account for 43 per cent of all apprentices and trainees in training – nearly double the amount supported by a big business. Female ownership is trending up and now accounts for 35% of all small business owners in Australia – almost double the rate from the 1970s.¹

It is vital that policy settings encourage workplace productivity and entrepreneurship. The Productivity Commission's *Advancing Prosperity* report concluded that Australia is facing 'a seemingly entrenched slowdown in the rate of productivity growth,' with average annual labour productivity growth over the decade to 2020 (1.1.%) being the slowest rate in 60 years, and half the rate recorded in the 1990s (2.2%).²

Unfortunately, the increasing complexity of Australian workplace laws is imposing significant compliance costs and administrative burdens that are disproportionately borne by small businesses. Small businesses do not always have the legal expertise, time or resources to interpret and apply the rules set out in multiple pieces of legislation, and to readily and correctly identify and apply the appropriate Award, classification and conditions.

This complexity has resulted in unintentional non-compliance, despite best intentions and efforts. Even some large employers with internal human resources departments, sophisticated software, and access to expert legal counsel have had notable instances of non-compliance. Having access to specialised external or internal resources should not be a prerequisite to operating a business.

Inversely, the predominance of avoidable regulatory complexity can hinder smaller businesses from competing effectively against larger incumbents. Complicated regulations also impede the ability of employers to introduce new technology and reorganise work to reduce costs, enhance existing offerings, or transform business models.

¹ Australian Small Business and Family Enterprise Ombudsman, *Small Business Matters*, June 2023.

² Productivity Commission, *5-year Productivity Inquiry: Advancing Prosperity*, Inquiry report, volume 1, Report no. 100, 7 February 2023, released 17 March 2023.



Recommendation 1: Establish a small business expert panel to advise the Fair Work Commission

One of the objects of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national prosperity and social inclusion, including by acknowledging the special circumstances of small and medium-sized businesses.

The speed and scope of changes made to workplace law since 2022 are increasing the time and cost for small businesses to ascertain, understand and comply with their obligations under National Employment Standards and relevant Awards and industrial instruments. Recent legislative changes have also expanded the role and discretion of the Fair Work Commission, whose procedures and terminology are unfamiliar and intimidating for small-business owners.

To support small business compliance and reduce the disproportionate impact on the sector, we suggest the Australian Government guide the Fair Work Commission to initially establish a small business expert panel. This panel should be charged with providing specialist advice, directives and considerations for the commission regarding the specific circumstances of small businesses that appear before it. The panel should also consider and advance the establishment of a Fair Work Commission Small Business Division (or a Small Business Commissioner).

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (Secure Jobs, Better Pay Act)* recognised the importance of acknowledging the specific challenges and characteristics of sectors and workplaces by establishing three new expert panels. It is not unprecedented to take active steps to acknowledge the specific circumstances of a sector, and in the case of small businesses, we suggest this would be best done by establishing a specific small business expert panel to:

1. advise the Fair Work Commission on matters affecting small businesses
2. develop a small business synopsis to insert at the beginning of each Modern Award, to make the instrument more accessible and help small business owners identify and understand key obligations and employee entitlements under that Award
3. explore opportunities to simplify and embed any small-business exceptions, adjustments or considerations in particular Modern Awards into National Employment Standards
4. consider the suitability of a Small Business Division within the commission.

The small business expert panel should consist of people who personally understand the distinctive circumstances of these businesses. This would ensure that the panel is best-placed to provide practical advice and assistance to the commission on matters affecting small business, as well as having an understanding of the unique challenges faced by small businesses and their employees which would enable it to consider how this could be better served by a small business division.

There are points of tension in the interactions between small businesses and the Fair Work Commission. The following concerns were raised in the 2018 report to the Fair Work Commission: *Working better for small business: Report from the Connect and Engage small business consultation program*:

- ‘The consultative process revealed many positive interactions with the Commission, its Members and staff.’ However, ‘Smaller employers viewed “Fair Work” (i.e. the Commission)



as having a very significant impact on their workplaces yet it is uninformed of the day-to-day challenges and operational pressures experienced by small business ...

- ‘There is a strong belief in the small business community that maintaining and demonstrating a contemporary working understanding of the relevant industry and enterprise environments will build greater confidence in the Commission’s deliberative processes ...
- ‘The perceived disposition, determinations and procedures of the Commission and experiences with the Commission’s processes, can have a direct impact on smaller employer’s preparedness to recruit, invest and expand their operations in Australia ...
- ‘There seemed to be limited understanding of the precise remit of the Commission and the FWO, where they cross over and, where they diverge, and equally not much concern about understanding the difference.’³

Instituting a specific Small Business Division, focused on small business needs, would mitigate the tension outlined above, bolster compliance by small businesses, and ensure employees are afforded their full entitlements.

The small business division would enable the Fair Work Commission to provide a simpler and more streamlined jurisdiction, support an educative posture towards compliance, enforcement and engagement, and ensure right-sized processes and procedures.

Having a small business division composed of those with small business experience would ensure a more accessible dialogue between the Fair Work Commission, employers and employees when issues are brought before it – rather than the current state where the Fair Work Commission may assume a level of understanding, knowledge and sophistication that small businesses do not have. This would both ensure the process is accessible for small business employers, and also facilitate a quicker and smoother resolution of matters for employees.

The ASBFEO recommends that the Australian Government advance object 3(g) of the Fair Work Act 2009 – ‘acknowledging the special circumstances of small and medium-sized businesses’ – by establishing a small business expert panel to provide advice, direction and considerations for the Fair Work Commission regarding the specific circumstances of small businesses that appear before the Fair Work Commission, and to consider the merits of establishing a Small Business Division to provide an accessible forum to assist generalist small-business owners to comply with their obligations.

Recommendation 2: Ensure that the implementation of the Small Business Wage Compliance Code is supportive, proportional and encourages self-reporting

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* introduced a criminal offence for certain types of intentional underpayments (‘wage theft’), which commences the later of 1 January 2025 and the day after the first time the Minister for Employment and Workplace Relations declares a Voluntary Small Business Wage Compliance Code.

An employer will commit an offence of wage theft if:

³ The Hon Bruce Billson, founder and principal, Agile Advisory, *Working better for small business: Report to the Fair Work Commission from the Connect and Engage small business consultation program*, 6 July 2018, p. 8ff.



1. the employer is required to pay an amount ('payment owed') to or on behalf of, or for the benefit of, an employee under the Fair Work Act, an industrial instrument, or a Fair Work Commission order (other than superannuation, long service leave under state or territory legislation, paid leave for being a victim of crime, paid leave for jury service or emergency service leave for certain employees)
2. the employer performs an act or neglects to do so
3. the act or omission results in a failure to pay the payment owed to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

The new offence will carry a maximum of 10 years' imprisonment, and/or a maximum fine of the greater of:

- 3 times the amount of the underpayment, if the court can determine that amount, or
- for an individual: 5,000 penalty units (\$1,565,000); or for a body corporate: 25,000 penalty units (\$7,825,000).

The Fair Work Ombudsman (FWO) will be primarily responsible for investigating possible cases of wage theft and referring matters to the Commonwealth Director of Public Prosecutions or the Australian Federal Police for consideration, and potentially prosecution.

The Act introduced two pathways to encourage employers to self-disclose conduct which may amount to the commission of a wage-theft offence, in return for not being referred by the FWO for criminal prosecution:

1. A Voluntary Small Business Wage Compliance Code, to be developed by government in consultation with employer associations and trade unions. If a small business can demonstrate that it complied with the code (regarding the payment owed) and the FWO confirms in a written decision that it has done so, then the FWO must not refer the matter to the Director of Public Prosecutions or the Australian Federal Police, or enter into a cooperation agreement.
2. A cooperation agreement, which the FWO may enter if an employer discloses that they have engaged in conduct that may amount to the commission of wage theft. In entering a cooperation agreement, the FWO must have regard to whether the employer has made a voluntary, frank and complete disclosure of the conduct (to the extent of the employer's knowledge at the time of the disclosure) the nature and level of detail of the disclosure, and the employer's history of compliance with the Fair Work Act. The FWO must not refer conduct engaged in by the employer who is a party to the cooperation agreement to the Director of Public Prosecutions or the Australian Federal Police for prosecution.

Nonetheless, compliance or otherwise with the voluntary code does not affect the power of a Fair Work Inspector to institute or continue civil proceedings, or to give a compliance notice in relation to the conduct, or affect the power of the FWO to accept an enforceable undertaking.

Similarly, while a cooperation agreement is in force, it does not prevent an inspector instituting or continuing civil proceedings in relation to the conduct, or conduct engaged in by any other person from being referred to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.



To minimise unintended errors and encourage self-reporting, it is imperative that the regulator, in implementing the Voluntary Small Business Wage Compliance Code, makes every effort to educate and assist non-compliant businesses in becoming compliant. Civil penalties should only apply if notices and guidance from the regulator do not correct behaviour.

The complexity of some Award provisions for small-business owners should not be underestimated. The example below demonstrates the complexity of calculating Award wages for a single apprentice employed in the construction sector.

Example: Determining take-home pay for one worker employed under the Building and Construction General On-site Award 2020

The worker is a second-year construction apprentice who left school at 16 after completing year 10. They are now 17 years old. They are expected to work underground in the carpark of a 2-storey apartment complex 4 days a week. They are expected to work a simple roster from 8:00am to 4:30pm, Monday to Friday.

Assuming the worker takes their allocated breaks, they are working 8 hours a day (including 0.4 hours a day to contribute to their regular rostered day off). This also assumes these hours include the necessary time spent at a registered training organisation. This includes a half hour unpaid meal break that must be taken between 12pm and 1pm (unless it is varied by agreement). It also includes a 10-minute paid crib break between 9am and 11am.

The Building and Construction General On-Site Award 2020 stipulates overtime rates are payable at the rate of double time for employees required to work through their daily scheduled half-hour meal break (per Clause 29.6(a)).

The minimum rate of pay for this employee is \$940.90 a week, or \$24.76 an hour. However, as a second-year apprentice who did not finish year 12, they are only owed 60 per cent of this rate. However, the worker is also owed the general building and construction industry allowance of \$56.45 per week, as well as \$16.94 per week as part of the underground allowance. However, if the employee is only expected to work underground for 4 or fewer days per week, this allowance drops to \$3.76 a day or per shift. Note that every 19 days this employee also earns a rostered day off (RDO). Being asked to work on this RDO will incur overtime rates – although an employee under the age of 18 cannot be compelled to work overtime.

If the employee agrees to work overtime one day, they will be owed 150% of the ordinary hourly rate for the first 2 hours and 200% thereafter. However, if they reach that two-hour threshold, they will then be entitled to an extra 20 minutes of crib time – which if they do not take will be added to their shift as time worked.

This means that for this week, this employee will be paid:

- Weekly rate (60%) = \$564.54
- General building and construction industry allowance = \$56.45
- Tool Allowance = \$34.87
- Ordinary Time Hourly Rate = \$17.26 x 38 = \$655.88 weekly
- Underground allowance (4 days a week) = \$15.04



- First 2 hours of overtime (by agreement) = \$44.57 ($\$74.28 \times 60\%$) $\$17.26 \times 1.5 = \$25.89 \times 2 = \$51.78$
- 3rd hour of overtime = \$29.71 ($\$49.52 \times 60\%$) $\$17.26 \times 2 = \34.52
- 1 x Meal Allowance (after 1.5 hours overtime) = \$16.37
- 20 minutes of crib time paid as overtime = \$9.9 ($\$29.71/3$) $\$17.26 / 3.33 = \10.36
- 4 x Daily Fares Allowance @ \$17.29 per day = \$69.16 (plus reimbursement of travel costs incurred on training day – value unknown)
- Total weekly earnings: \$720.57 = \$853.11

Note that the example above indicates the difficulty of accurately calculating wages for one employee, for one week. It does not include other considerations such as annual and personal leave, superannuation, or any other workplace entitlement (such as long service leave) that may be governed by other workplace instruments or legislation. A small-business owner may be required to undergo this process for multiple different employees who may not work uniform rosters, or be entitled to uniform conditions, because of various licenses, qualifications or duties.

Recommendation 3: Enhance self-auditing tools and guidance to give small businesses real-time assurance

The ASBFEO acknowledges the ongoing efforts of the Fair Work Commission and Fair Work Ombudsman to provide concise, accessible and up-to-date information to small businesses, notably through the Small Business Hub and Small Business Showcase, respectively.

The ASBFEO especially sees utility in the FWO's *Guide to self-auditing your business*, which contains a five-step checklist for businesses to check the law, check their record-keeping, audit their records, review the findings and fix any problems. While the guide contains links to current guidance and resources, it is nevertheless a static document (last updated in July 2023) rather than an interactive tool.

The ASBFEO suggests that the Fair Work Commission and Fair Work Ombudsman work together (and with other government entities) to transform the *Guide to self-auditing your business* into a fully interactive decision-support tool. Such a tool could incorporate legislative changes, commission decisions and best-practice improvements in real time, and enable employers to efficiently provide input for the self-audit by linking the tool to single-touch payroll reporting.

A comprehensive and interactive decision-support tool could not just help small business employers understand and fulfill National Employment Standards, it could also alert them to specific obligations under the prevailing Modern Award (or Awards) and guide them through the required entitlement calculations and administrative actions.

Generative artificial intelligence might also be used to answer detailed questions from employers, identify common misunderstandings or anxieties, continually update and improve guidance, and facilitate assurance.

The more support and confidence an employer can have that they are capably managing their Fair Work obligations, the higher their propensity will be to self-report any errors, misgivings or anomalies.



Australian Government



Australian
Small Business and
Family Enterprise
Ombudsman

If you require any further information, please do not hesitate to contact the ASBFEO Policy & Advocacy Team via email at advocacy@asbfeo.gov.au.

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman