

7 March 2025

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Fair Work Ombudsman

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Dear Ombudsman

Review of the Fair Work Act small business employer definition

The Australian Small Business and Family Enterprise Ombudsman welcomes the opportunity to contribute towards your review of the definition of small business as set out in section 23 of the *Fair Work Act 2009*. Given that Object 3(g) of the Fair Work Act is ‘acknowledging the special circumstances of small and medium-sized businesses’, a review of the appropriateness of the current definition of small business is appropriate.

The ASBFEO considers that the current definition of small business employer – fewer than 15 employees at a particular time, including casual employees employed on a regular and systematic basis – is no longer reflective of developments in the labour market, or the increasing weight and complexity of workplace regulations. The Employment White Paper observed that the Australian labour market is exhibiting a ‘trend towards part-time employment and more varied and flexible work arrangements.’¹ This means that an increasing share of smaller employers are reaching the 15 headcount threshold, and therefore losing access to special considerations such as a fair dismissal code, delayed commencement of certain new provisions, and the Voluntary Small Business Wage Compliance Code.

These considerations are necessary because Australia’s workplace rules are complex, onerous and difficult for small businesses to navigate. Small business employers need actionable information, right-sized regulation, and a supportive compliance approach focused on education and guidance, especially given significant changes to:

- wage compliance and enforcement
- the regulation of casual employment, independent contracting and digital-platform work.

The ASBFEO considers that this increasing complexity warrants an increase to the size of defined small business workplaces, who cannot reasonably expect to have the same access as larger businesses to specialist human resource professionals, legal counsel and sophisticated payroll compliance systems.

While there is a logic to shaping tailored requirements that are more readily and confidently implementable by small employers in a sure-footed way, reducing excessive system and

¹ Australian Government, *Working Future: The Australian Government’s White Paper on Jobs and Opportunities*, 25 September 2023, p. 11.

regulatory requirements is a poor substitute for right-sizing the workplace regime for small business.

In addition, while there is an ostensible attractiveness to adjusting or seeking to harmonise definitions and thresholds, there are sound policy reasons for divergence. Firstly, regulators of taxation or market disclosures will be much more focused on the financial characteristics of reporting entities than regulators of workplaces, for whom the presence and number of workers is more likely to be the determining factor. Secondly, a small business definition might be expansive to ensure wide access to assistance (as in the ASBFEO Act) or subsumed under the category of small and medium-sized enterprise, to encourage competitive access to Commonwealth procurement opportunities.²

In workplace relations, a sensible balance needs to be struck between reducing compliance obligations for small-business employers and ensuring employees of small businesses receive the same substantive protections and entitlements as employees of larger businesses. Consequently, while there is merit in the Australian Government reviewing the appropriateness of longstanding small-business definitions and exploring options to streamline them, we would encourage the government to take a considered approach to examining where and whether harmonisation is practicable or desirable.

We therefore offer for your consideration the following recommendations.

Recommendation 1: The number of employees used to define a small business for the purposes of the *Fair Work Act 2009* should be increased to at least fewer than 20 employees, excluding all casuals.

The current headcount (rather than full-time-equivalent) definition of small business has the virtue of simplicity and relative ease of compliance for small-business employers. To address both the evolution of employment patterns and increasing regulatory complexity noted above, the ASBFEO recommends that the threshold be raised to no fewer than 20 employees *excluding* casuals, whether those casuals are regular and systemic, or not part of an employer's ongoing schedule or plan.

Further, the ASBFEO recommends that this revised definition of small business should also extend to single interest employer authorisations for multi-enterprise agreements, so that employers with fewer than 20 employees – excluding all casuals – cannot be included in a single interest employer authorisation unless they agree.

Since 26 August 2024, the process for determining the casual status of an employee has become more complicated and onerous. The new definition of casual employment under the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* means that a person is a casual employee if, when they start employment:

² According to the Australian Small Business and Enterprise Ombudsman Act 2015, 'A business is a small business at a particular time in a financial year (the current year) if: (a) it has fewer than 100 employees at that time; or (b) either: (i) its revenue for the previous financial year is \$5,000,000 or less; or (ii) if there was no time in the previous financial year when the business was carried on, its revenue for the current year is \$5,000,000 or less.' For the purposes of procurement, the Department of Finance defines a small and medium sized enterprises as: 'Australian and New Zealand firms with fewer than 200 full-time equivalent employees'.



- the employment relationship has no firm advance commitment to ongoing work, taking into account a number of factors; and
- they're entitled to a casual loading or specific casual pay rate under an award, registered agreement, or employment contract.

Additionally, from 26 August 2025, a casual employee of a small business will be able to provide written notice to their employer to change to permanent employment under the employee choice pathway if they:

- have been employed for at least 12 months
- believe they no longer meet the requirements of the casual employee definition.

This means that employers of casuals must take into account both the totality of the employment relationship in determining if an employee is casual, as well as the nature of their engagement with the employee throughout the lifecycle of employment. Given these more demanding compliance obligations, the ASBFEO considers that excluding all casual employees from the definition of small business employer would reduce complexity for small business employers, without compromising protections or entitlements for employees.

ASBFEO position 1: The Fair Work Commission should work with the Fair Work Ombudsman to 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 December 2024) 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. The tool should be available through both the Fair Work Ombudsman and the Fair Work Commission.

A comprehensive and interactive decision-support tool could not just help small business employers understand and fulfill National Employment Standards, it could also allow regulated workers and contractors to more fully understand their rights and the channel to raise disputes.

ASBFEO position 2: The Australian Government to create a dedicated Small Business Commissioner and Division within the Fair Work Commission to honour the 'special circumstances' of smaller employers which existing workplace law is required to reflect and to oversee the implementation of proportionate instruments, procedures, practices and protections.

The procedures, modes of engagement and terminology of the Fair Work Commission are unfamiliar and intimidating for small-business owners. To honour the special circumstances of



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small and family businesses, the Fair Work Commission should have a Small Business Division led by a dedicated Small Business Commissioner. This would enable the Commission to have people who understand the unique challenges for small businesses and their employees and provide a simpler and more streamlined jurisdiction, support an educative posture towards compliance, enforcement and engagement, and ensure right-sized processes and procedures.

If you require any further information, please do not hesitate to contact the Policy and Advocacy Team on Advocacy@asbfeo.gov.au

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman