27 February 2026

Ms Susan Booth
Closing Loopholes Review
Department of Employment and Workplace Relations
140/180 City Walk
Canberra ACT 2601

via email: closingloopholesreview@dewr.gov.au

Dear Ms Booth

Review of the Closing Loopholes Acts

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) welcomes the opportunity to make a submission to the Department of Employment and Workplace Relations for the Review of the Closing Loopholes Acts. The review consists of amendments to the *Fair Work Act 2009* (FWA), including the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (the Acts). The review also includes consideration of the impact of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*.

Small businesses are the engine room of the Australian economy. They employ approximately 5 million Australians, representing 42% of the private-sector workforce, and contribute around one-third —$590 billion annually— of Australia's GDP.[1] This contribution has declined since 2006, when small businesses contributed 40% of GDP and employed 53% of private sector workers.[2], The number of small employing businesses —with 1-4 employees— decreased 5.3% between 2021-22 and 2024-25, from 727,457 to 688,870.[3]

Australian small business productivity has also fallen in recent years, declining 9% from a peak of $110.40 per hour in November 2022 to $100.30 per hour in late 2023.[4] A recent global study found that Australian small businesses are only around half as productive as large firms, and that lifting small business productivity and narrowing the gap with larger businesses could lift national productivity and boost GDP by up to 5%.[5]

While the causes of low and declining productivity of Australia's small businesses are varied and complex, there is little doubt that growth in the number and complexity of regulations impacting small business is a key contributor. According to the Australian Institute of Company Directors, the

[1] Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Number* of *Small Business in Australia*, ASBFEO, Australian Government, August 2025.
[2] ASBFEO, *Energising Enterprise - 14 Steps to boost Australia's small and family businesses*, ASBFEO, Australian Government, August 2024.
[3] ASBFEO, *Number* of *Small Business in Australia*, ASBFEO, Australian Government, August 2025.
[4] Xero Small Business insights, *Special Report Part 1 - Small business productivity: Trends, implications and strategies,* Xero, April 2024 (revised July 2024).
[5] Madgavkar A, Piccitto M, White O, Ramírez M J, Mischke J and Chockalingam K, *A microscope on small businesses: Spotting opportunities to boost productivity*, May 2024, McKinsey Global Institute, Exhibit 5, p 14 and Exhibit 6, p 15.

cost of complying with Commonwealth regulations has grown to $160 billion, nearly 6% of GDP, up from $65 billion (4.2% of GDP) in 2013.[6]

The ASBFEO's stakeholder engagement indicates that small business employers are still grappling with the many, unsynchronised changes to workplace regulations introduced through the Acts where, according to one estimate, there were at least 35 major changes to the FWA between May 2022 and December 2024 alone.[7] Our submission provides an overview of some of these amendments —on employment status, wage theft, and leave entitlements— to illustrate the scale and impact of cumulative changes, and the consequences arising from missteps, on stretched small business owners.

We advocate for regulatory reforms that support small businesses to focus their resources on opportunities for growth and productivity, rather than struggle with numerous, complex compliance requirements, with one eye on survival.

The distinctive nature of small businesses

Most Australian small businesses operate on a small or micro scale with very limited resources, raising a range of challenges which differ markedly from those faced by larger enterprises. Their limited resources to devote to administrative tasks borne from regulatory compliance, means they are much more vulnerable to seemingly minor changes in the regulatory environment.

Small business owners are 'jack of all trades, master of none', adaptable generalists who are occupied day-to-day with addressing both the operational demands of working 'in' the business to deliver products and services, as well as 'on' the business – that is, on business administration. Small business owners' time is stretched thinly across a range of demanding roles and skillsets, including strategy, customer service, book-keeping, human resources and information and communications technology. In contrast, larger businesses tend to have inhouse subject-matter expertise to keep across the regulatory landscape, with the capacity to employ specialist staff or contract for expert advice as and when needed.

Small businesses also face the perennial threat to viability arising from unreliable and unpredictable cash flow. They typically operate on slim margins, so delays in payments are an Achilles heel for their survival. When a debtor is late in paying, it can cascade through the supply chain. Too often the delaying debtor is a well-resourced big business or a government department. This can also have knock-on effects for compliance with small businesses often struggling to meet tax obligations because of inadequate cash reserves. This is reflected in the fact that the second highest (27%) source of grievances for which the ASBFEO's clients seek advice involve a payment dispute.[8]

Furthermore, slow payments often lead to payment disputes, which can put unpaid small business creditors in an extremely precarious position. It is not uncommon for the ASBFEO to hear about small business owners needing to sell their family home to keep their business afloat. The

[6] Mandala Partners, *$160bn and counting: The cost of Commonwealth regulatory complexity,* Australian Institute of Company Directors, November 2025.
[7] Council of Small Business Organisations Australia (COSBOA), *'A line in the sand': clear and comprehensible IR required to support small business*, COSBOA website, 2024, accessed 11 February 2026.
[8] ASBFEO, *Quarterly Report: 1 October to 31 December 2025*, ASBFEO, Australian Government, 2026.

uncertainty that comes with depending on reliable cash flow is exacerbated by the high and growing number of corporate insolvencies.[9]

Operating a small business can also place a significant burden on an owner's mental health. In addition to the stress of resource constraints are pressures that arise from the less formal, personal nature of many small businesses. Small business workplaces tend to have a higher degree of informality and personal familiarity, rather than operating through formal systems and professional relationships. For example, small businesses tend to employ staff known to the owner, a family member or friend of the owner. While there are many advantages to this informal proximity, the relative absence of the formal workplace boundaries typical of bigger businesses can generate great strain on owners' mental capacity to manage their business.

These are some of the inherent challenges of running a small business. The raft of complex changes introduced by the Acts has exacerbated these challenges and added to a compliance burden that is overwhelming many small business owners.

Regulation of Australian workplaces needs to be right-sized for small business

'Right-sized regulation' is about ensuring that obligations are proportionate and risk-based, with compliance requirements capable of being met by entities subject to the regulation. Where regulation will impact a small business, right-sized regulation can be achieved where policymakers adopt a 'think small business first' mindset and undertake early and genuine stakeholder consultation to inform policy development and regulatory design.

One of the FWA's objectives is 'acknowledging the special circumstances of small and medium-sized business'.[10] While the Acts take account of the needs of small business in several areas, this is done by exception and does account for small business circumstances in a systematic way. As a consequence, the Acts have added unnecessary complexity and uncertainty to an already-complex area of regulation, adding to the compliance burden and increasing the risk of non-compliance. To reduce this burden, compliance should be 'right-sized' and regulations streamlined to make it easier for small business owners to understand their obligations and take steps to meet compliance.

This is illustrated by the provisions pertaining to casual and 'employee-like' employment. The many questions and tests raised by the Acts in relation to casual and employee-like work illustrate how well-intentioned, and seemingly clear provisions can create regulatory uncertainty for small businesses. Small business owners are now even less certain about the status of their employees, the cost implications of that status, and the likelihood of that changing through Fair Work Commission (FWC) decisions. This regulatory uncertainty and the compliance burden it imposes can discourage small business owners from hiring employees.

The Acts and their supporting material should therefore be drafted in a way that can be readily understood and does not discourage small business to hire employees to expand their business. Establishing and maintaining workplace relations regulation that is right-sized for small business should be supported by the establishment of a dedicated Small Business Commissioner and Division within the FWC.

[9] ASBFEO, *August 2025 ASBFEO Small Business Pulse: Cautious optimism amid modest improvements in small business conditions*, ASBFEO, Australian Government, 2025.
[10] Section 3(g), *Fair Work Act 2009 (Cth)*.

Casual employment

The Acts redefine casual employment and seek to make it easier for employees to move from casual to permanent status. The legislated indicators of what constitutes casual employment are intended to be pragmatic —'…to be determined by ascertaining the real substance, practical reality and true nature of the employment relationship[11]…'— however, for many small business owners this has introduced considerable uncertainty as to the status of their staff.

In addition, the FWA allows a casual employee to convert to full- or part-time employment by notice and the employer can only refuse that notice on specific grounds, placing the onus on the business owner to justify a refusal with reference to multiple factors, and at the risk of a civil penalty. This means that small businesses who employ workers on a casual basis must grapple with the complexity of taking into account the totality of the employment relationship, involving a range of nuanced considerations applied to multiple staff, and do so throughout the lifecycle of employment.

The ASBFEO's view is that excluding all casual employees from the definition of small business employer would reduce unnecessary complexity for small business employers, without compromising protections or entitlements for their employees.

Employee-like workers

The Acts also empower the FWC to set minimum standards for 'employee-like' workers performing digital labour platform work. The policy intention, of protecting vulnerable gig-economy workers, is an important one which the ASBFEO supports. We also recognise the Government's narrow definition of 'digital labour platform' and 'digital labour platform operator', to reduce the risk of inadvertently applying this regime to the growing number of small businesses who use these platforms.

The test for determining whether a worker should be characterised as 'employee-like' is, however —particularly for a time-poor business owner— a complex, multifactorial one for which the outcome is uncertain, absent legal adjudication. If that test is applied by the FWC in the affirmative, it will require compliance with minimum standards orders that may constrain businesses from working with commercial autonomy through fast-moving technological change. There are many situations where a business may seek services from a platform that does not, and is not intended to, create an employee-employer relationship.

Establishing an FWC Small Business Commissioner

To assist small businesses owners and their employees, the ASBFEO advocates for the establishment of a new Small Business Commissioner (SBC) and Division within the FWC. The SBC would dedicate itself to disseminating knowledge and guidance of the 'special circumstances' of smaller employers which the FWA is intended to embody. The SBC would also exercise oversight of the development and implementation of workplace policy instruments, procedures and practices to ensure proportionality with small business needs.

In addition, the SBC would ensure more accessible dialogue between the FWC, employers and employees when issues are brought before it. Without this facilitative role, the FWC is at risk of assuming a level of understanding and sophistication which small businesses generally do not have. Ultimately this would facilitate a quicker and smoother resolution of matters for employers.

[11] Section 15AA, *Fair Work Act 2009 (Cth)*.

The SBC could also play a leading role in facilitating a more educative, partnership-oriented approach to raising small business understanding of the FWA, in a way which improves compliance while fostering productivity.

Supporting compliance through better educational support

Small businesses typically lack the resources to interpret and apply detailed provisions set out in legislative instruments, particularly instruments as detailed and complex as the FWA. Even big businesses with internal human resources departments, sophisticated software, and access to expert legal counsel can struggle to comply with complex regulatory obligations. The demand for better educational support on workplace relations legislation was reflected in a recent survey conducted by COSBOA where small business respondents expressed strong support for guidance, with 67% willing to use toolkits and 55% open to attending webinars or workshops.[12]

The need to keep abreast of —let alone comply with— complex regulation is a persistent source of concern for small businesses. Government can go some way towards lifting small business confidence if it adopts a more facilitative and educative approach to achieving regulatory compliance. This approach would recognise that the more support, clarity and confidence a small business employer can have about their legal obligations, the higher will be their propensity to comply, to self-report errors, and to seek further guidance where needed, with penalties only used as a measure of last resort for repeated, intentional wrongdoing.

A more systematic approach to educational support should be informed by an understanding of the most appropriate modalities for dissemination, whether for the purpose of awareness-raising, learning or exchanging experiences. The ASBFEO's Small Business Pulse August 2025 found that '[s]mall business owners are most interested in workshops or face-to-face meetings as the way to explore future business prospects in preference to online tools and resources'. Small businesses more commonly rely on their affiliate organisations to provide them with accessible information about their legislative obligations – for example, COSBOA noted that its members rarely have the 'luxury of time … to navigate the obligations and requirements' as detailed in the Fair Work Ombudsman (FWO) materials.[13]

The ASBFEO recognises Government efforts to develop a more comprehensive approach to engaging with and supporting small businesses to meet their obligations. These include tailored FWO workplace relations guidance and support for small businesses, for example, the updated *Small Business Employer Guide to Family and Domestic Violence* and Small Business Helpline. The ASBFEO encourages the Government to continue developing educational tools and guidance that are practical and accessible to small business owners.

Wage theft, the Small Business Voluntary Compliance Code and related guidance

Under the Acts' wage theft provisions, the intentional underpayment of wages or entitlements is a criminal offence. In practice, underpayment of wages is often due to unintentional error rather than through malicious intent. Our stakeholders have indicated these provisions are a persistent

[12] COSBOA, *Small Business PEAK Benchmark Research Report: Beyond Compliance - Measuring the Impact of Recent IR Changes on Small Business*, COSBOA, August 2025.
[13] Matthew Addison, *COSBOA Submission on Statutory Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, COSBOA, 12 June 2024.

source of uncertainty and concern for small businesses – even for business owners for whom the legislation is relatively clear.

The introduction of the Small Business Voluntary Compliance Code (the Code) is a welcome step towards mitigating this uncertainty. The Code is a safe harbour, so that businesses cannot be referred for criminal prosecution if they can demonstrate compliance with the Code (but does not preclude exposure to civil penalties). The Code is intended to provide assurance to small businesses, but not guidance – it is therefore a necessary, but insufficient, measure for mitigating the uncertainty raised by the Acts' wage theft provisions.

The Code is complemented by the FWO's *Guide to self-auditing your business*. These are valuable sources of assurance and guidance for small businesses which highlight the importance of knowledge dissemination. This should be seen as the foundation for, rather than a model of, partnership to provide educational support for small businesses to better understand the FWA.

To enhance this initiative small businesses would benefit from clarification of the nature of the Code. Its name suggests an instrument which is legislative in nature, imposing additional compliance obligations rather than being an opt-in tool for businesses to protect themselves against inadvertent infringements. It would also be more useful if the Code elaborated on what constitutes intentional and non-intentional misconduct —illustrated through case study examples— or is complemented by additional guidance which serves this purpose.

The FWO should also work with the FWC, and other relevant government agencies, to transform the *Guide to self-auditing your business* from being a static document to providing a fully interactive decision-support tool that could, for example:

- incorporate legislative changes, commission decisions and best-practice improvements in real time
- enable employers to efficiently provide input for the self-audit by giving them the option of linking the tool to single-touch payroll reporting
- guide them through complex entitlement calculations and administrative actions (for example, under the prevailing Modern Award).

Paid Family and Domestic Violence (FDV) leave

Small business stakeholders have raised with the ASBFEO a range of concerns with how the provisions for FDV leave could be interpreted and applied, suggesting a need for guidance around:

- potentially conflicting legal requirements – in particular, protecting privacy while fulfilling work health and safety obligations and reporting crime
- the leave application process
- transitioning from leave back to work.

A common thread to these needs is concern about the sensitivity and seriousness of FDV, particularly in the context of a very small workplace. Stakeholders have indicated that the usual

financial and regulatory burdens would be compounded by the need to 'support, document, and if necessary, report what is an incredibly sensitive and delicate situation'.[14]

It is also noteworthy that awareness of the FDV leave entitlements is still low, at 49%, although this has increased significantly from 37% in 2024.[15] This highlights the need for basic information dissemination and awareness-raising initiatives targeted at small business.

If you would like to discuss this matter further, please contact the ASBFEO Policy and Advocacy team via email at advocacy@asbfeo.gov.au.

Yours sincerely

The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman

[14] Australian Industrial Transformation Institute, *Report to the Department of Employment and Workplace Relations (DEWR): Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*, DEWR, Australian Government, August 2024, p 17.
[15] COSBOA, *Small Business PEAK Benchmark Research Report: Beyond Compliance - Measuring the Impact of Recent IR Changes on Small Business*, COSBOA, August 2025.