

## Inhibitors to small businesses employing

3.1 The environment in which small businesses operate in Australia is complex and challenging. In evidence to the Committee, small businesses and their representatives commented on the difficulties that small businesses face on a day-to-day basis in order to remain in operation. In its submission, the Australian Chamber of Commerce and Industry (ACCI) identified the top ten constraints on small businesses:

1. Business taxes and government charges
2. Insufficient demand
3. Import competition
4. Non-wage labour costs
5. Federal Government regulations
6. Insufficient retained earnings
7. Charges by lending institutions
8. Current levels of debt
9. State Government regulations
10. Wage costs.<sup>1</sup>

3.2 This chapter addresses many of these issues. It is structured as follows:

- attitudes of business owners;
- regulation and red tape;
- industrial/workplace relations;
- workplace health and safety;

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<sup>1</sup> Australian Chamber of Commerce and Industry (ACCI), *Submission 22*, p. 12. See also ACCI Small Business Survey, December Quarter 2014, *Identifying National Trends and Conditions for the Small Business Sector*, <<http://www.acci.asn.au/getattachment/d3885a5f-6317-4d17-bf38-a552ae63760e/ACCI-Small-Business-Survey---December-Quarter-2014.aspx>>, viewed 2 June 2015.

- penalty rates;
- payroll tax; and
- competition and fair trading.

3.3 Small business is vital to the performance of the Australian economy and its capacity to grow and employ Australians. Accounting for approximately 93 per cent<sup>2</sup> of all employing businesses, and spanning all industries, securing Australia's business future through innovation and providing the majority of employment and training opportunities within our communities.

3.4 The Victorian Employers' Chamber of Commerce and Industry expressed the importance of the small business to the Australian economy and, in particular, to employment in Australia:

Small business is vital to the growth and development of the Australian economy. Taken together, small businesses are major employers and key drivers of economic activity, investment and trade. If we are to continue to grow employment opportunities and living standards for all Australians, small business must be supported by government policies that reduce red tape and encourage business investment, innovation and growth.<sup>3</sup>

3.5 Given the large number of small businesses in Australia, it is unsurprising that their contribution to employment is significant. As Master Grocers Australia/Liquor Retailers Australia highlighted the importance of small business to retail employment and the importance of sustaining this, and removing inhibitors to job creation is crucial to economic success:

In a context where unemployment rates are high, it is imperative that inhibitors to job creation and employment are eliminated. The retail industry is a fundamental stepping stone for Australia's youth to enter the employment field.<sup>4</sup>

3.6 Master Grocers Australia/Liquor Retailers Australia also described a direct link between the health of small businesses and the health of the community:

The local businesses and employees supported by independent retailers, and the communities in which independent grocery retailers operate who gain significant social and community benefits as a result of the economic participation of small to

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2 Australian Industry Group, *Submission 17*, p. 13.

3 Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 39*, p. 3.

4 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 6.

medium sized enterprises, would be adversely impacted by any reduction in their market share.<sup>5</sup>

- 3.7 Small businesses also face significant risk. Many are sole traders who put everything they have on the line to make their business a success<sup>6</sup>. Taking risks, especially through taking on employees who may not be a good fit for a business, can mean significant losses to personal assets. Mr Peter Coronica, Chief Executive Officer and Founder of Fingerprint Me Youth Employment Academy and previous small business owner explained that finding the correct and most skilled person for the job is critically important for small businesses:

...if you fail, you will lose your family home. When you consider that your family home is on the line every day you go to work, you will make every decision possible. You will hire the right people and you will not take risks.<sup>7</sup>

- 3.8 Mrs Daniela Ascone, Director, Strategy and Partnerships, Fingerprint Me Youth Employment Academy, outlined examples of how fragile the balance between success and failure can be when small businesses are faced with unexpected hurdles:

In Victoria, unfortunately, we have got many small businesses that have gone out there and have taken that risk to set up a business, but they were not expecting things like a congestion tax to be introduced into the community, where their budgets go from not having to pay anything for car spaces to some businesses having to pay \$200,000 to \$350,000 a year... as employers they would not be expecting the government to not take into consideration the impact of certain things such as a congestion levy here in Victoria or, for example, recently the announcement of a public holiday prior to the AFL grand final. That is going to cost businesses in excess of \$300,000 to pay those penalty rates et cetera. They were not expecting that when they signed their house over, when they put their assets on the line.<sup>8</sup>

- 3.9 To assist with managing their small businesses and providing advice in overcoming obstacles such as these, employers can seek assistance from various industry associations. However, as noted by Mr Mark Brennan, Commissioner, Australian Small Business Commission, this assistance and

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5 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 5.

6 Sole traders are able to employ.

7 Mr Peter Coronica, Chief Executive Officer and Founder, Fingerprint Me Youth Employment Academy, *Committee Hansard*, Melbourne, 13 July 2015, pp. 1-2.

8 Mrs Daniela Ascone, Director, Strategy and Partnerships, Fingerprint Me Youth Employment Academy, *Committee Hansard*, Melbourne, 13 July 2015, p. 7.

advice is limited and fragmented due to the absence of any absolute peak body that represents small business:

Although there is a number of industry associations and the like, and COSBOA is seen as something like a peak body, in effect there is no real peak body like you might find in other sectors of industry. One of the problems in the small business area is that there are so many people there – there are about 2.4 million small businesses in Australia – and not all of them are members of industry associations or chambers of commerce. In fact, the vast majority are not.<sup>9</sup>

- 3.10 This reduced amount of small business engagement with industry is significant because it can result in poor business knowledge and the inability to keep up with compliance changes. Mr Brennan explained further the problems associated with this:

It is about educating small business as to what they need to do. That educating is not just all about compliance; it is also about how to run a business. When we start to talk about inhibitors to employment, for example, a lot of small businesses would make their decisions about whether they would employ or not based on insufficient or inadequate information. They do not get themselves properly informed because they are not part of any sort of information feed. It is that area which I think is worth the effort and resources to try to get through to the small business community – that they do need to inform themselves.<sup>10</sup>

## Attitudes of business owners

- 3.11 While it is generally accepted that small businesses seek growth and prosperity, and thereby creating opportunities to employ more people, a major inhibitor to growth can be the attitude of the small business owner. In 2003, the Senate Employment, Workplace Relations and Education References Committee's report into *Small Business Employment* found that this is not always the case:

The inquiry found that many small businesses have limited growth aspirations, with a minority having both the desire and potential to grow significantly. The major employment

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9 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 1.

10 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 2.

contribution of many small businesses is to provide jobs for the owner, some family members and one or two others. This contribution should not be under-valued but it indicates the need for a realistic appraisal of the scope for government initiatives to lift employment across the sector.<sup>11</sup>

- 3.12 Further evidence in this regard was received from Mr Tony Mylan, Chief Executive Officer, ET Australia, who provided an anecdote of a family owned business on the NSW Central Coast:

...on one of our premises we have a cleaner we have used for at least 15 years. His business model – it is a father and son business – is that they work their business up; they keep taking on new cleaning jobs until such time as those two are working themselves to death, and then they sell off particular jobs they have won to other cleaning companies so they do not have to employ anybody.<sup>12</sup>

- 3.13 The motive for a small business owner choosing not to expand is not clear. However, as will be discussed in further detail below, taking on an employee can be a daunting task for some employers. Coupled with significant risk and often little knowledge and assistance as to how to effectively run a business, expansion and therefore job creation, can be significantly inhibited in the small business sector.

## Regulation and red tape

- 3.14 While regulation per se is not a barrier to small business employing staff, the number of regulations, the approach and mind-set of the regulator, and the overlap of both regulations and regulators can certainly constrain small business from employing people. This section looks at these issues.
- 3.15 The time, loss of productivity and actual financial costs of complying with Government regulation or 'red tape' is a major issue facing small businesses. In early 2013, a large-scale survey of 10 000 Australian businesses investigated the tax compliance costs from all taxes for Australian small and medium-sized enterprises in the 2012 fiscal year.

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11 Parliament of Australia, The Senate Employment, Workplace Relations and Education References Committee, *Small Business Employment*, February 2003, p. xix. See also Mr Peter Strong, Chief Executive Officer, Council of Small Business Organisations of Australia, *Committee Hansard*, Canberra, 11 November 2015, p. 1.

12 Mr Tony Mylan, Chief Executive Officer, ET Australia, *Committee Hansard*, Tumby Umbi, 21 August 2015, p. 13.

- 3.16 The survey found that ‘overall gross compliance costs for Australian SMEs have increased by 118% in constant dollar terms over the period from 1995 to 2012<sup>13</sup>’ and that:

...business size (measured by annual turnover) is the single most significant determinant of the magnitude of compliance costs at firm level. In addition, the number of taxes the entity has to comply with is also a significant predictor of the magnitude of these costs, even when controlling for size. In contrast, legal form is not found to be significantly correlated with a firm's compliance costs.

The results of the study strongly suggest that taxation compliance costs continue to be a significant issue for SMEs, and that policy shapers and policy makers need to be very cognisant of the potential impact on that burden whenever changes to legislative and administrative requirements affecting the tax system are contemplated.<sup>14</sup>

- 3.17 The Australian Government currently has a strong focus on cutting red tape, with substantial progress already being made through the introduction of bi-annual repeal days (see Chapter 2). However, inquiry participants continued to express their concern at the extent of the compliance burden and its impact on small business. Mr Dick Grozier, Associate Director, Workplace Relations, Australian Chamber of Commerce and Industry, outlined the impact of regulation on small business:

Regulation can be inappropriate because unnecessary, duplicative or disproportionate; because excessively complex; and/or because of the way it is enforced. As discussed in the written submission, regulation imposes the highest costs on the smallest because of the proportionate compliance costs and the lack of specialist expertise. This is more serious than just being an issue of concern because, given the significant proportion of microemployers in the economy, these affects echo nationally. Inappropriate regulation not only imposes costs which sap other business related activity; it leads to avoidance behaviours as well – some at the cost of employment growth, some at the cost of best compliance.<sup>15</sup>

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13 Phil Lignier, Chris Evans and Binh Tran-Nam, *Tangled up in tape: the continuing tax compliance plight of the small and medium enterprise business sector*, (2014) 29 Australian Tax Forum, p. 242.

14 Phil Lignier, Chris Evans and Binh Tran-Nam, *Tangled up in tape: the continuing tax compliance plight of the small and medium enterprise business sector*, (2014) 29 Australian Tax Forum, p. 247.

15 Mr Dick Grozier, Associate Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Committee Hansard*, Sydney, 6 October 2015, p. 11.

- 3.18 Some participants, such as Master Electricians Australia (MEA), felt that it was small businesses which felt the impact of red tape the most. MEA submitted:

Business owners are forced to comply with multiple requirements just to keep their operations afloat with limited support from the regulators themselves. While this may be a burden shared by all business including large corporations, small business suffers the most, as in most cases they will not have the resources to engage legal, financial or human resources professionals to perform the work for them. For the most part, these tasks fall to the business owner who must endeavour to acquire an understanding of the complex regulatory requirements and ensure they comply. The consequences for non-compliance are also more serious for small businesses who have slim profit margins and far less capacity to absorb additional costs.<sup>16</sup>

- 3.19 This notion is supported by the Productivity Commission which made the following statement in their 2013 report *Regulator Engagement with Small Business*:

Small businesses feel the burden of regulation more strongly than other businesses. Almost universally, their lack of staff, time and resources present challenges in understanding and fulfilling compliance obligations.<sup>17</sup>

- 3.20 It was generally acknowledged that some form of regulation is necessary in the workplace for the benefit and safety of all involved. That said, there was also agreement that the cumulative impact of regulatory requirements affects the capacity of small business and their ability to employ.<sup>18</sup> The Australian Small Business Commissioner submitted:

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

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16 Master Electricians Australia, *Submission 20*, p. 2.

17 The Productivity Commission, *Regulator Engagement with Small Business*, Productivity Commission Research Report, September 2013, p. 2, <[pc.gov.au/inquiries/completed/small-business/report/small-business.pdf](http://pc.gov.au/inquiries/completed/small-business/report/small-business.pdf)>, viewed 2 June 2015.

18 See: Fingerprint Me Youth Employment Academy, *Submission 12*, p. 2; Productivity Commission, *Regulator Engagement with Small Business*, Productivity Commission Research Report, September 2013, p. 71, <[pc.gov.au/inquiries/completed/small-business/report/small-business.pdf](http://pc.gov.au/inquiries/completed/small-business/report/small-business.pdf)>, viewed 2 June 2015; Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 4.; Dr Brent Davis, National Director, Industry Policy, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 3.

governments can be complicated and time consuming. So much so that some businesses opt not to employ staff.<sup>19</sup>

- 3.21 The Australian Chamber of Commerce and Industry (ACCI) Chief Executive Officer Ms Kate Carnell agreed that the burden of excessive paperwork on small businesses was a detriment to their ability to create job opportunities:

Every hour that an entrepreneur spends filling in paperwork is an hour they are not growing their business, satisfying their customers and creating job opportunities. We all recognise that some regulation is necessary, but when those regulations bury business in mounds of paperwork, they are clearly doing more harm than good. Some 55 per cent of businesses say they cannot pass on the increased cost to consumers, so they are absorbing the costs of compliance themselves. But with businesses less able to innovate, invest and hire, we all pay a big price for excessive regulation.<sup>20</sup>

- 3.22 ACCI also commented on the extent and types of compliance that small businesses regularly have to meet:

These costs come from a range of sources with the Productivity Commission estimating that small businesses in Australia are subject to approximately 480 Commonwealth, state and territory regulators, as well as 560 local Government regulators. Regulation may attach to the specific activities of a business or the industry in which it operates or apply to businesses more generically. Typical obligations for employing businesses relate to the following areas (without limitation):

- income tax, including maintenance of records and submission of tax returns to the Australian Taxation Office;
- reporting and payment of goods and services tax (GST) on sales;
- reporting and remitting pay as you go (PAYG) withholding amounts to the ATO;
- businesses that provide fringe benefits to employees or associates are required to pay fringe benefits tax and submit a return to the ATO;
- payment of payroll tax on the business's wage bill;
- compliance with the Fair Work Act 2009 (Cth) (FW Act) which sets out a complex range of regulatory requirements surrounding the employment of people in the business.

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19 Australian Small Business Commissioner, *Submission 11*, p. 5.

20 Australian Chamber of Commerce and Industry (ACCI), *Submission 22*, p. 7.

Legislated standards in the form of the NES must be observed and there are also different awards that apply. Dismissing staff is also heavily regulated and there are specific obligations that need to be met;

- making contributions to employees' super funds on a periodic basis in line with superannuation guarantee laws;
- compliance with work health and safety laws. There are general obligations that apply to all employers as well as well additional requirements in higher risk areas, with training and accreditation required to undertake specified activities;
- payment of workers' compensation insurance premiums.;
- financial reporting;
- business registrations;
- planning and development applications associated with the business activities.<sup>21</sup>

3.23 Blueberry Fields, a small agricultural business, gave one example of the frustrations that it feels when attempting to comply with regulation:

On many occasions we have attempted to proactively understand changes or proposed changes by telephoning government agencies, such as the ATO. Our experience has been that the personnel answering general enquiries at the ATO are minimally trained on how to answer specific queries and are not permitted to move the call to an expert in the area. We are often directed away from the ATO for answers, e.g. to the Ombudsman, who just directs us back to the ATO. We are often told that the ATO cannot give us advice on how to run our business yet what we are asking is for information on how to reach compliance. We are also often told just to employ more administrative staff. We have faced similar difficulties when contacting superannuation companies to work out new superannuation administrative arrangements.<sup>22</sup>

3.24 This type of example highlights the need for businesses to be able to access information on regulatory requirements. Also highlighted is the need for trained staff and minimal points of contact. Blueberry Fields added that:

...any information provided to employers relating to red tape should be presented in such a way that it is timely, easily accessible, easy to understand, and easy to implement. If it's too hard for a whole government department to work out, then maybe it will be too hard for a small business employer to work out too.<sup>23</sup>

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21 Australian Chamber of Commerce and Industry (ACCI), *Submission 22*, p. 14.

22 Blueberry Fields, *Submission 33*, p. [1].

23 Blueberry Fields, *Submission 33*, p. [2].

- 3.25 The Council of Textile and Fashion Industries of Australia told the Committee that too many compliance and regulatory requirements can push their members to take business offshore. Ms Kiri Delly, Chief Executive Officer, explained how further reform in this area would provide an incentive for businesses to employ locally:

There also seems at present an attitude across multiple areas towards taking the path of least resistance. With the challenges in having a business, employing people, adhering to the range of compliance and legislative requirements and a loss of many skills, many operators are simply deciding to take their work offshore. We therefore need to look towards providing incentives to keep operations local and reduce the impediments in doing business here in Australia. Once businesses go offshore it is very unlikely for them to come back...<sup>24</sup>

- 3.26 The Committee believes that reducing the amount of red tape that small businesses are required to navigate would create more time for small business owners to focus on growing their business.

- 3.27 A streamlined regulatory framework must still have an important role. The Australian Small Business Commissioner, Mr Mark Brennan, noted that reducing red tape does not mean doing away with regulation altogether. Rather it provides more time and opportunity for them to be successful in businesses. Extending the required renewal times for licences, and thereby reducing contact with government bodies, is one example Mr Brennan provided that would be a step in the right direction:

A really positive way of looking at reducing red tape and deregulating is to have the attitude that we are going to try to reduce the amount of contact that people have to have with us. I think a really good example of that, though it is not on your topic, is licensing schemes. People often have to renew a licence – I was regulator of gambling and liquor in Victoria, and liquor licences have to be regulated every 12 months. There is no rhyme or reason why they should be every 12 months. Why couldn't they be every five years or every 10 years? And yet people have to come back every time. So it is a good question to ask: are people coming back to agencies too often? If they are, there is something wrong with the system.<sup>25</sup>

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24 Ms Kiri Delly, Chief Executive Officer, Council of Textile and Fashion Industries of Australia, *Committee Hansard*, Melbourne, 13 July 2015, p. 42.

25 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 7.

- 3.28 Mr Brennan put the onus on government to educate small business on their compliance requirements:

What I say is that there is a core responsibility of government, particularly where governments intervene and if they have set up a system where you must pay according to certain things, and it is incumbent upon government to invest in educative programs to make sure people understand.<sup>26</sup>

- 3.29 In this context the Fair Work Ombudsman introduction of a *Pay and Conditions Tool* aims to assist small businesses to navigate their payroll obligations. Ms Jennifer Lawrence, Adviser, Office of the Small Business Commissioner explained the tool's benefits:

It is basically a decision tool to help small businesses and employees to work out what the right award is, what the right classification within that award is and what the allowances and entitlements are. It has combined a number of existing tools that the Fair Work Ombudsman already has and made the process a lot simpler.<sup>27</sup>

## Conduct of regulators

- 3.30 The purpose of regulators is to ensure a fair playing field for all businesses and for the safety of employees, employers and the general public. Regulators can issue fines for non-compliance and request employers to undertake additional activities in order to comply. But they must also be a source of information, education and support for small businesses.
- 3.31 Regulators can also be an inhibitor to small business growth if they operate in a heavy handed way. The Small Business Commissioner, Mr Brennan, acknowledged this and stated that an educative approach to regulation would provide significantly greater benefit:

Regulators across the board too often take an approach of being crackdown, clampdown, 'found you there' and 'we're following you here'. They find it easier to be a crackdown, clampdown type regulator rather than to educate to comply...The business community is far more responsive to a facilitative or educative

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26 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 8.

27 Ms Jennifer Lawrence, Adviser, Office of the Small Business Commissioner, *Committee Hansard*, Canberra, 03 June 2015, p. 8. See also Australian Government Fair Work Ombudsman, 'The P.A.C.T. Pay and Conditions Tool', <[calculate.fairwork.gov.au/](http://calculate.fairwork.gov.au/)>, viewed 7 September 2015.

approach by a regulator than they are to the crackdown and clampdown.<sup>28</sup>

- 3.32 Likewise, the Productivity Commission agrees that the maintenance of a positive and educative relationship between regulators and small businesses is paramount in encouraging compliance and enabling business success. The Productivity Commission, in its report *Regulator Engagement with Small Business*, stated that the success of this relationship depends primarily on the delivery of services:

The way regulations are implemented is often as important to small business and to compliance outcomes as the content of the regulations themselves. Regulators, by their conduct in interpreting, administering and enforcing regulatory requirements, can take considered, well designed regulation and produce regimes which discourage compliance, squander government resources or add to business costs and delays. Alternatively, a regulator might take an unwieldy accumulation of regulation and, by choosing judiciously what, when and how to enforce, deliver the desired regulatory outcomes in an efficient manner. It is through engagement with regulators in their role of administering and enforcing regulation that small businesses primarily 'experience' regulation and much of the associated compliance burden.<sup>29</sup>

- 3.33 In this context, positive relationships are bolstered by the quality of the delivery of regulation by regulators. Such an approach would ensure that requirements are easy to understand and easy to implement, limiting the need for fines and other actions taken as a result of non-compliance.

## Multiple agencies and jurisdictions

- 3.34 As noted above, a reoccurring theme of this inquiry is the cumulative effect of red tape on the capacity of small businesses to invest and employ. One particular issue of particular concern is the duplication of legislative and regulatory requirements across Federal and State jurisdictions. Some small businesses need to liaise with multiple Government agencies to take on an employee.
- 3.35 Already complex administrative requirements facing small businesses are compounded in cases where they must liaise with, and remain compliant
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28 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 8.

29 The Productivity Commission, *Regulator Engagement with Small Businesses*, September 2013, p. 3, <[pc.gov.au/inquiries/completed/small-business/report/small-business.pdf](http://pc.gov.au/inquiries/completed/small-business/report/small-business.pdf)>, viewed 10 June 2015.

to, numerous separate agencies. The Australian Small Business Commissioner explained the current situation:

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 complexity. 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 (sic) a negative perception creating a disincentive to engage and a fear of consequences for unintentional noncompliance.<sup>30</sup>

3.36 The Australian Small Business Commissioner listed some of the agencies that small business have to comply with:

- **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.<sup>31</sup>

3.37 The frustration of dealing with multiple agencies extends beyond state governments and the different compliance requirements between borders towns in particular, to local government/councils within the same immediate vicinity.

3.38 This is particularly significant in the building and construction industry where the National Construction Code can have substantial state, territory and local government variations – an issue for small businesses working between jurisdictions. Mr Wilhelm Harnisch, Chief Executive Officer, Master Builders Australia (MBA) explained:

But the other issue is for small business, even not in those border towns where you have the problem where they operate between

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30 Australian Small Business Commissioner, *Submission 11*, p. [3].

31 Australian Small Business Commissioner, *Submission 11*, p. [4].

shires and local government areas where there are differences in local government standards. Queensland is a classic one – the different local shires and councils require different specifications for different aspects, and on one side of the street you have got to do this and on the other side of the street you have got to do that.<sup>32</sup>

- 3.39 Dr Brent Davis, National Director of Industry and Policy at MBA, provided a specific example of discrepancies between local government regulations within the same city:

We are aware of instances in parts of Sydney, for example, where you do a concrete pour taking 20 minutes. You turn up, they have got the frame, in goes the concrete and then the truck drives off. There are local governments in other parts of Sydney where you have to have an approved delivery plan, scaffolding around trees and a lollipop man, and the fees can be somewhere between \$400 and \$1,200 for a 20-minute drop and go. That cascades through the process, so yes, it is the biggest problem at the borders, as Mr Harnisch rightly observed. We have got 565 local governments, and many of them have contiguous borders with seven or eight other local governments. You can imagine the lottery for the member – the small business especially – who says, 'Here's the code. Terrific, I'll go to the local council.' The council says, 'That is not how we do it here,' and the member realises, 'Okay, this is going to be a while now.' This is the cost that flows through.<sup>33</sup>

- 3.40 Significantly, Mr Harnisch made a direct link between the navigation of these jurisdiction compliance burdens, and a small business' ability to employ:

Obviously, that is one of the consequences: certain contractors decide not to operate in certain local government areas because the compliance burden – in terms of getting approvals, such as the example of the concrete-truck delivery – just makes it too hard when you can go across the street and get the same amount of work. Expanding your business is inhibited by the fact that small business only has limited capacity and limited resources. They will make strategic choices on what delivers them the best outcome for the resources they have. They are not going to chase work – and

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32 Mr Wilhelm Harnisch, Chief Executive Officer, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 2.

33 Dr Brent Davis, National Director, Industry Policy, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 2.

therefore employ people – in areas where the compliance burden escalates beyond the capacity of their small business.<sup>34</sup>

- 3.41 MBA has suggested implementing a website, similar to the Australian Government's *MyGov* website that provides access to all local council's National Construction Code variations. Dr Davis argued that this would assist small business to navigate their regulatory requirements:

We have done some work looking at what you might call 'MyCouncil'. What would that achieve? Transparency. The local governments would be required to put up their variations from the National Construction Code and the states would put up their variations. How does this council vary from the state building act? Builders, consumers and suppliers would know.<sup>35</sup>

- 3.42 MBA also recommended a regular report on local government services that looks at performance rating and benchmarks across the state as a method for local governments to be transparent and accountable in their requirements. Dr Davis continued:

We have been looking at an option where the Productivity Commission could publish a report on local government services. That sort of transparency would be enormous. What is the time that every council takes to do a development application? What is the average cost? What are your variations to the state building act? Therefore, if I develop here or I build there, this would be enormous information... There are roughly 580 local governments. ...it is this variability that is sending our members spare.<sup>36</sup>

## Trading hours

- 3.43 The Retail Council describes current retail hours as follows:

A host of outdated trading hour restrictions exist in Australia – most notably in Queensland, South Australia and Western Australia. These restrictions often illogically discriminate between retailers on the basis of size, location, or products sold, allowing some stores to trade when others cannot.

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34 Mr Wilhelm Harnisch, Chief Executive Officer, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 3.

35 Dr Brent Davis, National Director, Industry Policy, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 7.

36 Dr Brent Davis, National Director, Industry Policy, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 8.

These regulations restrict competition and therefore consumers' choice on what can be peak shopping periods – like on Boxing Day, for example.

Retail figures also show that up to 20 per cent of weekly trading volume occurs on a Sunday – when it is permitted. Some States regulate trading on each and every Sunday, which prevents all retailers from being able to open. This often results in consumers paying higher prices at those retailers that are able to trade.<sup>37</sup>

3.44 This variation in trading hours across states and territories provide opportunities and challenges for small businesses. On one hand, regulated trading hours limit some small businesses ability to trade, and therefore small business losing the potential to create more employment opportunities. On the other hand, the regulation of trading hours can provide reprieve from competing with large chain stores for example, small businesses operating in the grocery sector which compete with large national grocery chains.

3.45 The National Retail Association was among some submitters that felt trading hours restrictions limited their members' ability to operate:

There can be no greater impediment to job creation for a business than being forbidden by Government regulation to open your doors and trade. Yet this is the circumstance many businesses find themselves in. While the NRA recognises that some days of the year are considered sacrosanct, there are many other times when retailers are prohibited from trading simply due to their location, their size, their product range or even their ownership structure.<sup>38</sup>

3.46 Likewise, in its submission to the Productivity Commission's report on *Relative Costs of Doing Business in Australia: Retail Trade*, the Chamber of Commerce and Industry Queensland provided specific examples of how trading hours can limit a small business:

The anomalies present in Queensland's existing shop trading hours framework are disadvantaging small business. Thirty six different zones define which business can trade during certain times and confusion around trading category, location, product type, activities, ownership structures, and number of employees, makes Queensland the most restrictive trading hour's framework in the country... For example, motor vehicle dealerships are not

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37 Australian National Retailers' Association (ANRA), 'Trading hours – pursuing fairer trading', media release, <<http://www.anra.com.au/policies/trading-hours.html>>, viewed 10 December 2015.

38 National Retail Association, *Submission 9*, p. 13. See also Australian Retailers Association, *Submission 37*, p. 11.

allowed to sell ride-on mowers on Sundays due to the current restrictions in the legislation, yet larger 'hardware' chains that sell the same product are permitted to trade. Similarly, caravan and boating retailers are able to open on Sundays to display vehicles and discuss their features, but cannot make a representation of price or make a sale. It is the same with the caravan and boating industries, where retailers can open on Sundays to display vehicles and discuss their features, but cannot make a representation of price or make a physical sale.<sup>39</sup>

3.47 Master Grocers Australia/Liquor Retailers Australia, on the other hand, submitted that in terms of their stakeholders, complete deregulation of trading hours could have a detrimental effect on small grocery retailers that have to compete with the larger chains. Its submission stated:

...the push for the total deregulation of retail trading hours across Australia is simply another avenue for Coles and Woolworths to extend and grow their market share, as well as undercut their smaller competitors, resulting in the extinction of independent retail businesses. Furthermore, in areas such as Queensland where trading hours for non-exempt shops are regulated, consumer-based surveys and petitions have not been presented in those areas which evince a demand by consumers for greater shopping diversity or an extension of trading hours. As such, it remains only a perception that the total deregulation of trading hours in all areas of Australia is both necessary and warranted to promote consumer welfare.<sup>40</sup>

## Superannuation

3.48 Superannuation compliance is a requirement for all small businesses that take on an employee. Employers are required to register new employees with their choice of fund, as well as make regular contributions on behalf of their employee. With the introduction of the Small Business Superannuation Clearing House (as discussed in Chapter 2), this process has become less onerous for many small businesses by reducing the amount of regular paperwork. However, some businesses claimed the compliance burden had actually increased.

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39 The Chamber of Commerce and Industry Queensland (CCIQ), 'Relative Costs of Doing Business in Australia: Retail Trade', 11 July 2014, *submission to the Productivity Commission's inquiry into the relative costs of doing business: retail trade industry*, <[cciq.com.au/assets/Documents/Advocacy/submissions/RetailTrade-ProductivitySubmissionReview.docx](http://cciq.com.au/assets/Documents/Advocacy/submissions/RetailTrade-ProductivitySubmissionReview.docx)>, viewed 7 September 2015.

40 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 7.

- 3.49 Two submitters operating small agricultural businesses felt that the introduction of the Clearing House had in fact created more paperwork. The agriculture sector is typically seasonal with the volume of employees increasing significantly at certain times of the year. Viticulture business G & S Ellis Holdings Pty Ltd noted that despite the Clearing House processing large numbers of seasonal employees was a lengthy and onerous process. As it , explained:

Each employee's superannuation details have to be registered twice - once with the clearing house and once with the employee's superannuation fund. Whilst the clearing house aids distribution to the various super funds many employees do not qualify for minimum wage requirement triggering a superannuation payment.<sup>41</sup>

- 3.50 Grey Sands Vineyard, another small viticulture business, echoed this sentiment:

Being a small employer, I have always given employees their choice of Super Fund. In the past this has meant I've had to register as an employer with a myriad of different funds. The ATO has addressed this, in part, by the Small Business Clearing House, which allows employers to make one payment, which the ATO then disburse to the relevant Super funds...HOWEVER the information that is required to be entered in order to enable this is not readily available to the employer. eg the Fund's ABN and USI number. I had multiple instances this year where I did a 'search for Super Fund' on the ATO site to be confronted with 8+ Funds with the same name...ONE payment alone took me nearly 40 mins to be able to 'action'...I had 6 payments to make...<sup>42</sup>

- 3.51 Blueberry Fields, also a small agricultural business, highlighted the difficulties agriculture businesses encounter when processing superannuation for a large amount of seasonal employees. It suggested that current systems were created to assist less fragmented employment models:

We employ more than 100 individual casual seasonal employees every year and we find that generally employment systems presume a much more stable workforce, especially for superannuation. For most of our employees, we sit outside the norm and therefore have to work out systems for ourselves, e.g.

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41 G & S Ellis Holdings Pty Ltd, *Submission 1*, p. [1].

42 Grey Sands Vineyard, *Submission 26*, p. [1].

paying superannuation for workers who are terminated in the systems and then return.<sup>43</sup>

- 3.52 Submitters also raised concerns with the necessity of provisions of superannuation for employees on working holiday visas. Superannuation, in this context, is often a small amount that is either accessed by the employee on departure from the country, or 'abandoned' in superannuation accounts and slowly diminished by fees.

G & S Ellis Holdings Pty Ltd explained that this is true of its experience:

The amount of superannuation paid into a seasonal casual employees account is often very small (less than \$50) ... the employee does not redeem this amount on leaving Australia and it is gradually frittered away on management fees not to mention the amount of paper, time and effort on the superannuation fund.<sup>44</sup>

- 3.53 Grey Sands Vineyard questioned the necessity of paying superannuation in these instances, when the purpose is to provide for employee retirement:

Superannuation is meant to be for Australian residents to help with their retirement...why then do employers have to pay Superannuation Guarantee payments to casual, overseas workers who will not be staying in Australia (ie they are on 1 or 2 year 'working visas')...effectively giving them a 9.5% increase in their wages, which they can access when they leave Australia?<sup>45</sup>

- 3.54 G & S Ellis Holdings Pty Ltd suggested that in such instances, the employee superannuation contribution could form part of their take-home wages:

Solution/recommendation

Where a casual employee's term of employment is less than 6 months (seasonal workers) and they are not residents of Australia or Australian citizens then superannuation is paid directly into their accounts instead of having to register for superannuation. This can be detailed on their payslips for auditing purposes.<sup>46</sup>

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43 Blueberry Fields, *Submission 33*, p. [2].

44 G & S Ellis Holdings Pty Ltd, *Submission 1*, p. [1].

45 Grey Sands Vineyard, *Submission 26*, p. [1].

46 G & S Ellis Holdings Pty Ltd, *Submission 1*, p. [2].

## Industrial/workplace relations

- 3.55 Compared to many countries Australia has a highly regulated system on industrial/workplace relations. This creates a safety net for workers comprising of three main instruments that set minimum wages and conditions for employees: the national minimum wage, the National Employment Standards and awards which include penalty rates. Complying with industrial legislation is one of small businesses biggest costs both in time and money.
- 3.56 The following quote from the Productivity Commission's Workplace Relations draft report sums up what they see as the current workplace relations situation :
- The challenge for a WR framework is to develop a system that provides balanced bargaining power between the parties that encourages employment, and that enhances economic efficiency. It is easy to over or under regulate. Set against that framework, Australia's WR system is not dysfunctional – it needs repair not replacement.<sup>47</sup>

## National Employment Standards

- 3.57 As described in Chapter 2 the National Employment Standards (NES) specify minimums for 10 conditions of employment.
- 3.58 Discussing the NES the Chamber of Commerce and Industry WA (CCIWA) argued that:
- The National Employment Standards (NES) needs to be flexible and easy to understand, acknowledging the "special circumstances" of small to medium sized businesses. This can be achieved by reducing their complexity, leaving practical application of entitlements to employers and their employees, providing flexibility in their application to small business and removing references to state based legislation.<sup>48</sup>
- 3.59 CCIWA highlight to inconsistencies in the NES with reference to State legislation:
- Three of the NES provisions (community service leave, long service leave and public holidays) refer to state and territory based legislation to derive entitlements. This not only results in different

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47 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 3, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 11 September 2015.

48 Chamber of Commerce and Industry WA, *Submission 23*, p. 5.

outcomes depending upon the State in which the employee is engaged, but generates unintended consequences due to the incompatibility of the State and Federal provisions.<sup>49</sup>

- 3.60 In particular, CCIWA point to the public holiday provisions in the NES that increase the entitlements in some States:

In any one year, there is the potential for WA businesses to be subject to up to four additional public holidays than that provided in the NES. Over the 2010-11 Christmas season, there were six public holidays for three occasions. In 2015 and 2016, WA will face 12 public holidays each year, rather than the national standard of 10.<sup>50</sup>

## Modern awards

- 3.61 The Productivity Commission has described awards as ‘an Australian idiosyncrasy with some undesirable inconsistencies and rigidities.’<sup>51</sup> In recent times there has been a significant reduction in the number of awards which has been welcomed by the business community.
- 3.62 The awards that remain, however, are still criticised for their complexity leading to a call for further simplification.
- 3.63 The Australian Small Business Commissioner stated:
- 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.<sup>52</sup>
- 3.64 The Commissioner commented that modern awards are a significant improvement on previous arrangements:

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49 Chamber of Commerce and Industry WA, *Submission 23*, p. 13.

50 Chamber of Commerce and Industry WA, *Submission 23*, p. 14. See also Restaurants and Catering Australia, *Submission 40*, p. 10.

51 Australian Government, Productivity Commission, ‘Workplace Relations Framework: Productivity Commission Draft Report Overview’, p. 4, <http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>, viewed 17 November 2015.

52 The Australian Small Business Commissioner, *Submission 11*, p. 6.

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.<sup>53</sup>

- 3.65 Mr Stephen Smith, Director, National Workplace Relations Policy, Australian Industry Group (Ai Group) gave the following perspective on these modern awards:

Our view is that there is a lot of scope to simplify the award system. We went from about 3,000 awards down to 122 industry and occupational awards, and that was a significant reduction, but every one of those awards is, on average, in excess of 50 pages long. They go to a vast amount of detail still in a whole range of areas, and the fact that they are so detailed makes it much harder to reduce the number of awards. We are suggesting not that there be different awards for small businesses but rather that the system should be much simpler for all employers, and that will have a particular benefit for small businesses given the higher reliance of small business on the award system.<sup>54</sup>

- 3.66 The Ai Group claimed that the complexity of current awards exacts a particularly heavy burden on small businesses. Ai Group called for simplifying the award system:

The award system must be simpler and less prescriptive for small business employers” and “...the highly prescriptive and inflexible nature of the modern award system is a particular problem for small business employers.

...the modern award system is far too complex and prescriptive for employers and it does not reflect a genuine safety net. This problem is especially the case for small business employers who have very little resources to navigate, interpret and implement modern awards terms. Usually in a small business the business owner is responsible for and undertakes all business functions, including human resources and payroll.

The level of detail in awards in areas such as types of employment, hours of work, breaks, leave, countless allowances, and numerous other areas especially cause problems for small business

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53 The Australian Small Business Commissioner, *Submission 11*, p. 6.

54 Mr Stephen Smith, Director, National Workplace Relations Policy, Australian Industry Group, *Committee Hansard*, Melbourne, 13 July 2015, p. 25.

employers and their employees ...What we have is 122 industry and occupational awards of approximately 66 pages each.<sup>55</sup>

**Figure 3.1 Citizen co-design with small business owners**

**Report prepared by Sweeney Research for Fair Work Commission: *Citizen co-design with small business owners***

This qualitative study was commissioned by the Fair Work Commission in the context of the 4 yearly review of modern awards to elicit practical insights from small businesses (1–19 employees) that are end-users of modern awards. The current consultation on modern awards may not necessarily capture the views of end-users from the small business sector who are not active participants (or who pay for their interests to be represented) in the workplace relations system. Accordingly, a citizen co-design process was proposed to engage some of these end-users in a qualitative study.

The overarching objective of the study was to understand the attitudes and behaviours of the small business community in relation to usage and usability of modern awards.

The research relied on the principles of citizen co-design to explore the usability of modern awards by considering matters relating to their format, content structure, language, and usability (known as ‘information architecture’)

A series of six group discussions and ten depth interviews were conducted with small business operators, resulting in a total of 47 individual participants in the study across a range of industries. The research was conducted in Victoria and New South Wales (NSW), across metropolitan and regional locations, from 17 June to 9 July 2014. The sample was split by business size (1-8 and 9-19 employees) and level of familiarity (more or less familiar) with modern awards. In all sessions, respondents explored a range of current modern awards and then compared these experiences with an exemplar modern award. The information architecture was further examined via a series of tasks that participants were asked to complete.

Consistent themes emerged across regional and metropolitan employers. These themes were also consistent across Victorian and NSW participants. Essentially, small business operators in this study faced similar challenges in relation to the modern awards.

As the study was qualitative in nature, the findings cannot be generalised across the entire small business community.

Source Sweeney Research, ‘A Qualitative Research Report on: Citizen co-design with small business owners’, prepared for the Fair Work Commission, August 2014, p. 5, <[fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf](http://fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf)>, viewed 10 December 2015.

3.67 Figure 3.1 (above) sets out the research design of research conducted by Sweeney Research for the Fair Work Commission. The report was made public in August 2014. The research found that the small business community had ‘very little confidence in the current modern awards’.<sup>56</sup> Specifically, the small business owners surveyed noted that the information in modern awards tends to be complex and convoluted which can lead to disengagement. As the report concluded:

...the challenges faced by the smaller end of the business community suggest that regulatory documents will struggle to have optimal impact if not presented in a manner that demonstrates an appreciation of the needs and capabilities of the end-user. Information that is too hard to deal with may result in ‘best guess’ solutions or avoidance of the document altogether.<sup>57</sup>

3.68 The Sweeney research report noted that small businesses’ ‘best guess’<sup>58</sup> approach included practices such as paying above the award for fear of misinterpreting the award’s conditions. In the report’s own words:

A key implication of the current modern award information architecture is that low expectations and poor experiences were acting as barriers to using the modern awards for the participants. At the same time, participants were acutely aware of needing to adhere to and follow the modern awards. To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they didn’t get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties.<sup>59</sup>

3.69 The Sweeney report added that this approach is a disincentive to employ:

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56 Sweeney Research, ‘A Qualitative Research Report on: Citizen co-design with small business owners’, prepared for the Fair Work Commission, August 2014, p. 6. [fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf](http://fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf), viewed 10 December 2015.

57 Sweeney Research, ‘A Qualitative Research Report on: Citizen co-design with small business owners’, prepared for the Fair Work Commission, August 2014, p. 7.

58 Sweeney Research, ‘A Qualitative Research Report on: Citizen co-design with small business owners’, prepared for the Fair Work Commission, August 2014, p. 25.

59 Sweeney Research, ‘A Qualitative Research Report on: Citizen co-design with small business owners’, prepared for the Fair Work Commission, August 2014, p. 7.

Some participants were changing their employment practises in order to avoid dealing with the modern awards, i.e. not hiring or moving toward contract labour.<sup>60</sup>

- 3.70 For many industries that have awards tailored to a range of tasks, such as construction and hospitality, it can be difficult for small business owners to ensure employees get correctly paid for each task that they perform. Sweeney Research made the following observations:

A key challenge for these small business operators was that there did not seem to be a modern award that clearly represented the type of activities of their employees. Participants stated that employees of small businesses are often required to multi-task and do not fit into neat or clear categories. For example, the same employee in a café could be part chef, part wait staff and part dish hand. This raised the key question for some participants of whether the modern awards were actually relevant to their business. Classification remained difficult even where an employee could be allocated to the role in which they perform the majority of their work, as this could still change depending on, for example, work flow, or peak times versus off-peak times.<sup>61</sup>

- 3.71 The Chamber of Commerce and Industry provided a detailed example of how the complicated award structure affects the construction industry:

The over-regulation of awards not only reduces flexibility, but also frequently establishes provisions that are overly onerous or difficult to for an employer to comply with. By way of example, the Building and Construction General On-site Award 2010 [MA000020] (Building Industry Award) provides for 69 separate allowances that may apply to an employee. Frequently, these allowances are payable based on the nature of work or the type of equipment that the employee is using for all or part of that day. These provisions require employers to maintain exceptionally complex records in order to be able to identify when allowances are payable. For example, clause 22.2(o) of the Building Industry Award provides that:

(o) Heavy blocks – employees laying other than standard bricks

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60 Sweeney Research, 'A Qualitative Research Report on: Citizen co-design with small business owners', prepared for the Fair Work Commission, August 2014, p. 7, <[fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf](http://fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf)>, viewed 15 June 2015.

61 Sweeney Research, 'A Qualitative Research Report on: Citizen co-design with small business owners', prepared for the Fair Work Commission, August 2014, p. 27, <[fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf](http://fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf)>, viewed 15 June 2015.

(i) Employees employed laying blocks (other than concrete blocks for plugging purposes) must be paid the following additional rates:

- where the blocks weigh over 5.5 kg and under 9 kg—3.2% of the hourly standard rate per hour;
- where the blocks weigh 9 kg to 18 kg—5.8% of the hourly standard rate per hour;
- where the blocks weigh over 18 kg—8.2% of the hourly standard rate per hour.

In order to comply with this provision, the employer's payroll function needs to know not only when the employee commenced and finished work that day, but also what work has been performed (in this case laying blocks), the nature of the that work (in this case how heavy the blocks are) and for how long the employee was engaged in that activity.<sup>62</sup>

3.72 Ms Madeleine Skerritt, co-owner of a small building business, felt that this award had been developed with little thought as to small businesses' ability to execute without assistance from specialists. Ms Skerritt provided an example of a typical employee's workday, outlining the onerous task her small business has in processing wages:

...on any given day we could be removing asbestos, working at heights, working in confirmed (sic) spaces, installing insulation, engaged in dirty work, lifting heavy blocks, carrying fuels & oils, spraying plaster, bagging bricks, cutting tiles, using secondhand timber, repairing roofs, computing quantities, and using pneumatic tools; each of these activities attracts a 'special rate' which is an additional hourly rate on top of the standard rate. These additional rates all vary depending upon the activity.

For instance Wednesday of last week we undertook the following activities that attract special rates:

- Removed asbestos for 1 hour - 4% added to hourly rate for wearing protective clothing & 10.8% added to hourly rate for asbestos removal
- Installed insulation for 2.5 hours - 4% added to hourly rate
- Crawled under a floor for 2.5 hours - 3.2% added to hourly rate for dirty work and 4% added to hourly rate for confirmed (sic) work

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62 Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 18. See also Madeleine Skerritt, *Submission 6*.

- Lifted heavy blocks for 0.5 hour – 3.2% added to hourly rate for blocks under 9 kgs and 5.8% added to hourly rate for blocks under 18 kgs.
- Used a pneumatic tool for 0.5 hour – 17.6% added to the hourly rate
- Used secondhand timber for 2 hours - 12.6% added to hourly rate

As you can see detailed diary entries are required throughout the day to keep track of what activities were undertaken and for how long, in order to calculate the pay for our employee; this is an onerous task.<sup>63</sup>

3.73 In a similar vein, the Council of Textile and Fashion Industries of Australia (TFIA) Limited submitted that the current Textile, Clothing and Footwear (TCF) Award also does not provide the requisite flexibility that meets the reality of their industry. For example, the TCF award limits the amount of hours that a casual employee can work, requiring part time employees to work a minimum of 15 hours per week. Additionally, the award places the onus on small businesses to ensure compliance of their contractors as well as the contractors employed by their contractors. This is not suited to the intermittent nature of the TCF industry. As the TFIA argued:

The current TCF Award, its rules around using contractors, and the onerous paperwork required when employing outworkers, has discouraged many businesses from using Australian workers, and in fact even disallows businesses from being created – let alone employing. TFIA members have reported that they have lost work due to the current legislation. This reduction in work has meant their turnover has been affected and they have had to reduce their staff levels to survive. Many businesses such as manufacturers are hesitant to work with new clients based on their need to give people ongoing full or part time work (minimum 15 hours per week) and concerns around being able to continue this capacity. Others have had to make decisions to look at options other than manufacturing in Australia in order to maintain the commercial viability of their businesses.<sup>64</sup>

3.74 Ms Jenny Layton, Member, TFIA, provided a specific example of where the award provisions had led to an employee resorting to welfare:

We had a pattern maker – and it is not just the machinist – who worked for 11 people. She was a single mother with three kids. She had been working in the industry, but every time the kids

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63 Madeleine Skerritt, *Submission 6*, pp. [1-2].

64 Council of Textiles and Fashion Industries of Australia Ltd. (TFIA), *Submission 25*, p. [2].

were sick et cetera she lost time out. So she set up in her garage and worked for 11 different people as a contractor. She borrowed \$25,000 from the bank to buy all the equipment needed. She is now on Centrelink payments and has moved to Ballarat because none of those people could guarantee her a minimum of 15 hours a week every week of the year. She went down to about two. We took her on for quite a few days, but we could not guarantee her either, because we have five pattern makers in-house. She ended up working for Bunnings at weekends, but it was not enough to keep her going. She was earning about \$155,000 a year, and she is now on Centrelink payments. That happened in six months. It happened about a month ago.<sup>65</sup>

- 3.75 Mr Philip Endersbee, Member, TFIA, advised that the TCF Industry is the only such industry to have this award and it is severely stifling growth and employment prospects:

In the building industry, with plasterers, painters, electricians et cetera, if one said that the builder was totally responsible for every one of these people – having to fill in a Fair Work submission for everything they do on a quarterly basis and being responsible for going down to the plasterer and not just seeing the subbie but seeing the guys doing the job and working out what their labour rate was and making sure that that labour rate fitted in with the award structure – then you would have mayhem. But that is the way it applies in the textile industry.<sup>66</sup>

- 3.76 Master Electricians Australia claim that modern awards are not flexible enough to fit with the changing business environment:

Award inflexibility is a common theme for members. In an increasingly '24/7' economy, many contractors can only perform maintenance and service work during shut down or quiet periods of business. There is a mismatch between client demand for when the work is to be performed and the inflexibilities in the modern award with regard to the arrangement of the hours of work ...and...Small businesses, which make up the majority of the employers within the industry, are most significantly impacted in this regard as they rely heavily on the modern award for their terms and conditions of employment. These members describe

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65 Ms Jenny Layton, Member, Council of Textile and Fashion Industries of Australia (TFIA), *Committee Hansard*, Melbourne, 13 July 2014, p. 44.

66 Mr Philip Endersbee, Member, Council of Textile and Fashion Industries of Australia (TFIA), *Committee Hansard*, Melbourne, 13 July 2015, pp. 42-43.

that they undertake jobs at a loss in order to win the work and as such have very limited margins on almost all types of work.<sup>67</sup>

3.77 The Ai Group, in their 2014 national CEO survey, found that, modern awards do not always meet the needs of employers:

A number of modern awards provide blanket restrictions on the types of employees that an employer can engage. For example, several awards do not recognise part-time or casual work at all and require employers to only offer full-time employment. This regulatory restriction limits employers' ability to engage employees who may have family responsibilities or require flexible working hours. It also restricts how a business can use labour hire services to manage peaks and troughs in demand. In addition, there are still many awards that do not permit an employer and employee to agree on non-monetary arrangements for working additional hours, such as time off in lieu of an overtime penalty.<sup>68</sup>

3.78 Streamlining of modern awards to support small business' needs has been highlighted as a solution to these problems. Industry bodies such as the Chamber of Commerce and Industry Western Australia call for wider stakeholder consultation in the consideration of this matter, as opposed to previous methods which were limited to third party consultation.<sup>69</sup>

3.79 Modern awards need to be reviewed to make them more user friendly for small businesses with limited resources. In its submission to the inquiry the New South Wales Business Chamber suggested that a simple set of minimum rules be established. These rules would support increase productivity and the employment of new staff via a proposed *Small (Micro) Business Schedule*:

Key features of the Schedule include:

- Applies to any employer, and their employees, when that employer employs four employees or less.
- Regular, fixed starting and finishing times for permanent employees over a maximum of six days per week, variable by agreement, or by the employer on seven days' notice.

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67 Master Electricians Australia, *Submission 20*, p. 4.

68 Australian Industry Group (Ai Group), 'National CEO Survey: Burden of Government Regulation', March 2014, p. 22, [aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE\\_CONTENT/Publications/Reports/2014/Burden\\_of\\_Government\\_Regulation\\_Mar\\_2014.pdf](http://aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Publications/Reports/2014/Burden_of_Government_Regulation_Mar_2014.pdf), viewed 19 June 2014.

69 Chamber of Commerce and Industry of Western Australia, *Submission 23*, pp. 4-5.

- Ordinary hours must not exceed 10 hours on any day or shift except by agreement, in which case the maximum number of hours is 12.
- Employees must not be required to work for more than five hours without an unpaid break of at least 30 minutes.
- There will be standardised overtime provisions, with time worked in excess of an average of 38 hours per week by full-time employees to be paid at the rate of 150% for the first three hours, and 200% thereafter. For part-time employees who agree to work extra hours, overtime will not become payable until the part-time employees work in excess of 38 hours per week.
- All wages will be required to be paid in accordance with the Fair Work Act's minimum payment period i.e. weekly, fortnightly or monthly.
- Provision for micro business employers to substitute gazetted public holidays with substitute days, provided employees (or the majority of the workforce) consent.<sup>70</sup>
- The Shop Distributive and Allied Employees Association, however, submitted that any changes to the award system could adversely affect the moral of jobseekers:

Any fundamental change in the award system would seriously disadvantage employees and act as a major disincentive to many who would otherwise seek employment.<sup>71</sup>

3.80 The Shop Distributive and Allied Employees Association (SDA), however, submitted that any changes to the award system could adversely affect the morale of jobseekers:

Any fundamental change in the award system would seriously disadvantage employees and act as a major disincentive to many who would otherwise seek employment.<sup>72</sup>

3.81 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia/Liquor Retailers Australia stated that in his industry, the current award system, works well:

In our instance, I think an age-based award is absolutely fine because it does provide flexibility. If someone shines and does well, our members will reward that and they will pay them what they are worth...I think the current stepped award system is satisfactory. It does give our members incentive to employ young people and give them a start. We need that gap. There are lots of menial tasks, particularly when it is busy, when we require just

70 NSW Business Chamber, *Submission 38*, pp. 2-3.

71 Shop, Distributive and Allied Employee's Association, *Submission 15*, p. 8.

72 Shop, Distributive and Allied Employee's Association, *Submission 15*, p. 8.

menial skills that the juniors can perform and perform well. We give more responsibility to the adults. Adults will not be pushing trolleys, filling baskets or taking groceries out to people's car boots and things like that.<sup>73</sup>

3.82 Mr Peter Strong, the Chief Executive Officer of the Council of Small Business Organisations of Australia (COSBOA), referred to retail and hospitality small businesses' view of ideal workplace relations:

...when it is a retail shop or hospitality or whatever then it should be much simpler. We know what the wages are. And with a small business industrial award I say that what we want is for the employer and the employee, neither of whom is an expert on this, to look at a computer screen and it is obvious: it is 20 bucks, 50 bucks, two hours. Whatever it is, it is really obvious – no ambiguity. You cannot, after you leave, go and complain to someone and say, 'I thought it should have been 10 hours', or whatever. That is our Holy Grail when it comes to workplace relations.<sup>74</sup>

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73 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia/Liquor Retailers Australia, *Committee Hansard*, Melbourne, 13 July, p. 10.

74 Mr Peter Strong, Chief Executive Officer, Council of Small Business Organisations of Australia, *Committee Hansard*, 11 November 2015, Canberra, p. 5.

## Enterprise bargaining

- 3.83 Figures 3.3, 3.4 and 3.5 explain the meaning and the context of the terms ‘enterprise bargaining’, the ‘better off overall test’ and ‘individual flexibility agreements’.

**Figure 3.2 Enterprise bargaining**

**Enterprise bargaining**

Following almost one century of centralised conciliation and arbitration, Australia introduced enterprise-level bargaining in 1993. Enterprise bargaining involves employees working together to reach an agreement with their employer over the terms and conditions of their employment. Enterprise bargaining can potentially yield efficiencies through negotiating and using one, rather than many, individual arrangements. It is also a vehicle for a delicate balance between the parties’ interests. On the one hand, it provides a counterweight to the bargaining power of the employer (the adversarial aspect to bargaining), and, on the other hand, the scope for cementing cooperation between parties that have a mutual stake in the efficiency and performance of the individual enterprise. Enterprise bargaining provides some flexibility to take into account the special circumstances of any one firm. This contrasts with collective bargaining across multiple enterprises and industries (the arrangements preceding 1993), which did not have a focus on the individual enterprise.

Source Australian Government, Productivity Commission, ‘Workplace Relations Framework: Productivity Commission Draft Report Overview’, p. 31

**Figure 3.3 The better off overall test (BOOT)**

**The better off overall test (BOOT)**

The application of the BOOT is creating uncertainty during the bargaining process and at the agreement approval stage. The main source of confusion lies with how to assess whether the relevant groups of employees (or prospective employees in the case of a greenfields agreement) are better off overall compared with the relevant award. A particularly vexing issue — for both enterprise agreements and individual flexibility arrangements — is how to trade off non-monetary benefits against other benefits of an award.

While the BOOT is not in principle defective, in practice it has sometimes lent itself to a ‘line by line’ approach, which involves assessing whether the relevant class of employees are made better or worse off by each individual term in the agreement when compared with the relevant term in the award. The intention of the BOOT was that it should be a global test, which takes into account the sum of all the benefits of an agreement and tests those against the overall benefits of the award. Shifting to a new ‘no-disadvantage’ test is likely to assist in supporting that intention. It would still ensure that employees were not disadvantaged compared with the award — an essential requirement — while allowing employees and employers to develop agreements that represent wins for both parties.

Source Australian Government, Productivity Commission, ‘Workplace Relations Framework: Productivity Commission Draft Report Overview’, p. 32.

**Figure 3.4 Individual flexibility agreements (IFAs)****Individual flexibility agreements (IFAs)**

Even when part of an enterprise agreement, all employment contracts are, in law, individual arrangements. A WR system merely provides different ways in which such contracts can be packaged, weighing up the advantages and disadvantages of individual flexibility, the costs of contract variations across workers in the same enterprise, and the risks of power imbalances that arise from different contractual arrangements.

While most employees are paid at rates determined by an enterprise agreement or stipulated in an award (figure 1), a sizeable minority are paid on an individual basis at above-award rates. A relatively few — around 2 per cent of all employees covered by the Fair Work Act — have formed so-called ‘individual flexibility arrangements’ under the Act.

In principle, individual flexibility arrangements allow an employee and employer to negotiate terms and conditions that suit their personal circumstances. For example, an individual flexibility arrangement may change rostering arrangements to suit an employee and an employer. An individual flexibility arrangement may allow, but does not require, an employee to forgo some award or enterprise agreement conditions so long as they pass a ‘better off overall test’ as described above. (The BOOT is against the enterprise agreement if an employee is opting out of the agreement, but otherwise against the pre-existing award or award-based arrangement.) No agreement can trade off conditions specified under the National Employment Standards.

Individual flexibility arrangements represent a new marque of statutory individual arrangements, and supersede several variants of Australian Workplace Agreements (AWAs). Under WorkChoices, AWAs were not subject to a no-disadvantage test, and were contentious because some employees who lacked bargaining power had their entitlements reduced. Such AWAs were offered as a condition of employment (‘take it or leave it’) and had a low safety net threshold. Available data suggest the take up of AWAs was around 3 per cent of employees. Prior to WorkChoices, AWAs had stronger protections and were less controversial.

Source Australian Government, Productivity Commission, ‘Workplace Relations Framework: Productivity Commission Draft Report Overview’, p. 35.

3.84 Enterprise bargaining has been highlighted as a barrier to overcoming the expense of penalty rates. While some large businesses and corporations such as McDonald’s, are able to use their resources to develop enterprise agreements to alleviate these costs, small businesses that are under resourced often do not have such luxuries. Instead, they are subject to ill-fitting awards that hinder a small businesses’ ability to flourish.

3.85 The Productivity Commission points out:

Enterprise bargaining generally works well, although it is often ill-suited to smaller enterprises. However,

- the 'better off overall test' used to assess whether an agreement leaves employees better off compared with the award can sometimes be applied mechanically, losing some benefits of flexibility for employees and employers. Switching to a no-disadvantage test with guidelines about the use of the test would encourage win-win options. The same test should be used for individual arrangements
  - bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines. A limited menu of bargaining options would address the worst deficiencies, while taking account of the different nature of greenfields projects.<sup>75</sup>
- 3.86 The line by line approach of the better off overall test (BOOT) leaves small business employees worse off.
- 3.87 While enterprise agreements still need to meet the BOOT, a large business' ability to tailor these agreements to suit their business gives them an unfair advantage. Further, there are claims that the BOOT is inconsistent in its evaluation methods and its outcomes can depend on the views of the individual assessor.<sup>76</sup>
- 3.88 CCIWA recommends that a simplified system be made available for small businesses that enable them to establish their own enterprise agreements without the need for specialist assistance.<sup>77</sup>

### Individual flexibility agreements

- 3.89 A solution to the inability of many small businesses to effectively bargain is with the ability to provide an individual flexibility agreement (IFA) for each of their employees. Each IFA is intended for businesses to be able to fairly adjust a worker's pay and conditions to best suit the needs of both the business and the employee.
- 3.90 Business South Australia outlined the benefit of an IFA over an enterprise agreement:
- Individual agreements are necessary in the Australian workplace environment as collective bargaining is not practical for small business. These businesses are characterised by their informal nature and the close relationship between owners and employees. Often small businesses seek to simplify their industrial

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75 Australian Government, Productivity Commission, 'Workplace Relations Framework: Productivity Commission Draft Report Overview', p. 4, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>>, viewed 11 December 2015.

76 Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 27.

77 Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 27.

arrangements and provide working conditions that cater for the needs of their individual employees and their business. The use of external bargaining agents often goes against the culture of a small business, where employer and employee relations are established and maintained on personal interaction. Further to this, collective bargaining is cost-inhibitive to small businesses, and our members tell us that they see entering into a collective agreement as unnecessary and more geared towards larger organisations that can find efficiencies in agreement making on a larger scale. It is important that individual workers and their employer are able to reach agreements, departing from the relevant award or enterprise agreements, subject to the worker not being disadvantaged.<sup>78</sup>

- 3.91 IFAs are only able to be used if each agreement is able to meet the BOOT. The BOOT, however, also has its drawbacks as the Victorian Automobile Chamber of Commerce (VACC) explained:

In addition, the Better Off Overall Test (BOOT) has also prevented employers from achieving workplace flexibility and productivity. The new BOOT has effectively taken productivity out of the equation in negotiating an enterprise agreement. This is contrary to the objectives at the beginning of the Fair Work Act 2009 and in section 171.<sup>79</sup>

- 3.92 The VACC believes that the forgone 'no disadvantage test' was a better and fairer option than the BOOT:

[With the BOOT] There is no scope for an employer to negotiate flexible pay arrangements and working arrangements that suit the nature of the business. The 'no disadvantage test' that operated prior to 27 March 2006 provided employees with some scope for flexibility and productivity, but within defined parameters.<sup>80</sup>

- 3.93 The Chamber of Commerce and Industry of Western Australia also believes this test is of greater benefit than the BOOT:

Having a no disadvantage test against the [National Employment Standards] would also allow for the speedy approval of agreements that could be administratively applied, without the cost associated with approval by members of the FWC.<sup>81</sup>

- 3.94 The Productivity Commission sees benefit in a no disadvantage test:

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78 Business South Australia, *Submission 27*, p. 2.

79 Victorian Automobile Chamber of Commerce, *Submission 21*, p. 15.

80 Victorian Automobile Chamber of Commerce, *Submission 21*, p. 15.

81 Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 27.

Shifting to a new 'no-disadvantage' test is likely to assist in supporting that intention. It would still ensure that employees were not disadvantaged compared with the award – an essential requirement – while allowing employees and employers to develop agreements that represent wins for both parties.<sup>82</sup>

## Unfair dismissal

- 3.95 Unfair dismissal laws are an accepted part of the Australian worker protection landscape. By law an employer cannot dismiss an employee in a 'harsh, unjust or unreasonable' manner.
- 3.96 In some evidence received, unfair dismissal laws were presented as a deterrent to small businesses taking on new employees. The evidence indicates that current unfair dismissal laws have resulted in many employers being wary of employing permanent staff, and instead of using casuals, family members and contractors. This evidence will be discussed here.
- 3.97 Submitters suggested the current unfair dismissal laws are geared at the protection of the employee providing low risk and low cost access to reinstatement. However, small businesses are often faced with considerable time and financial costs, such as the requirement for legal representation, sometimes through no fault of their own.<sup>83</sup> The Productivity Commission stated:

The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor.<sup>1</sup> The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain procedures meant that the dismissals were unjust, unreasonable and therefore unfair.<sup>84</sup>

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82 Australian Government, Productivity Commission, 'Workplace Relations Framework: Productivity Commission Draft Report Overview', p. 32, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>>, viewed 11 December 2015.

83 Chamber of Commerce and Industry of Western Australia, *Submission 23*, pp. 32-33.

84 Australian Government, Productivity Commission, 'Workplace Relations Framework: Productivity Commission Draft Report Overview', pp. 27-28, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>>, viewed 11 December 2015.

3.98 The Chamber of Commerce and Industry of Western Australia stated:

In the case of small businesses, concern over the unfair dismissal laws affects their preparedness to employ staff, or results in them seeking to limit their exposure to the provisions through the engagement of casual or labour hire employees. This is particularly the case amongst those businesses which have had to deal with an unfair dismissal application.<sup>85</sup>

3.99 Master Builders Australia lamented the extensive process involved in dealing with an unfair dismissal case, which is time taken away from a small business' ability to operate efficiently:

After the first 12 months of service of an employee, a dismissal by a small business employer can be challenged on both substantive and procedural fairness grounds. The issue is that sometimes the procedural fairness elements are not met. Even though there is the Small Business Fair Dismissal Code in place at the moment, that was designed to recognise the particular position of small business. But it is not well used, because you have to prove that you have complied with it. So quite often our members are caught up by the procedural fairness elements – the written warnings, the counselling, the requirement perhaps to train a person if they are lacking in a specific area related to their performance. There is a massive body of case law that has grown up in this area.

Ultimately, unfair dismissal, if you employ one or two people, can be an extraordinary strain on their business because that is 50 per cent of your workforce.<sup>86</sup>

3.100 The Victorian Automobile Chamber of Commerce stated that 'employers are not granted the same procedural fairness allocated to employees',<sup>87</sup> contributing to a wariness among small businesses in employing permanent staff.

3.101 Mr William Chesterman, Industrial Relations Manager, Victorian Automobile Chamber of Commerce, provided an example of where the employer had a strong case the process simply became too expensive and the matter settled to eliminate further costs to the business:

You will have certain lawyers and consultants picking off the process and taking a small business employer to court or the Fair Work Commission. I went through it only the other day. It was a

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85 Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 33.

86 Mr Richard Calver, National Director, Industrial Relations and Legal Counsel, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 5.

87 Victorian Automobile Chamber of Commerce, *Submission 21*, p. 8.

larger employer; it was a dealership. It was quite clear that there was one of the fee-for-win-only consultants representing the employee, and it was pretty clear when the consultant dropped the claim from 12 weeks to six weeks that he recognised that the employer did not really have much of a case after we had presented our position. I said that we should run it because I thought we had a good case. He said, 'That means I take four mechanics out of a dealership for a day and a half or two days. We'll settle for four weeks,' and that is what we did. That is one of the problems that I have with the unfair dismissal process.<sup>88</sup>

3.102 Small businesses that are faced with, or have been affected by, the onerous and expensive task of defending themselves against an unfair dismissal claim are more likely to have a tendency to employ more casual staff in place of part-time or permanent.

3.103 Providing 'go away money', which pays the claimant to drop the case, is a method often used by small businesses to avoid lengthy and costly cases. The Australian Chamber of Commerce and Industry stated:

'Go away money' is an entrenched part of the system. Three quarters of matters conciliated settle with a monetary payment and 80 per cent of employers are influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings in choosing to settle rather than proceeding to an arbitrated outcome. Employers make commercial decisions to dispense with applications rather than incur further expenditure defending a claim.<sup>89</sup>

3.104 The Victorian Automobile Chamber of Commerce provided an example of where 'go away money' had been used by one of their members to avoid ongoing unfair dismissal costs:

An apprentice was dismissed after the owner of a business found his apprentice at the workplace on Good Friday with three of his friends. The apprentice and his friends were working on their cars and drinking alcohol. Two other employees were also on the premises however they were authorised to be there.

When the apprentice was asked to remove the vehicles, the apprentice swore at the owner and then on removing the last vehicle, he spun the wheels throwing up stones over the employer

88 Mr William Chesterman, Industrial Relations Manager, Victorian Automobile Chamber of Commerce, *Committee Hansard*, Melbourne, 13 July 2015, p. 40.

89 Australian Chamber of Commerce and Industry, *Submission 22*, p. 33. See also Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 32, and Victorian Automobile Chamber of Commerce, *Submission 21*, p. 8.

and his companions who were present. The apprentice also drove a vehicle off the property although he did not have a Victorian licence and spun the wheels again 100 metres from the business premises. The employee was dismissed.

The apprentice made an unfair dismissal claim and his defence was that other people were on the premises too. The matter was settled for four weeks' pay. The owner decided it would be too expensive and time consuming to go through a hearing.<sup>90</sup>

## Employee v contractor

3.105 Whether a worker is characterised as an employee or a contractor has implication for a small business. As Mr Mark Brennan, Australian Small Business Commissioner explained:

...there are more compliance requirements associated with engaging an employee than there are for engaging a contractor. That underpins where the problem is. There seems to be a looseness. You could be a contractor for one purpose and an employee for another. In some sectors it seems to operate that way as a matter of convenience. By way of example, in one of my previous positions I was the Victorian Small Business Commissioner, the first commissioner of any type anywhere, and we dealt with the owner-drivers sector. The bigger transport companies tended to treat the owner-drivers as employees when it suited them and contractors when it suited them.<sup>91</sup>

3.106 In his submission, the Australian Small Business Commissioner also acknowledged the complexity of the employee/contractor distinction:

... 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.

And

...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.<sup>92</sup>

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90 Victorian Automobile Chamber of Commerce, *Submission 21*, p. 27.

91 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 2.

92 The Australian Small Business Commissioner, *Submission 11*, pp. [3 & 5].

3.107 The Fair Work Ombudsman (FWO) sets out the factors that contribute to determining between an employee and an independent contractor in the following table (Table 3.1):

**Table 3.1 Who is an employee? Who is an independent contractor?**

<b>Indicator</b>	<b>Employee</b>	<b>Independent Contractor</b>
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week,	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

Source Australian Government, Fair Work Ombudsman, 'Contractors and employees - what's the difference?', <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/rights-and-obligations/contractors-and-employees-whats-the-difference>>, viewed 2 October 2015.

- 3.108 The Small Business Commissioner commented on the ATO's and FWO's advice:

...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 (sic) changes the results from a contractor to an employee. There is a need for greater clarity, particularly across government agencies.<sup>93</sup>

- 3.109 Master Builders Australia pointed to a specific example of how confusing definitions between employees and contractors can be when looking at the issue of payment of worker's compensation:

Whether a builder has responsibility for payment of workers' compensation to a subcontractor depends upon the definition of 'worker' in the workers' compensation legislation of the State or Territory where the work is being done.

The legislation may define persons as 'workers', and therefore as employees, despite the fact that by other tests, and for all other purposes they are independent contractors.

WorkCover NSW provides the following advice (per an advisory sheet titled Worker or Contractor?):

*A person may have been hired as a contractor and be a contractor for other purposes such as tax, but still be a worker for the purpose of workers' compensation.*<sup>94</sup>

- 3.110 The MBA proposed that a government supervised registration system could be established:

... preferably hosted by the Australian Taxation Office (ATO) where contractors can voluntarily register for contractor status, subject to a single set of tests, recognised across agencies and jurisdictions which reflect the operation and conduct of a modern building sector.<sup>95</sup>

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93 The Australian Small Business Commissioner, *Submission 11*, p. 4.

94 Master Builders Australia, *Submission 32*, p. 25.

95 Master Builders Australia, *Submission 32*, p. 27.

3.111 The benefits of such a register are that it would 'require minimal Government supervision'<sup>96</sup> and:

...establish clear separation between commercial law which should govern independent contractors, and workplace relations law which should govern employers and employees.<sup>97</sup>

**Figure 3.5 Minimum wages**

**Minimum wages**

Minimum wages in Australia are set by an FWC Expert Panel, taking into account changes in economic conditions and representations, especially from the government, business and union stakeholders. It generally awards modest rises in minimum wages, and its predecessors have occasionally suspended increases during downturns. A commonly used measure of the comparative level of the minimum wage is its ratio to the median wage rate, which also enables meaningful comparisons with other countries. While the minimum-to-median wage ratio remains high in Australia compared with most other countries (France and New Zealand being the notable exceptions), it has declined over the past decade.

Source Australian Government, Productivity Commission, 'Workplace Relations Framework: Productivity Commission Draft Report Overview', p. 13, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>>, viewed 14 December 2015.

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96 Master Builders Australia, *Submission 32*, p. 27.

97 Master Builders Australia, *Submission 32*, p. 27.

**Figure 3.6 Wages for juniors, apprentices and trainees****Wages for juniors, apprentices and trainees**

The FWC sets out minimum pay rates for younger workers, apprentices and trainees. Wage rates for juniors are a share of the adult minimum wage and increase with age until the person reaches 21 years old (although some awards vary this). Similarly, trainee wage rates also have an age-based structure, with rates depending on the time elapsed since leaving school. Apprentice wages vary across awards and are set as a proportion of a qualified tradesperson's wage and increase the closer the apprentice is to completion.

Australia is one of around the fifty per cent of OECD countries that set youth wages as a share of the adult rate. Indeed, notwithstanding the high ratio of the adult minimum wage to median wages, Australian youth wages start at comparatively low levels relative to those in many other countries. For example, a fast food level 1 employee aged under 16 years could have more than a year of experience, but would get \$7.59 an hour (44 per cent of the adult minimum wage). In many states in the United States, many such employees would receive at least US \$8. The decisive test in some countries is not age per se, but also experience, with substantially lower wages for someone with short experience in a job. In the United States, the federal minimum wage is around 60 per cent of the adult minimum for a person aged under 20 who has worked with their employer for less than 90 days. New Zealand has a similar system, with no minimum wage for people aged less than 16 years, and a discounted wage for 16- and 17-year olds with less than six months job experience with their employer.

Source Australian Government, Productivity Commission, 'Workplace Relations Framework: Productivity Commission Draft Report Overview', p. 18, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft-overview.pdf>>, viewed 14 December 2015.

**The general cost of labour**

- 3.112 The cost of labour in general can potentially inhibit small business employment. The higher the cost of the employee, the less likely a small business will be able to afford to employ. Chapter 2 outlines a number of wage subsidies that the Australian Government have instituted.
- 3.113 The overarching need for a business to successfully manage wage and other costs is critical to business success:

Management of costs is an important factor for the successful operation of all businesses. In the case of retail, hospitality and other service based industries, wages is one of the most significant costs.<sup>98</sup>

3.114 In service orientated industries such as hospitality wage costs are of particular importance given the labour-intensive nature of the work that is often undertaken outside standard operating hours. Restaurant and Catering Australia noted that:

As a sector dominated by small business, the hospitality sector bears a disproportionate cost burden of the workplace relations system due to its labour intensity and customer service focus. R&CA's 2015 Industry Benchmarking Survey found wages and staff on-costs can represent up to 42.1 per cent of a business's expenses.<sup>99</sup>

3.115 Restaurant and Catering Australia also identified a range of other issues. Their submission stated:

Payroll tax, PAYG, superannuation, penalty rates and income tax obligations all represent a greater proportion of revenues compared to small businesses operating in other sectors. In addition, the impact of penalty rates is greatest on those industries where the days and hours of work are not considered 'standard', meaning industries where weekend, evening and night work are common. The hospitality industry is no exception to this rule.<sup>100</sup>

3.116 The Australian Chamber of Commerce and Industry identified a direct link between the cost of wages and a small business's ability to create jobs:

When capacity of employers to offer sufficient work is constrained (including as a result of operational and compliance costs), this heightens the risk that too large an increase in the minimum wage will lead to reduced employment and working hours.<sup>101</sup>

3.117 In the small business employment market where skills and experience are critical to employment decisions, junior wages cutting out after age 20 acts as a disincentive for small business to employ younger workers between the ages of 20 and 25. Fingerprint Me Youth Employment Academy highlighted this issue:

Considering that a twenty year old with no experience, and a skilled forty year old are the same price per hour, deciding who to employ if a business owners personal assets are at stake becomes clear. ... The Fair Work Act has priced youth labour from the age of twenty at a rate that is uncompetitive for small business to contemplate.<sup>102</sup>

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99 Restaurant and Catering Australia, *Submission 40*, p. 4.

100 Restaurant and Catering Australia, *Submission 40*, p. 8.

101 Australian Chamber of Commerce and Industry, *Submission 22*, p. 21.

102 Fingerprint Me Youth Employment Academy, *Submission 12*, p. 3.

3.118 The statement above refers to Clause 20.3 of the *Restaurant Industry Award 2010* which provides:

20.3 Juniors – minimum wages

(a) The minimum rate of wages for junior employees will be the percentages as set out below of the rate prescribed for the adult classification appropriate to the work performed for the area in which the employee is working.

Age	%
16 years and under	50
17 years and under	60
18 years of age	70
19 years of age	85
20 years of age	100 <sup>103</sup>

3.119 The key, according to Mr Peter Coronica of Fingerprint Me Youth Employment Academy, is that young people must have the following before the age of 20:

The two things we touched on were making them job ready with job skills, ideally at the end of school, and the career goal. The career goal needs to be realistic. When you have someone who is 20 years of age or beyond entering the workforce without a career goal they end up playing what we call hopscotch, hopping among employers looking for their ideal fit. Employers are fed up. They are tired of young people trying to find themselves in the workplace. If young people at 15 or 16 could have a career goal where there is really realistic demand, say, surveying, when 90 per cent of graduates get full-time work and it is a growing industry – there are many others – 40 per cent of employers claim they cannot fill skilled roles but 32 per cent of university graduates are either unemployed or underemployed. That shows that university is not the ticket anymore. Otherwise, the employers would be filling roles and university graduates would all be getting jobs. So realistic career goals from 15 or 16 work because young people earn 50 per cent to 70 per cent of the adult wage rate. That gives employers an incentive to hire them and to overcome the restrictions in the Fair Work Act from age 20 and above.<sup>104</sup>

103 Australian Government, Fair Work Ombudsman, 'Restaurant Industry Award 2010', Clause 20.3, <<http://awardviewer.fwo.gov.au/award/show/MA000119>>, viewed 14 December 2015.

104 Mr Peter Coronica, Chief Executive Officer and Founder, Fingerprint Me Youth Employment Academy, *Committee Hansard*, Melbourne, 13 July 2015, p. 3.

3.120 The Small Business Commissioner, Mr Mark Brennan stated that in regional areas such as Tasmania, the cost of wages is an issue especially when small businesses are in direct competition with the public sector for quality employees:

Small businesses in Tasmania say that one of the real problems for them is that they cannot compete with the public sector in the level of wages. They cannot afford to pay the same rates that the Commonwealth or Tasmania state governments are paying their people. They get some good people in, they get a bit of experience with the small business and then they apply for a job with the government and the government can pay more.<sup>105</sup>

3.121 While business groups have often identified minimum wages as a barrier to employment in small business, the union movement has argued the need for adequate minimum wages to attract young people to work in an industry. Mr Ian Blandthorn, Assistant Secretary, Shop, Distributive and Allied Employees' Association told the Committee:

In terms of minimum wages, they are critical to people having any opportunity at all to live decently with dignity. If you cannot get a decent wage in one industry, you are going to go elsewhere, and that is where it impacts on employment. It goes back to the discussion we were having earlier about why a lot of young people look for industries other than the sorts of industries that we deal with for their future. It is because of the levels of income. To cut it further creates an even bigger disincentive for young people to seek or retain employment in these sorts of industries.<sup>106</sup>

3.122 Ms Julia Fox, Industrial Officer, Shop, Distributive and Allied Employees' Association, identified the particularly harmful impact that a cut in minimum wages would have on women:

A major disincentive I see in cutting the minimum wage is the impact on women. I think that, when you look back at Work Choices and all the studies that followed into the impact those cuts had on women, that is a really important issue. If you disincentivise and keep reducing the minimum wage or take penalty rates out – women are predominant employees in retail, hospitality, cleaning, the low income sector. That is where women, unfortunately, do make up a lot of the workforce. You are disincentivising by cutting. They will just stay home with children

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105 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 5.

106 Mr Ian Blandthorn, Assistant Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, pp. 22-23.

because the tax system does not work and they are on work that is not able to eventuate a decent income. So I think you have to build female workforce participation into this debate and talk about what can be done to lift that. With the gender gap only getting worse, I think that is something people need to focus on.<sup>107</sup>

## Workplace health and safety

- 3.123 Onerous and jurisdictionally inconsistent Work Health and Safety (WHS) requirements can dissuade small businesses from employing.
- 3.124 Australia's workplace has gone through recent changes to the workplace health and safety environment has been recently reformed to align all jurisdictions' WHS requirements. These changes, using model WHS legislation are designed to bring all Australian jurisdictions into alignment in their regulation of WHS requirements.
- 3.125 All states and territories except WA and Victoria have implemented the model Work Health and Safety laws.<sup>108</sup>

## Workers' compensation

- 3.126 Each state and territory has its own workers' compensation scheme and the Commonwealth has three schemes – one for Commonwealth employees and authorities licensed to self-insure under the *Safety, Rehabilitation and Compensation Act 1988* (Commonwealth), one covering seafarers and one covering military personnel.
- 3.127 The Australian Small Business Commissioner highlighted the potential complexity of multi-jurisdictional workers compensation arrangements. He noted that while 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:
- ... 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

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107 Ms Julia Fox, Industrial Officer, Shop, Distributive and Allied Employees Association, *Committee Hansard*, Melbourne, 13 July 2015, p. 23.

108 Safe Work Australia, 'Jurisdictional progress on the model work health and safety laws', <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/jurisdictional-progress-whs-laws>>, viewed 16 December 2015.

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.<sup>109</sup>

3.128 The Commissioner recommended 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.<sup>110</sup>

## Penalty rates

3.129 The Productivity Commission describes penalty rates as follows:

Many Australians work non-standard hours either by working longer than the 38 hour norm under the National Employment Standards or by working at non-standard times, such as at night or on weekends. They are compensated by regulated premiums on normal wage rates (sometimes generically categorised as 'penalty' rates).

Penalty rates are strongly dependent on when work is undertaken and the total time spent working. The three principal time-related wage rates are:

- shift loadings, and weekend and evening pay premiums. These are requirements placed on employers to pay additional wages at certain times of the day or on certain days of the week, and are not dependent on how many hours in total a person has worked during the week
- overtime rates, which represent higher wage rates for hours worked greater than the usual ordinary hours listed under an award or an agreement
- payments for working on public holidays.<sup>111</sup>

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109 The Australian Small Business Commissioner, *Submission 11*, p. 4.

110 The Australian Small Business Commissioner, *Submission 11*, p. 4.

111 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 22, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 14 September 2015.

- 3.130 Two of the industries most affected by penalty rates are retail and hospitality.
- 3.131 The *General Retail Industry Award 2010* provides for the following:
- On Monday to Friday evenings a penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals;
  - On Saturday a penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm;
  - On Sunday a penalty payment of an additional 100% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees; and,
  - Work on a public holiday must be compensated by payment at the rate of an additional 150%.<sup>112</sup>

- 3.132 The *Hospitality Industry (General) Award 2010*<sup>113</sup> provides for the following:

An employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 20 – Minimum wages for the relevant classification:

	Monday to Friday %	Saturday %	Sunday %	Public Holiday %
<i>Full-time and part time</i>	100	125	175	250
Casual (inclusive of the 25% casual loading)	125	150	175	275

## Arguments against penalty rates

- 3.133 Service orientated industries, such as hospitality, that operate often in a seven day per week trading environment with high staffing needs, have been quite vocal about the additional costs of operating on days that attract penalty rate payments for their employees.

112 Australian Government, Fair Work Ombudsman, 'General retail industry award 2010', clause 29.4, <[https://www.fwc.gov.au/documents/documents/modern\\_awards/award/MA000004/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/MA000004/default.htm)>, viewed 29 January 2016.

113 Australian Government, Fair Work Ombudsman, 'Hospitality Industry (General) Award 2010', clause 32.1, <[https://www.fwc.gov.au/documents/documents/modern\\_awards/award/MA000009/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/MA000009/default.htm)>, viewed 29 January 2016.

- 3.134 Restaurant and Catering Australia, for example, stated that penalty rates have significant impacts on hospitality small businesses' ability to employ:

Australia's workplace relations framework remains the single largest impediment to employment growth in the hospitality industry in Australia. Research commissioned by R&CA indicates business owners are more likely to reduce staff hours on Sundays and public holidays, limiting employment opportunities that could have resulted should these businesses have remained open.<sup>114</sup>

- 3.135 Mr Stephen Smith, Director, National Workplace Relations Policy, Australian Industry Group also identified the challenges that many businesses in the hospitality and retail sectors face when trading in a 24/7 environment:

In some industries such as fast-food restaurants and retail, many employers, particularly small businesses, struggle to keep their doors open because of the level of weekend penalty rates in the relevant awards. Australian consumers expect to be able to go out for a meal, buy a coffee or go shopping on any day of the week and they expect to pay reasonable prices when they do, and it is a reasonable expectation. In many cases the employees who work on the weekend in these industries are young people who are not available to work during the week and they would be happy with the rate of pay which applies on weekdays. A high proportion of employees get their first job in the fast-food, retail or restaurant industries regardless of what industry they end up building their career in.<sup>115</sup>

- 3.136 Restaurants and Catering Australia argued that, in situations such as this penalty rates can be an inhibitor for businesses in creating employment opportunities:

Small businesses such as cafés now find themselves in the absurd situation where the business owner is forced to work seven days a week and earn less than the minimum wage. Employees in small businesses are also affected by being rostered to work less hours or no longer being required to work on

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114 Restaurant and Catering Australia, *Submission 40*, p. 4.

115 Mr Stephen Smith, Director, National Workplace Relations Policy, Australian Industry Group, *Committee Hansard*, Melbourne, 13 July 2015, p. 24.

weekends and public holidays where high penalty rates make trading commercially unviable.<sup>116</sup>

- 3.137 The general shift nationwide toward seven day per week trading has put added pressure on small businesses given the requirement to pay penalty rates. Master Grocers/Liquor Retailers Australia made the following comment on seven day trading:

Seven day trading is now the norm in Australia, however, the restrictive penalty rates, especially on Sundays, severely impact on the viability of small businesses in particular, and act as a disincentive to create additional weekend employment.<sup>117</sup>

- 3.138 The National Retail Association (NRA) suggested that penalty rates are a major factor in weekend business closures, and limited staff in those that choose to remain open:

Feedback from our members indicates that the current workplace relations regime has prompted a significant proportion of smaller retailers on Sundays and public holidays, either to remain closed or to limit their staffing to proprietors and family members only, to avoid the imposition penalty rates. This trend is notably high in the cafes and restaurants category, as well as fast food and personal services, but it is also evident in many core categories of retail such as fashion, hardware and home wares. While trade and revenues may be higher on Sundays and public holidays, the additional labour costs imposed typically make the day less profitably than normal trading days. When this causes retailers to close, this not only denies staff the opportunity of work, but it also hinders profitability by forcing the business to attempt to recover its fixed costs over a shorter trading period each week.<sup>118</sup>

- 3.139 Business South Australia made a similar comment:

Small business is significantly impacted by penalty rates. The cost of opening a restaurant or cafe on a Sunday or a public holiday can be so prohibitive to some small businesses that they do not open their doors, preferring to remain closed. The demand, however, to access restaurants and cafes does not decrease on a weekend day. Businesses need to be able to look at their operating costs in light of the market conditions, and the workplace relations legislation

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116 Restaurant and Catering Australia, 'Submission for the Productivity Commission into the Economic Structure and Performance of the Australian Retail Industry 2011', p. 8, <[pc.gov.au/inquiries/completed/retail-industry/submissions/subdr193.pdf](http://pc.gov.au/inquiries/completed/retail-industry/submissions/subdr193.pdf)>, viewed 29 January 2016.

117 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 9.

118 National Retail Association, *Submission 9*, p. 5.

which has in it entrenched penalty rates is a significant deterrent to productivity and profitability for most business operators.<sup>119</sup>

- 3.140 The NRA linked high wages to a businesses' difficulty to hire more workers or give staff additional hours::

There is an indisputable link between the cost of wages and a business's ability to hire more workers or give staff additional hours. There is clear evidence that many shops and cafes close their doors on Sundays and public holidays because of the high cost of employing staff at those times, while others will rely on "unpaid" labour such as business owners and their families. Current levels of penalty rates and the times at which they are applied are clearly hurting businesses' ability to create employment.<sup>120</sup>

- 3.141 Penalty rates are also an issue in other businesses that operate seven days per week out of necessity. The Australian Dairy Farmers outlined in their submission the award classification differences between essential and non-essential services that are exempt from penalty rates. The submission argued that elements of the industry, such as milking, should be classified as essential services for this purpose:

Another obstacle put forward by the Pastoral Award 2010 is that milking is not classified as an essential service. Feeding and watering stock are considered essential services and are thus exempt from the double time pay for over time on Sundays. This fails to recognise that daily milking is an essential daily requirement in the care of cows. Furthermore, it can also exacerbate the additional costs related to the three hour minimum engagement clause, and put added pressure on smaller dairy farm businesses. The Award should therefore be updated to include "milking" as an essential service relating to penalty rate classifications, similar to "feeding and watering stock".<sup>121</sup>

- 3.142 Interestingly, the results of a research commissioned by the ARA showed that both employees and employers could attribute the payment of penalty rates to suboptimal operating environments:

There was consistency between retail employers and retail employees in what they reported regarding the detrimental impact on them attributed to the Sunday penalty rate. For retail employers it was that they operated with a lower number of

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119 Business South Australia, *Submission 27*, p. 3.

120 National Retail Association, *Submission 9*, p. 7.

121 Australian Dairy Farmers, *Submission 14*, p. [2].

employees than optimal, or with a mix of employees that was less than optimal. For retail employees it was that older, more expensive employees were disadvantaged when compared to younger, lower cost employees when it came to the allocation of Sunday hours.<sup>122</sup>

- 3.143 Some 24/7 industries, such as hospitality, add surcharges to mitigate the cost of paying penalty rates. Others, such as retail, are not able to do this:

Can you imagine anybody shopping for groceries or liquor on a Saturday or Sunday or of an evening and being told, 'We've got a surcharge on your credit card and purchase with us'? Can you imagine a supermarket doing that? There was one supermarket group that got away with it for a while because they did not tell consumers about it. But someone found out about it and, since then, they have reduced that rate by half. But there is no other supermarket group in Australia that would dare put a surcharge on it. You can go to cafes, bistros and restaurants on a Sunday or a public holiday and many of them will put a 10 per cent surcharge on, and that is to cover their penalty rates. We cannot do that, so we have to absorb that cost somewhere along the line and that just squeezes margins further and further.<sup>123</sup>

### Arguments for penalty rates

- 3.144 Various submitters argued that penalty rates are an appropriate and necessary measure that reflects community views and values about the special place of weekend work.
- 3.145 Unions Tasmania, argued that penalty rates provide a greater level of disposable income for employees and therefore stimulated economic growth and job opportunities:

The key driver of growth in any economy has always been demand – the demand of consumers for products and services. Demand is driven by necessity and purchasing capacity. In a modern, first-world economy such as Australia's the key driver of demand is the elastic capacity of consumers to spend 'disposable' income ...Demand can only grow when consumers have the capacity to spend. For a large number of employees, from cleaning, to nursing, to hospitality, penalties make up one third of

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122 Australian Retailers Association, *Submission 37*, p. 11.

123 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia/Liquor Retailers Australia, *Committee Hansard*, Melbourne, 13 July 2015, p. 13.

their take home pay. Cutting penalty rates for these workers will result in a reduction in their spending.<sup>124</sup>

- 3.146 Similarly, Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association agreed stating that a reduction in the income of many retail workers could have an adverse economic effect:

We also say that [penalty rates] are a very important part of take-home pay for people on modest incomes, like retail workers, and we are conscious of the economic flow-on effect if people on modest incomes are to have their take-home pay reduced. That would actually feed into a weaker retail industry, because people on modest incomes tend to spend a greater percentage of their income and therefore keep the economic wheels, particularly of retail, turning.<sup>125</sup>

- 3.147 Unions ACT agreed that not only does the payment of penalty rates provide economic stimulus, but the social and health benefits are considerable as well:

In the instance where workers agree to work during unsociable hours, they are financially compensated for these social and health costs. This is true for 1.86 million workers, where penalty rates comprise a central part of their take-home pay. For many of these workers, penalty rates are vital to ensuring a living wage. This is true for close to 40% of workers in the hospitality and retail industries. An important component of working unsociable hours is the choice to do so. Legislation that ensures the workplace security of workers who choose not to work unsociable hours must be maintained and enforced.<sup>126</sup>

- 3.148 Further results also indicated that employees felt at a social disadvantage when working on Sundays in particular, and that some compensation for this was warranted:

The (commissioned research organisation) sought the views of retail employees about Sunday work in particular, and it is clear that there are some difficulties experienced by those working on Sundays in terms of the balance between work and their family and social lives. These difficulties are not causing employees in retail to seek to withdraw from Sunday work, and it is clear that employees in the main would be happy with a 50% penalty for

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124 Unions Tasmania, *Submission 24*, p. 6.

125 Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, p. 16.

126 Unions ACT, *Submission 30*, p. 7.

Sunday work. In that sense, as it relates to the retail industry, penalty rates for Sunday work are not effectively addressing these concerns as they are overcompensating for them.<sup>127</sup>

3.149 Mr Dwyer, agreed that, for the small percentage of people working unsociable hours, some compensation was necessary:

We argue that penalty rates need to be seen for what they are: some compensation for working at unsociable hours. I think that close to 70 per cent of the workforce still works from Monday to Friday, and that has only changed one percentage point in the last 15 years. So there does need to be some compensation for people who do work on weekends and late nights outside the nine to five parameters.<sup>128</sup>

3.150 He added:

In a consumer based economy, to reduce take-home pay for people who are on modest income and therefore spending the bulk of their money each week will have quite serious and adverse economic effects. You will see that not just in households but in whole communities. We are very concerned that it would feed into particular industries. The ones really in the gun would be retail and hospitality.<sup>129</sup>

3.151 Mr Dwyer, warned that any changes to penalty rates needs to be carefully considered from all angles:

In regional centres earnings are below what they are in the city by anywhere between seven and 10 per cent, depending on the research, but those cafes are driven by the mums and dads, the average workers in those communities. Any playing around with take-home pay by virtue of penalty rates on a Sunday or whenever will see a negative impact on the business across the week.<sup>130</sup>

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127 Australian Retailers Association, *Submission 37*, p. 12.

128 Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, p. 16.

129 Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, p. 21.

130 Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, p. 23.

## Payroll tax and its impact on small business

3.152 Payroll tax is a self-assessed, general purpose state and territory tax assessed on wages paid or payable by an employer to its employees, when the total wage bill of an employer (or group of employers) exceeds a threshold amount. It is a significant source of state revenue. The following table (Table 3.2) shows the variation in payroll tax rates and thresholds between states and territories.

**Table 3.2 State and territory payroll tax rates**

State/Territory	Tax threshold	From	Tax rate
Northern Territory	\$1,500,000 (annually) \$125,000 (monthly)	1 July 2012	5.50%
Queensland	\$1,100,000 (annually) \$91,666 (monthly)	1 July 2012	4.75%
New South Wales	\$750,000 (annually) \$57,534 (28 day month) \$61,644 (30 day month) \$63,699 (31 day month)	1 July 2013	5.45%
ACT	\$1,850,000 (annually) \$154,166.66 (monthly)	1 July 2014	6.85%
Victoria	\$550,000 (annually) \$45,833 (monthly)	1 July 2014	4.85%
Tasmania	\$1,250,000 (annually) \$95,890 (28 day month) \$102,740 (30 day month) \$106,164 (31 day month)	1 July 2013	6.1%
South Australia	\$600,000 (annually) \$50,000 (monthly)	1 July 2012	4.95%
Western Australia	\$800,000 (annually) \$66,667 (monthly)	1 July 2014	5.5%

Source Payroll tax Australia, 'Payroll tax rates and thresholds', < <http://www.payrolltax.gov.au/harmonisation/payroll-tax-rates-and-thresholds> > , viewed 19 January 2016.

3.153 The Productivity Commission points to the effect that payroll tax has on curbing wages and employment growth:

All Australian states and territories levy payroll taxes on wages in enterprises with payrolls exceeding certain thresholds. (These thresholds and the applicable tax rate vary by jurisdiction.) A common feature of these taxes is that once the payroll threshold is exceeded, all of the payroll is taxed at the tax rate – thus creating

an incentive for smaller employers to curb wages and/or employment growth.<sup>131</sup>

- 3.154 The Productivity Commission noted that '[C]utting payroll tax is seen by some as a way of reducing wage costs and achieving stronger employment outcomes.'<sup>132</sup> Indeed, ACCI has proposed abolishing payroll tax:

The most important priority of the business community for tax reform is payroll tax...The payroll tax threshold...negatively affects employer's decisions to expand business operations and increase wages and employment as they approach the threshold for liability. The effect of the threshold operates as an incentive to keep businesses inefficiently small.

The Henry Review found that payroll tax is the third most inefficient Australian tax after royalties and crude oil excise and insurance taxes, which causes in excess of 40 cents of economic damage for each dollar of additional revenue raised. It is incongruous for the Government to have at one point prioritised cutting the company tax rate when the efficiency gains to be realised from a reduction in the rate of payroll tax would lead to an even greater increase in social welfare.<sup>133</sup>

- 3.155 Submitters and witnesses to this inquiry also highlighted the perverse employment impact of payroll taxes. Master Grocers Australia/Liquor Retailer Australia noted that based on feedback from their constituents, payroll tax can be an inhibitor to small business expansion:

A prevailing consideration for any retailer contemplating an expansion of their enterprise is whether the increase in employment growth will, depending on their size, either compound their existing payroll tax liability, or cause their business to surpass the exemption threshold.<sup>134</sup>

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131 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 389, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 15 December 2015.

132 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 389, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 15 December 2015.

133 Australian Chamber of Commerce and Industry (ACCI), 'ACCI Submission: Board of taxation review of tax impediments facing small business', May 2014, p. 4, <[https://www.acci.asn.au/sites/default/files/uploaded-content/field\\_f\\_content\\_file/acci2014\\_may\\_small-business-tax-review-submission\\_final.pdf](https://www.acci.asn.au/sites/default/files/uploaded-content/field_f_content_file/acci2014_may_small-business-tax-review-submission_final.pdf)>, viewed 29 January 2016.

134 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 8.

- 3.156 Similarly, Business South Australia identified payroll tax as the tax that limits a small businesses' capacity to expand:

In a survey of members conducted in 2014, over half of respondents cited payroll tax as the tax or levy most limiting the expansion of their business.<sup>135</sup>

- 3.157 The New South Wales Business Chamber also made a direct link between payroll tax and reduced employment:

Payroll tax remains a key inhibitor for businesses, particularly those businesses that are growing and need to take on more staff. Consistent with feedback from our members, the tax that NSW businesses find most objectionable is payroll tax. Businesses report that payroll tax significantly reduces the number of staff they employ. While other taxes like GST are only payable when revenue is received, businesses are liable for payroll tax even if they make no sales.<sup>136</sup>

- 3.158 Mr Salim Sukari is a director of an IT services company in Sydney's west. He told the Committee of the company's concerns in having reached the New South Wales payroll tax threshold:

Being the owner of a small business, I would be very inclined to hire another person myself if, for example, if I did not have to pay any more payroll tax...If I did not have to pay payroll tax then I know I could spend that money towards something. It is probably not going to cover a person's salary but it definitely would come a long way.<sup>137</sup>

- 3.159 The Chamber of Commerce and Industry Western Australia explained that payroll tax can determine whether a business will employ more staff:

As a tax on employment, payroll tax acts as a disincentive for businesses to employ additional workers, particularly at the margin and even more particularly when a business' payroll breaches the tax free threshold. Payroll tax raises the marginal cost of employing an additional person, and so reduces the incentive for a business to employ that additional person.<sup>138</sup>

- 3.160 Further to the inhibiting cost of payroll tax, small businesses and peak bodies outlined the confusion and additional administrative burden of navigating multi-jurisdictional payroll tax obligations. Several submitters
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<sup>135</sup> Business South Australia, *Submission 27*, p. 3.

<sup>136</sup> NSW Business Chamber, *Submission 38*, p. 3.

<sup>137</sup> Mr Salim Sukari, Director, Lebanese Muslim Association, *Committee Hansard*, Parramatta, 19 November 2015, p. 42.

<sup>138</sup> Chamber of Commerce and Industry of Western Australia, *Submission 23*, p. 8.

argued the need to harmonise payroll tax. Master Grocers Australia/Liquor Retailers Australia put the following position:

In its April 2012 Report on the impacts and benefits of COAG reforms, the Productivity Commission documented the jurisdictional differences in payroll tax rates and revenue trends. The Report stressed the benefits of harmonisation and in doing so, reiterated the existing regulatory and red tape burdens for businesses operating in multiple jurisdictions.

For these businesses, there are various compliance costs and red tape regulatory burdens which have negative consequences on business viability.<sup>139</sup>

- 3.161 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia/Liquor Retailers Australia, expressed frustration at the purpose of payroll tax and the disincentive it provides for people seeking to employ during a time when unemployment is rising:

When you talk about minimum wage, as you did before – that is not what an employer pays. An employer pays the 9½ per cent super, all the on costs, the insurances – so it mounts. You can add another 40 per cent to that wage rate. But on top of that, with that, is the payroll tax. When you have Victoria imposing another public holiday on grand final eve, which is going to cost our industry sector alone an extra \$3 million just to open the doors on that day – add the payroll tax to that as well. It is one of those hidden costs and it is a tax on employment. The last government in Victoria reduced payroll tax, which I think was a first, from 4.9 to 4.85 per cent. So Victoria has a low payroll tax compared to other states, but the threshold is very low. With payroll tax across the country there are inconsistencies – for example there is a very high threshold in Queensland with a medium percentage. We see that as a tax on employment, to be honest, and we do not understand it at all – not in this day and age when we want to employ people; we really do.<sup>140</sup>

## Competition and fair trading

- 3.162 The Australian economy is based on fair trading and open competition providing greater choice for consumers for goods and services. Innovative

139 Master Grocers Australia/Liquor Retailers Australia, *Submission 13*, p. 8.

140 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia/Liquor Retailers Australia, *Committee Hansard*, Melbourne, 13 July 2015, p. 11.

and competitive businesses are the key driver in the delivery of higher quality products and services and lower prices for consumers.

- 3.163 For small businesses the motivation to be innovative and competitive is alive and well, however, in circumstances where the competitive forces are biased or unbalanced, small businesses are also the most vulnerable.
- 3.164 The Committee received evidence on various aspects of the current competitive marketplace that demonstrated a level of unfairness that diminished some small businesses ability to prosper and create employment opportunities. This evidence is discussed below.

### **Section 46 of the *Competition and Consumer Law 2010***

- 3.165 Section 46 of the *Competition and Consumer Act 2010* is the provision of Australian competition law which regulates unilateral conduct. Australian Competition and Consumer Commission Chairman Rod Simms has expressed s. 46 in the following terms:

do not take advantage of your substantial market power for the purpose of (amongst other things) substantially damaging a competitor.<sup>141</sup>

- 3.166 There are numerous laws affecting arrangements between two or more parties, but only section 46 - which prohibits the misuse of market power - focuses on big business acting alone.
- 3.167 Under Section 46 it must be proved that the relevant party had substantial market power, that it took advantage of that power, and that it did so for a 'proscribed purpose'. This is generally described as an anti-competitive purpose.
- 3.168 Section 46 is difficult to establish. The threshold of substantial market power is very high and it is also difficult to prove 'taking advantage' - while the courts have said this means no more than to 'use' market power.

### **The Harper Review and the effects test**

- 3.169 On 4 December 2013 the Prime Minister and the Minister for Small Business announced a review of competition policy. On 27 March 2014, the Minister for Small Business released the final Terms of Reference, following consultation with the States and Territories, and announced the Review Panel.

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141 Australian Competition and Consumer Commission, 'Section 46: The great divide', *speech by Mr Rod Sims, Chairman, Hodgekiss Competition Law Conference, Sydney, 30 May 2015*, <<http://www.accc.gov.au/speech/section-46-the-great-divide>>, viewed 15 December 2015.

- 3.170 The Draft Report was released on 22 September 2014. Submissions closed on 17 November 2014.
- 3.171 The Competition Policy Review Final Report was released on 31 March 2015. The Review has become known as the 'Harper Review' after the Chair of the review Professor Ian Harper.
- 3.172 The effects test as proposed by the Harper Review retained the first element of the current section 46 - substantial market power - but removes the other two elements; that of advantage and proscribed purpose.
- 3.173 In their place, an effects test has been inserted. The final report stated this as follows:

The Panel finds that **section 46**, dealing with the misuse of market power, is deficient in its current form. It does not usefully distinguish pro-competitive from anti-competitive conduct. Its sole focus on 'purpose' is misdirected as a matter of policy and out of step with international approaches. Section 46 should instead prohibit conduct by firms with substantial market power that has the purpose, *effect or likely effect* of substantially lessening competition, consistent with other prohibitions in the competition law. It should direct the court to weigh the pro-competitive and anti-competitive impact of the conduct.<sup>142</sup>

- 3.174 Put simply the 'effects' of actions by firms with substantial market power rather than the purpose of such acts would be used in judging anti-competitive cases brought under section 46.
- 3.175 Mr Peter Strong, Chief Executive Officer, Council of Small Business Organisations of Australia told the Committee that the real remedy for the concentration of market power is a divestiture power:

The concern we have with the effects test is that the people who are against it are about five companies and the Business Council of Australia, and the SDA [Shop, Distributive & Allied Employees Association]. And the SDA and Coles and Woolies are basically the same company. It is a very good union, the SDA, and Coles and Woolies are very good companies. They are not evil in any way, shape or form. They are just too big. We are saying that the effects test should not let things become that big. The effects test is a way of going into the marketplace and asking, 'Is the effect of this going to impact upon competition in a way that is not good for competition and for the future of competition?' the best

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142 Australian Government, 'Competition Policy Review: Final report', March 2015, p. 9, (emphasis added), <[http://competitionpolicyreview.gov.au/files/2015/03/Part1\\_final-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Part1_final-report_online.pdf)>, viewed 13 November 2015.

example I can give is land banking. For a long time Coles and Woolies would buy the land where you would build a supermarket in competition and then not let anybody else buy it, and that did impede ALDI for quite a while. You could not, under the current section 46, go in and say, 'You're doing that to impede competition', because you need proof; you absolutely need proof. So, the change is a very watered down effects test – nothing like they have in the United States or anywhere else – but it gives the capacity for the ACCC to say, 'No, that does nothing but impede competition and therefore you must divest yourself of this land.'<sup>143</sup>

3.176 The effects test may capture competitive conduct that is carried out in the normal course of business. Indeed s. 46 as interpreted by the High Court intends that competition be ruthless:

. . . the object of s46 is to protect the interest of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort . . . and these injuries are the inevitable consequence of the competition s46 is designed to foster.<sup>144</sup>

3.177 Also, as per the Federal Court;

Traders commonly fix prices with the intention of diverting to themselves custom which would otherwise flow to their competitors. In doing so, they realise that, if they are successful, the result will be to damage - in some cases, even to eliminate - those competitors. But such conduct is the very stuff of competition, the result which Part IV seeks to achieve.<sup>145</sup>

3.178 Clearly the kind of robust competition envisaged by the courts above can result in a lessening of competition. The question becomes whether or not the lessening of competition is from acts that benefits consumers or because of a misuse of market power that will harm consumers.

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143 Mr Peter Strong, Chief Executive Officer, Council of Small Business Organisations of Australia (COSBOA), *Committee Hansard*, 11 November 2015, Canberra, p. 5.

144 *Queensland Wire Industries Pty Limited v. The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177, Mason CJ and Wilson J at 191.

145 *Eastern Express Pty Limited v. General Newspapers Pty Limited* (1991) 30 FCR 385, Wilcox J at 409 - 410.

## Low value threshold on imported goods

3.179 The current low value threshold (LVT) exempts GST on imported goods under \$1 000 that have been purchased from overseas based businesses for importers not connected with supply. Australian industry bodies have long lamented what they perceive as the unfairness of this arrangement, in particular those that are linked with the retail sector that struggle to compete with the burgeoning online marketplace.<sup>146</sup> In response to this persistent advocacy, the Australian Government have recently announced its intention to broaden the GST to include overseas online transactions (discussed in Chapter 2).

3.180 Several submitters to this inquiry highlighted the adverse impact of the LVT on the volume of trade for retail small business. The National Retail Association (NRA) for example, confirmed the unfairness of the LVT on the Australian retail market:

Most problematic for Australian businesses, however, is the unfair loophole that currently allows overseas retailers to avoid paying GST on imports valued at less than \$1000. This Low Value Threshold (LVT) is allowing offshore web-based businesses to deliver retail goods to consumers in the domestic market without making any contribution to the goods and services tax take. Further, this GST exemption also creates an exemption from tariffs, import duty and customs charges – costs that are borne by suppliers to the Australian retail market and passed on to local retailers. Depending on the product category, these costs can add up to 25 per cent to the wholesale price of local goods.<sup>147</sup>

3.181 The NRA also highlighted the impact of the LVT on jobs, especially jobs for those who need them most:

Another report, also by Ernst and Young, estimated the loophole will cost up to 33,400 local retail jobs – most likely the jobs of lower paid or vulnerable workers such as young people, single parents and senior workers returning to the workforce.<sup>148</sup>

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146 Mr Gerard Dwyer, National Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, 13 July 2015, Melbourne, p. 16; and, National Retail Association, *Submission 9*, p. 3. See also: Dale, T., 27 October 2014, Parliamentary Library Research Paper, 'Online shopping and potential changes to the low value threshold: costs and benefits for government, consumers and retailers', p. 3, [parlinfo.aph.gov.au/parlInfo/download/library/prspub/3471890/upload\\_binary/3471890.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3471890/upload_binary/3471890.pdf;fileType=application/pdf), viewed 11 September 2015.

147 National Retail Association, *Submission 9*, p. 4.

148 National Retail Association, *Submission 9*, p. 4.

- 3.182 Mr Ian Blandthorn, Assistant Secretary, Shop, Distributive and Allied Employees' Association, agrees that there is a definite link between businesses operating on an unfair playing field, such as with the LVT, and employment opportunities:

I think the core issue here is a level playing field. I made a comment earlier that this is fundamentally a domestic industry within the borders of Australia, except for the impact of the low-value tax threshold. I think that is, as we move forward, creating substantial problems for a range of retailers. Not only is it creating substantial problems for retailers but it obviously affects their profitability and then, by extension, it affects employment. The more you buy overseas – we have all done it, and we are all guilty of it in that sense – the more it takes away the opportunity for a retailer to make a quid and to employ people.<sup>149</sup>

- 3.183 The Shop, Distributive and Allied Employees' Association (SDA) also submitted that the Australian retail industry faces significant disadvantage against overseas on-line retailers due to the LVT:

Australian retailers are required to pay G.S.T. on all merchandise they handle, plus pay any import duty on this merchandise.

Overseas-based on-line retailers do not pay the G.S.T. on merchandise priced under \$1,000. They do not pay import duty. This gives them a price advantage of up to 20% over Australian-based retailers who must pay both the G.S.T. and any import duty.

Therefore, we have an uneven playing field. This is unfair competition. The magnitude of the disadvantage suffered by Australian retailers is substantial for an industry where profit margins are generally quite small. It is not a sustainable situation...Overseas operators are taking advantage of the unfair competitive environment to grow their business. It is not uncommon for overseas operators to ensure GST and import duties are avoided. For example, if an order is over \$1000, it is automatically split into two orders to fall below the \$1000 threshold. A system that actively and willingly condones such approaches is wrong. Having inefficiencies that give overseas competitors an advantage in that they can avoid GST and import duties is something that the Australian retail industry should not have to contend with.<sup>150</sup>

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149 Mr Ian Blandthorn, Assistant Secretary, Shop, Distributive and Allied Employees' Association, *Committee Hansard*, Melbourne, 13 July 2015, pp. 19-20.

150 Shop, Distributive and Allied Employees' Association, *Submission 15*, pp. 38-39.

## Advances in technology

3.184 Technological advancements in all areas of the modern workplace have created innovation, efficiencies and cost savings which have benefited both the business' owner and consumer. However, while there are many benefits to this, advancements in technology can also effectively reduce the reliance on a people powered workforce.

3.185 In its submission to the Productivity Commission's 2014 report on the *Relative Cost of Doing Business In Australia: Retail Trade*, the Chamber of Commerce and Industry Queensland stated that the use of technology in businesses presents both challenges and opportunities:

Technological innovation has presented the small business retail sector with both opportunities and challenges. The use of smart devices has assisted with client enticement and loyalty via social media applications and provided for virtual shopping alternatives. However, competition with overseas retailers selling at lower prices, skills shortages in digital technology in retail, the growth of non-store channels, and general hesitancy of bricks and mortar stores to take up digital sales techniques has exacerbated such challenges.<sup>151</sup>

3.186 ET Australia submitted that such advancements directly affect the staffing requirements of small businesses:

Constant technology advances tend to reduce the number of employees a small business requires.<sup>152</sup>

3.187 In its submission, Fingerprint Me Youth Employment Academy made a direct link to technology advancements and youth unemployment:

We recognize that young people today face an increasing number of barriers to workforce entry. Competitive business conditions, labour saving advances in technology, an increasingly mobile and globalized labour market: many factors have conspired to make low skilled or entry-level jobs a scarcity. In these conditions it is often those who are young and inexperienced who miss out.<sup>153</sup>

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151 The Chamber of Commerce and Industry Queensland (CCIQ), 'Relative Costs of Doing Business in Australia: Retail Trade', 11 July 2014, *submission to the Productivity Commission's inquiry into the relative costs of doing business: retail trade industry*, p. 7, <[cciq.com.au/assets/Documents/Advocacy/submissions/RetailTrade-ProductivitySubmissionReview.docx](http://cciq.com.au/assets/Documents/Advocacy/submissions/RetailTrade-ProductivitySubmissionReview.docx)>, viewed 7 September 2015.

152 ET Australia, *Submission 7*, p. 1.

153 Finger Print Me Youth Employment Academy, *Submission 12*, p. 1.

3.188 The National Retail Association (NRA) argued that technology has created adverse competition for Australian retailers, in particular those that are solely bricks and mortar operations:

The retail sector is also undergoing a structural upheaval following advancements in technology, digitalisation and online shopping. Consumer product markets are now essentially global, meaning that Australian retailers are competing against offshore competition. In this context, widespread red tape and compliance burdens present an additional and unnecessary challenge for the sector, and in some cases a distinct competitive disadvantage.<sup>154</sup>

3.189 There are, however, new and emerging industries boosted by technology that have the proven capacity and potential to create more jobs. Renewable energy is one such area and, as Dr Barrie Pittock PSM pointed out, the opportunities for job growth in this area appear to be limitless:

Fossil fuels and centralised electricity grids are rapidly becoming stranded assets, and investment in the new technologies are the new growth industries.<sup>155</sup>

3.190 Dr Pittock further elaborated on how these new technologies can create entrepreneurial and employment opportunities, particularly in regional areas:

(Consideration should be given to) ways to foster local and regional growth of renewable energy industries, and especially the use of increasingly efficient and cheaper energy storage to enable local and regional communities to develop their own businesses and increase economic growth and employment. This is especially the case for remote communities such as many Aboriginal communities in northern and inland Australia.<sup>156</sup>

3.191 The National Innovation and Science Agenda points out that:

Over the decade from 2001 to 2011, SMEs aged less than five years employed only around 15% of the Australian workforce, but made the highest contribution (40%) to net job creation in Australia.<sup>157</sup>

3.192 The key is to recognise the importance of fostering investment and innovation in start-ups.

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154 National Retail Association, *Submission 9*, p. 3.

155 Dr Barrie Pittock, *Submission 34*, p. [1].

156 Dr Barrie Pittock, *Submission 34*, p. [1].

157 Australian Government, 'National Innovation and Science Agenda', p. 8, <<http://www.innovation.gov.au/system/files/case-study/National%20Innovation%20and%20Science%20Agenda%20-%20Report.pdf>>, viewed 15 December 2015.

## Retail tenancies

3.193 For many small businesses, leasing premises out of which to operate is an expected and regular cost of business. Tenancy contracts, however, particularly for small business located within shopping centre complexes, can be faced with significant ongoing costs relating to their tenancy agreement as well as uncertainty about the longevity of the tenancy. This can adversely affect their ability to employ and retain staff.

3.194 The ARA explained:

In addition to the base rental cost, significant additional rental expenditure is imposed through 'turnover rent' whereby, built into the rental agreement, the landlord is entitled to a percentage of takings in addition to the minimum rent. A retailer conducting business in a rental premise has little long-term certainty significant costs associated with set-up, and relocation is heavily leveraged at the point of re-negotiation. Due to the standard terms of a lease, which are usually five or seven years, a retailer has no security and can be told to leave the premises for the simple reason of "not fitting" with the centre's image, notwithstanding the investment into the retail space. Retailers are subject to the perceived threat that an alternative tenant is prepared to pay more for the same tenancy.<sup>158</sup>

3.195 The ARA argued that this model of tenancy favours large businesses and places a small businesses at competitive disadvantage:

The dependency on securing tenancies within shopping centres poses a significant structural challenge for the ongoing viability of the retail sector. The oligopolistic nature of shopping centre ownership and a retail tenancy regime which is skewed in favour of these large-scale landlords both present an inherent disadvantage to Australian domestic bricks and mortar retailers in terms of equitable competition.<sup>159</sup>

3.196 However, the Australian Small Business Commissioner, Mr Mark Brennan, believed that while disputes still arise, many of these are due to landlords behaviour which stems from a lack of understanding of their responsibilities:

The major issues of behaviour in the retail tenancy area to my mind are in those strip shopping centres, and, unfortunately, it is often small business landlord who is the problem. Again, it comes

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158 Australian Retailers Association, *Submission 37*, p. 21.

159 Australian Retailers Association, *Submission 37*, pp. 20-21.

down to education and knowing what you are supposed to do as a landlord. I think that for a lot of these small business landlords it may be the only investment they have but my expression for them is that they are Dickensian in the way in which they operate. They have read Charles Dickens and they realise that that is the way you behave as a landlord – they take a tough, uncompromising attitude and they create disputes. Again, there is an educative role to take with this. I would not like to see any national intervention; it rests with the states, though I would like to see some harmonisation amongst the states.<sup>160</sup>

## Tendering

- 3.197 The tendering process for government or non-government contracts can often be an expensive and time consuming process. If the applicant is unsuccessful, this time and expense is wasted which, for some small businesses, can damage their aspirations to grow and employ.
- 3.198 Government regulations often set the agenda for the tendering process, particularly for the awarding of government contracts. This can be an unfair barrier for small businesses that may invest considerable resources to in order to bid on contracts.
- 3.199 In the building and construction industry, some jurisdictions require businesses to be incorporated to take out workers compensation – a requirement when being considered for tenders. The additional work involved in operating a business as a corporation acts as a significant inhibitor to growth through loss of business opportunities. Mr Richard Calver, National Director, Industrial Relations and Legal Counsel, Master Builders Australia explained:
- In some tenders, unless you are incorporated you do not get the work. It depends on the nature of the tender and it depends on whether or not that is a requirement, but in many instances, yes, there is a requirement to be incorporated before you can win that work, so it is a barrier.<sup>161</sup>
- 3.200 The tendering process can also take up significant amounts of time and cost with no guarantee of recouping the financial cost. Mr Philip Endersbee, Member, Council of Textile and Fashion Industries of Australia provided the following example:

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160 Mr Mark Brennan, Commissioner, Australian Small Business Commission, *Committee Hansard*, Canberra, 3 June 2015, p. 9.

161 Mr Richard Calver, National Director, Industrial Relations and Legal Counsel, Master Builders Australia, *Committee Hansard*, Canberra, 24 June 2015, p. 4.

... one of the things that we floated with the government is that they should have a registration of suppliers for tender. In other words, if you want to be considered a supplier – let's say us, whatever it is going to be – then there is a process that you go through before you tender. At the moment we are doing thermal underwear for defence. Our lead time, until they announce who is going to win the tender, is nine months. Before that there was three months of work. Included in that, the cost of the submission, for thermal underwear, for us, is \$100,000. I personally think it is unfair that every one of the tender people have gone through that and the bureaucracy have to spend, I would say, 70 per cent of the time on the evaluation because they have to, of people who, in the first place, should not be registered to tender.<sup>162</sup>

## Committee comment

- 3.201 Government has an important role to play in providing conditions in which small businesses can grow and prosper. This is particularly true of small communities in regional or rural areas where small businesses can be the only economy; however, this also applies to communities across the nation who all rely on small business success for employment, services and recreation.
- 3.202 While it is widely acknowledged that some form of regulation is necessary, it is the accumulation of red tape and costs relating to regulation compliance that is the burden on small businesses, and not individual requirements and costs themselves.
- 3.203 In relation to industrial/workplace relations the Committee notes the recommendations contained within the draft report of the Productivity Commission's *Workplace Relation Framework Inquiry*.
- 3.204 The inquiry report was handed to the Australian Government on 30 November 2015. The release of the final report by the Government is the final step in the process. Under the *Productivity Commission Act 1998*, the Government is required to table the report in each House of the Parliament within 25 sitting days of receipt. This is expected to be after the Committee has tabled this report.

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162 Mr Philip Endersbee, Member, Council of Textile and Fashion Industries of Australia, *Committee Hansard*, Melbourne, 13 July 2015, p. 46.

## Committee comments on modern awards

3.205 The Committee acknowledges the complexity of awards. It notes the following draft recommendations of the Productivity Commission's report *Workplace Relation Framework Inquiry*:

### DRAFT RECOMMENDATION 12.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards
- add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective.

To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- obtain public guidance on reform options.<sup>163</sup>

### DRAFT RECOMMENDATION 12.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.<sup>164</sup>

## Committee recommendations on Employee v contractor

3.206 The Committee accepts that determining the difference between an employee and a contractor requires a number of factors to be taken into account. This can be an onerous process for a small business and a deterrent to it employing staff given the lack of certainty of a determination across government agencies.

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163 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 51, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 17 November 2015.

164 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 51, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 17 November 2015.

- 3.207 The Committee therefore recommends that the Australian Taxation Office and the Fair Work Ombudsman set up a working group to align the definitions of employee and contractor across government agencies. The working group should be tasked with developing a single decision tool to help small businesses correctly identify when a worker is an employee or a contractor. The working group should also identify legislative changes if needed.

### **Recommendation 1**

**The Committee recommends that the Australian Taxation Office and the Fair Work Ombudsman set up a working group to align the definitions of employee and contractor across government agencies and to develop a single decision tool to help small businesses correctly identify when a worker is an employee or a contractor. This working group should also identify legislative changes if needed.**

- 3.208 The Committee supports the MBA's suggestion of a register of contractors for the building industry. The Committee did not receive any more evidence discussing this suggestion. However, given the possible benefits of a register requiring minimal government supervision and establishing a clear separation between commercial law and workplace relations law, the Committee is supportive of the idea sees a need for more work including consultation with the broader building industry and building employee representatives.
- 3.209 The Committee therefore recommends that the above working group look into the MBA's proposal for a register of building contractors.

### **Recommendation 2**

**The Committee recommends that the Australian Taxation Office and the Fair Work Ombudsman working group set up to align the definitions of employee and contractor, and also to look into the Master Builders Australia proposals including for a register of building contractors.**

## Committee recommendation on workplace health and safety

- 3.210 The Committee is heartened that most jurisdictions have implemented the model Workplace Health and Safety (WHS) laws. The Committee notes the concerns of the Small Business Commissioner in relation to worker's compensation.
- 3.211 State and territory workers' compensation schemes work well. The issue here is one of the red tape involved where small businesses working across jurisdictions having to access different schemes. The Committee is drawn to the recommendations of the Small Business Commissioner for reciprocal arrangements 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.
- 3.212 The Committee notes that developing proposals for 'harmonising workers' compensation arrangements across the Commonwealth, States and Territories and national workers' compensation arrangements for employers with workers in more than one of those jurisdictions'<sup>165</sup> is a function of Safe Work Australia and is concerned, as the Small Business Commissioner points out, that seven years after the *Safe Work Act 2008* more work has not been done in this area.
- 3.213 The Committee therefore recommends that the Minister for Employment in conjunction with Safe Work Australia formulate proposals to take to COAG that eliminate the requirement for a small business operating in multiple jurisdictions to engage with multiple workers' compensation schemes.

### Recommendation 3

**The Committee recommends that the Minister for Employment in conjunction with Safe Work Australia formulate proposals to take to COAG that eliminate the requirement for a small business operating in multiple jurisdictions to engage with multiple workers' compensation schemes.**

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165 Safe Work Australia, 'Workers' compensation', <<http://www.safeworkaustralia.gov.au/sites/swa/workers-compensation/pages/workers-compensation>>, viewed 16 December 2015.

## Committee comment on penalty rates

3.214 The Committee recognises that penalty rates are a long established feature of Australia's workplace relations landscape, which reflect community values and upon which many low paid workers derive an important part of their income.

3.215 The Committee identifies with the Productivity Commission's statement that:

Penalty rates have a legitimate role in compensating employees for working long hours or at unsociable times. They should be maintained. However, Sunday penalty rates for cafes, hospitality, entertainment, restaurants and retailing should be aligned with Saturday rates.<sup>166</sup>

3.216 The Commission recommends:

### DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.<sup>167</sup>

3.217 It is clear to the Committee that penalty rates are a significant financial impost on small business. It is also clear that many employees, often in casual work on low wages, rely on penalty rates to supplement their income. It is clear that any debate around penalty rates must seek to balance the cost to business with the wider community and societal impact.

3.218 Rather than an 'all or nothing' or zero sum game approach to penalty rates the Committee feels that award negotiations around penalty rates should

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166 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 4, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 17 November 2015.

167 The Australian Government Productivity Commission, *Workplace Relations Framework: Draft Report*, August 2015, p. 52, <<http://www.pc.gov.au/inquiries/current/workplace-relations/draft/workplace-relations-draft.pdf>>, viewed 17 November 2015.

seek to think outside the square in order to reduce costs to business – particularly retail and hospitality businesses – on weekends without necessarily reducing the take home pay of the average employee.

### **Committee recommendation on payroll tax**

- 3.219 The Committee believes that payroll tax is a major disincentive to small business employing people. What is especially incongruous to the Committee, is the different levels of payroll tax across Australia. It is disappointing that the *Payroll Tax 2010 Harmonisation Joint Protocol* (described in Chapter 2) has not been able to harmonise the impost of payroll tax.
- 3.220 The Committee draws attention to the following recommendation of the Australia's Future Tax System Review:
- Recommendation 55: Over time, a broad-based cash flow tax – applied on a destination basis – could be used to finance the abolition of other taxes, including payroll tax and inefficient State consumption taxes, such as insurance taxes. Such a tax would also provide a sustainable revenue base to finance future spending needs.<sup>168</sup>
- 3.221 The Committee therefore recommends that the Australia Government work with states and territories to boost employment and business productivity by reducing state and territory governments' reliance on payroll tax as a form of revenue.

### **Recommendation 4**

**The Committee recommends that the Australia Government work with states and territories to boost employment and business productivity by reducing state and territory governments' reliance on payroll tax as a form of revenue.**

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168 Australian Government, The Treasury, 'Australia's future tax system: Consultation paper summary. Chapter 12: List of recommendations', <[http://taxreview.treasury.gov.au/content/finalreport.aspx?doc=html/publications/papers/final\\_report\\_part\\_1/chapter\\_12.htm](http://taxreview.treasury.gov.au/content/finalreport.aspx?doc=html/publications/papers/final_report_part_1/chapter_12.htm)>, viewed 12 October 2015.

## **Committee comment on Section 46 of the *Competition and Consumer Law 2010***

- 3.222 The Committee acknowledges the Harper Review's proposal to introduce an effects test to section 46 of the *Competition and Consumer Law 2010* to include an effects test, the Committee points out some of the issues surrounding the effects test.
- 3.223 The Committee was not inquiring into the effects test and did not receive a great deal of submissions or oral evidence on the effects test particularly or competition law in general.
- 3.224 The Committee understands that there are views that s. 46 is not stringent enough and that an effects test is needed to properly protect consumers and small business. The Committee also understands that there are legitimate arguments for and against an effects test and differing views on the likely impact of an effects test. It is a topic upon which reasonable minds can differ.
- 3.225 The Committee supports vigorous of competition, provided this competition does not take advantage of a business' special position in the market but is rather, is the routine conduct of an efficient competitor.
- 3.226 Important in any discussion of an effects test, therefore is the structure of the market and the impact of this structure on small business. The Committee did receive the evidence to give this issue adequate consideration.
- 3.227 The Committee therefore is not minded to make recommendations in this area and notes the government's response to the Harper Review as follows:
- The Government acknowledges concerns raised in submissions to the Harper Review about the operation of the misuse of market power provision (section 46 of the CCA) and the Harper Review's recommendation for reform. In light of the importance of this issue for business and consumers, the Government will consult further on options to reform the provision and release a discussion paper on this topic.<sup>169</sup>
- 3.228 The Committee looks forward to the release of the discussion paper.

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169 Australian Government, 'Australian Government response to the competition policy review', p. 2  
<[http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt\\_response\\_CPR.ashx](http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx)>, viewed 30 November 2015.

## **Committee recommendations on the GST threshold on physical importation**

- 3.229 The Committee noted that there was evidence about the current GST threshold on the importation of physical goods. The Committee believes that there needs to be more accurate information on the impact on small business and cost effectiveness of lowering the GST threshold on the importation of physical goods.

### **Recommendation 5**

**The Committee recommends that the Productivity Commission investigate the impact on small business of lowering the GST threshold on the importation of physical goods and undertake regular cost effectiveness research of GST threshold reduction.**