MASTER ELECTRICIANS AUSTRALIA

Lead.Connect.

INHIBITORS TO EMPLOYMENT FOR SMALL BUSINESS AND DISINCENTIVES TO WORKING FOR INDIVIDUALS

House of Representatives Standing Committee on Education and Employment

Submission from Master Electricians Australia

8 May 2015

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

INTRODUCTION

Master Electricians Australia is grateful for the opportunity to provide a submission to the *Inquiry into inhibitors to employment for small business and disincentives to working for individuals.*

Master Electricians Australia (MEA) is a dynamic and modern trade association representing electrical contractors. A driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

MEA has worked hard on improving business conditions and regulation for electrical contractors that maintain the highest standards but strip out red-tape and protect from unfair practices. Given that a large proportion of our membership comprises of small businesses and sole contractors we believe we can make a valuable contribution to this inquiry.

Earlier this year, MEA conducted a survey of our members on the aspects of the industrial framework that concerned them the most when creating jobs. Our responses to the terms of reference are based largely on the results of this survey.

TERMS OF REFERENCE

1. Matters relating to State and Commonwealth laws and regulations including, but not limited to, those that impose excessive red tape and compliance costs in relation to employment.

Addressing the regulatory burden

The multi-jurisdictional nature of regulation in Australia places a significant burden on small business. 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. Below are two examples of the regulatory burden in relation to employment and the impact this has on struggling small businesses.

- *Workplace Bullying*

Workplace bullying is currently addressed by harmonised Work Health and Safety Legislation in all states except Victoria and Western Australia, the *Fair Work Act 2009*, the Human Rights and Equal Opportunity Commission, state and territory anti-discrimination legislation, state and federal workers compensation actions and the common law via breach of contract.

The recent inclusion of bullying in Victoria's *Crimes Act 1958* is yet another layer of legislative coverage for bullying. The extent of this regulation can have a devastating impact on small business if multiple claims are lodged with different bodies by an employee relating to the same or a similar incident. While we would never advocate an employee being denied the right to pursue a claim for being subjected to bullying, there must be some protections in place for business, particularly small business, who can ill afford defending allegations in multiple forums. Clear guidelines need to be developed that will prevent multiple claims being lodged for the same incident. An example of a regulatory approach that would support small business in this respect is Part 6-1 of the *Fair Work Act*, which ensures that no claim can be lodged with the Fair Work Commission if alternative actions have already been commenced. We would see great value in other regulators recognising the burden of overregulation and consider a similar approach. This would ensure the intent of legislation is fulfilled without compromising the survival of small business in the process.

- *The Tax System*

While the initial introduction of the GST reforms was effective in terms of engagement with small business, the burden of taxation compliance remains problematic. In fact, the Institute of Public Accountants (IPA) describes small businesses in Australia as the "unpaid bookkeepers for regulators"[1].

In terms of employment, the introduction and development of the paid parental scheme and compulsory superannuation has left small businesses needing to invest a significant amount of time to meeting the administrative requirements of regulators. The IPA further commented that the practice of building special concessions into the tax law to ameliorate the taxation burden on small business is largely ineffective due to the complexity involved in order to claim these concessions. The proposed increase to the Superannuation Guarantee rate from 9% to 12% will place further administrative and financial pressure on small business, further discouraging employers taking on more staff.

The above are just some of the obstacles facing small business on an everyday basis. The weight of this regulatory burden calls out for change in the culture of government from one that promotes red tape to one that actively works to reduce it, with a focus on the cumulative effect of regulation.

2. Matters relating to laws or regulations that inhibit small business expansion to create additional employment.

Industrial Framework

According to the MEA member survey, there are two key aspects of the industrial framework that deter small business owners from creating new jobs; the cost of wages and employment conditions and the threat of unfair dismissal claims.

- *Cost of wages and employment conditions*

In terms of laws and regulation that inhibit small business owners taking on more employees, our members have cited difficultly in meeting the cost of wages and award conditions for their employees given the complexities of the award structure and the uncertainty of business conditions.

[1] http://www.publicaccountants.org.au/library/media-releases/preferentialtreatment

- Award inflexibility

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.

For example:
Coles and Woolworths grocery stores, which consistently trade until 9:00pm most nights in many regions, require their service, maintenance and installation work to be conducted outside these hours. This is to accommodate the safety requirements of electrical isolation, clear and uninterrupted work areas for tradesmen and for the safety of the general public.

The penalties associated with work outside the spread of hours and shift arrangements are not unique to the electrical industry. However, it is the case that the award minimum rates are significantly lower than the labour market expectations for employees working in the industry. On average, members report that they pay qualified electricians between 50% - 60% above the award minimum rate. This includes the smallest 'micro businesses' with one or two employees. Anything less than this wage rate and the business would not attract a reasonable candidate to the role.

Members then must apply the award conditions to this higher rate for work that falls outside the typical Monday to Friday arrangements. Accordingly, the net outcome of overtime rates in the award, for example $43.10 per hour for double time, are not representative of the actual wage cost that members bear in relation to their business for this double time work. As such, the modern award minimums are not a reflection of the conditions of employment within the industry.

Awards such as the *Retail Industry Award State 2004 (AN140257)*, have previously included exceptions to award conditions for employees of a particular class where their rate of pay was a set percentage above the modern award rate. This excluded core entitlements to super, leave and public holidays. This type of mechanism would greatly serve small businesses who often try to rely on 'all inclusive' rates without developing specific contract arrangements.

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 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.

Small businesses are not seeking a reduction in award conditions that would result in a real loss of wages to employees. Rather, some reliable mechanism within the award that allows for employers to have their over award payments recognised by a reduction of the penalty rate aspects of the award commensurate to the fact that they are paying between 50%-60% above the award minimum rate.

Some might counter that the award already has a mechanism for this. However, the award mechanism for varying award conditions, the Individual Flexibility Agreement (IFA), is not reliable as it cannot be made a condition of employment and can be terminated by notice from one party to revert back to the award conditions.

Small businesses could develop Enterprise Agreements which would, by virtue of the Better Off Overall Test (BOOT), allow them to offset these higher rates against some of these award provisions. However, developing such an agreement requires a high degree of knowledge of the awards, the Act's agreement making rules, in particular the BOOT assessment procedure,

as well as the negotiation skills to reach such a position with employees. In addition, a business must employ at least two employees in order to make an agreement which would exclude the smallest businesses that need the greatest assistance.

Small businesses are often hard pressed complying with the award provisions as they do not have the skills to undertake this type of agreement drafting or negotiation. For a business to seek assistance to create such an agreement for them would be cost prohibitive in most cases.

According to the results of our employer survey, the standard set by the modern and National Employment Standards (NES) is accepted by employers as largely a reasonable minimum standard. However, there exist opportunities to improve the flexibility of the arrangement of work against the demands for when the work is sought.

Such improvements could be as simple as allowing ordinary hours to be worked Monday to Sunday without a change to the penalty rate structure. It would allow employers to more flexibly roster ordinary hours of work to meet demand.

The legislation would need to be amended to specifically achieve this goal as the Fair Work Commission (FWC) would not reach such a reform decision on its own without lengthy and costly hearings. It is the preference of the FWC to reach distributive or compromise outcomes at best where applications have been made to vary awards in the past. The FWC is an establishment that has evolved from roots as an industrial conciliator and arbitrator to an organisation with the ability to significantly impact the economy of the country. The FWC, by admission of previous tribunal members, lacks the economic expertise to make decisions that are fundamental to productivity and viability of whole industries and occupations.

- *The fear of unfair dismissal claims*

Precarious market conditions alongside easily accessible and rigid dismissal provisions create an overall reluctance for employers, particularly small businesses, to create jobs.
Largely because of this there is a longstanding trend of businesses electing to engage employees as casuals as a way of 'proving' to the business that they are viable as an employee. Firstly from a position of, is there enough work for this person, and then from a perspective of the perceived likelihood that they will be a productive employee who won't make an unfair dismissal claim if they no longer meet the standards.

  - Small Business Fair Dismissal Code

The current industrial framework includes the Small Business Fair Dismissal Code ('the Code') to assist businesses with fewer than 15 employees to manage terminations initiated by the employer.

Unfortunately, from discussions with members we have found that the Code is an ineffective tool and rarely achieves its intent of reducing the potential burden of an unfair dismissal claim on a small business.

In effect, an employer that has followed the code is:

- Not protected from an unfair dismissal claim.

- Still 79%[1] likely to agree to pay to have the matter settled for a sum of less than $8000 in order to avoid lengthy and costly arbitration.

  Settlement amounts can have a significant impact on the viability of a small business particularly in the building, construction and electrical industries where cash flows are dependent on prompt progress payments.

- Not required to prove how they have followed the Code if the matter proceeds to arbitration.

  The Code is inadequate in this regard as it asks questions after the dismissal has taken place. The Code should be a prompt to employers before the fact to ensure they meet the obligations of the Act in terms of redundancy and the criteria for assessing the dismissal as provided for by section 387.

For example:

The Code states that:

"It is in the interests of the employer to complete this checklist ***at the time of dismissal*** *and to keep it in case of a future unfair dismissal claim."* (emphasis added)

It is not helpful for a small business employer who has just made an employee's position redundant in order to stay viable to then be prompted by the Code:

The Code states further:

3(a):
Did you comply with any requirements to consult about the redundancy in the modern award, enterprise agreement or other industrial instrument that applied to the employment?"

This is a requirement that should have been undertaken prior to the dismissal taking effect.

The Code also states that the employer should understand the requirements of the Code before proceeding with the dismissal. However, the above question does not prompt or imply that consultation ought to be any more than a discussion about the position of the business prior to the dismissal coming into effect.

The case law of the FWC makes it clear that an employer cannot simply meet with an employee to outline the reasons that they need to be made redundant. Consultation in their view is at least a meeting prior to the decision to dismiss the person. The employer is still obliged to engage costly advice to prosecute complicated jurisdictional objections or to assist them with the handling of the defence of the matter effectively. They are also forced to sideline their business efforts for extended periods (commonly 6 to 12 months) while the unfair dismissal matter goes through the FWC's processes.

When you consider that an unfair dismissal claim proceeds directly to conciliation with a FWC conciliator, who has no capacity to consider the merits of the case, including the employer's attempts at complying with the code; there is no advantage to the parties, or the FWC, that is gained by the employer for following the Code.

[1] Fair Work Commission – Results and Outcomes data 1 July 2013 to 30 June 2014 https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes

Reliance on the Code, in itself, does not reduce the likelihood of a claim or shorten the process by which claims are progressed. The inherent flaws in the unfair dismissal process, including the Small Business Fair Dismissal Code, can have a devastating financial effect on small businesses and are a key example of laws that inhibit small business owners from taking on new employees.

- *Recommendations*

Small business would be better placed to recruit new employees if the following changes were made to the industrial framework:

  - Improve the Code to afford an employer the opportunity to demonstrate how it has complied with the requirements of the Code through documentation and other material.

  - The FWC to involve itself earlier in the dismissal claim process by giving genuine consideration to the material supplied as part of the employer's response and making a determination 'on the papers' whether or not there is a case to be accepted. This would include considering issues regarding the number of employees, the timing of the claim and the seriousness of the conduct/performance against the 'fairness of process' afforded to the employee.

  - If accepted, the claim then proceeds through the usual FWC process of conciliation, then arbitration if unable to be settled.

  - If the matter is accepted, this would afford the parties a meaningful basis with which to agree to settle or contest the matter.

This arrangement would reduce the prevalence of frivolous claims to garner out some 'go away money' where there is vexatious basis for a claim. It would also reduce the likelihood of employers persisting with the defence of a claim on a misconception that there is 'no case to answer' in their view.

It may also better serve the Fair Work Act to include a genuine exemption to unfair dismissal claims for small businesses. Exclusions for businesses of a particular size have been utilised in the past by industrial legislation. This exemption would not reduce the ability for employees to make claims in relation to unlawful terminations.

3. Factors that discourage or prevent certain cohorts of Australians from gaining employment in small businesses, in particular young job seekers, mature aged Australians, those from regional areas and those with a partial work capacity.

Employment of apprentices

Small businesses make up over 90% of all employers engaging apprentices. However, the increase in the apprentice wage rate and lack of appropriate training can act as a powerful deterrent to small businesses taking on apprentices.

- *Apprentice Wages*

The Apprentice Wage Decision handed down by the Fair Work Commission in 2014 has seen a significant increase in wage costs incurred by employers.

First-year apprentices who have completed Year 12 now receive 55 per cent of a tradesperson's rate (up from 42 per cent) and second-year apprentices who have completed Year 12 now receive 65 per cent (up from 55 per cent).

It was the position of MEA during the 2012/2013 apprentice review of the modern awards that increasing cost of apprentices on these businesses will have a negative impact on employment of young people and negatively impact the businesses attempting to employ apprentices.

Apprentices are students being paid to learn and while important to the continuation of the industry and the economy; they are a cost for the organisation to bear which are largely not recoverable.

Adjustments to awards have also been made relating to apprentices' conditions of employment:

- Payment of apprentices' excess travel costs for attendance at block release training at a distant location that requires an overnight stay that the employer and the employee both agreed upon.

- Timely reimbursement by employers in relation to training fees (six months) and textbooks.

- Time spent by apprentices in off-the-job training and assessment is to be regarded as time worked for the purposes of wages, weekly ordinary hours, and leave entitlements.

- Apprentices cannot be required to work overtime or shift work, except in an emergency, if doing so would interfere with their attendance at training.

- Clauses that purport to exclude apprentices from some provisions of the National Employment Standards will be deleted from awards.

- *Apprentice Training*

It is an ever increasing problem that electrical apprentices are not receiving the level of training through Registered Training Providers (RTOs) that is required in order for them to become fully competent tradespeople. As a result, the businesses who take on these apprentices must fill the gaps to ensure the apprentice can perform work safely and efficiently. While larger businesses may have capacity to invest time and money in supplementary training for apprentices, small businesses do not have this luxury. Employing an apprentice is costly enough for employers. In fact, it is widely acknowledged that apprentices do not become profitable for a business until their third or fourth year. When a small business is then expected to invest more resources in basic training for an apprentice in those first few pivotal years, this eats even more profit out of a small business' bottom line.

To better support small businesses that take on apprentices, training regulators across Australia need to utilise their monitoring and enforcement tools and ensure that all RTOs facilitate training to the standard required to deliver competent tradespersons. This may involve regulators conducting audits on a regular basis to confirm that all of the training elements of an electrical apprenticeship are being delivered consistently by all RTOs. Such audits would also be an opportunity to ensure the information provided in training packages is up-to-date with current practices. These processes could give confidence to small businesses that they can rely on the training provided by RTOs and would also allow the employer to focus on providing opportunities for the apprentice to apply their skills in a real world environment.

- *Apprenticeship administrative burden*

The process of employing an apprentice can be complex and time consuming for an employer. There are a number of steps involved from finding a suitable applicant, working with an Australian Apprentice Centre to lodge a training contract and complete a training plan and navigating eligibility for the government incentives and subsidies available. All of this before any kind of training begins. These administrative processes are on top of the standard steps that must be followed when a new employee is taken on, making the hiring of an apprentice even more daunting for a small business or sole trader.

4. Other related matters that the Committee considers relevant.

No further comment.

CONCLUSION

MEA greatly appreciates the opportunity to contribute to the discussion on inhibitors to employment for small business. As an advocate for small business in the electrical industry, we would be eager to participate in any future discussions on this critical issue.

Yours sincerely,

Jason O'Dwyer
Manager Advisory Services