

Productivity Commission SUBMISSION COVER SHEET



Australian Government
Productivity Commission

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Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

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Do you have any views about minimum wages, awards, penalty rates, unfair dismissal, bargaining, the compliance burdens of the system and the performance of the Fair Work Commission and the Fair Work Ombudsman?

Overtime is a cost to businesses and we appreciate in some industries such as retail it is very costly and making it difficult for coffee shops and restaurants to operate however on the flip side overtime is usually outside of 'normal' hours which limits personal / family time and therefore reasonable to pay additional overtime depending on the arrangements. However, flexibility is a requirement with our ageing workforce and individuals expectations wanting to manage their work and personal life.

Whilst there is **flexibility** written into awards there are still restrictions and therefore not as much flexibility as needed particularly with 'normal' hours of work. The 'normal' hours of work are different to what they used to be so maybe it is time this needs to be reviewed to understand there still needs to be a balance.

Whilst on the issue of flexibility, we believe it can be easy for businesses to hide behind 'operational requirements' to prevent them from allowing individuals flexibility in the workplace, particularly when looking at those involved in domestic violence, those returning from parental leave and / or caring for younger children or those with a disability. Whilst we very much appreciate that at times it is difficult or impossible I do think employers can use 'operational requirements' to their advantage. This in turn means we are not creating an environment to make it easy for those needing flexibility let alone wanting it.

We also appreciate for clients that not being able to direct employees to take some annual leave until they have reached 8 weeks of accrual (in some awards) is in fact a lot for employers to carry. We also believe it may indicate that employees have not in fact taken enough leave to be able to have some 'down time' for their own mental health. Whilst we appreciate being able to allow the employee to accrue some for the future we believe the 8 weeks should be reduced to 4 weeks.

Have any of these parts of the system assisted you, or the other hand, created problems for you, and if so how?

Moving to the subject of **unfair dismissals**, we have found that unfortunately there is a component of 'go away money' that employers are forced to pay together with the costs in time and any support from professionals to assist in dealing with an issue. An individual is able to make a claim for unfair

dismissal and the application is still listed for conciliation, even where there are jurisdictional grounds such as an application being lodged out of time or even before a dismissal takes effect. There should be a baseline vetting of applications for obvious jurisdictional issues prior to listing. Mostly for our clients there aren't jurisdictional grounds however unfortunately they are still forced to use their time and ours to deal with the matter, regardless of its merits. In addition to that they sometimes may very well also need to pay 'go away money' as well. This is very unfortunate when you are trying to educate and encourage clients to do the right thing when they are having to spend money even when they do. We believe this needs to change and not allow the matter to be heard unless where there are obvious jurisdictional grounds for objections. This will free up employers' resources to allow them to focus on compliance and preventing claims in the first place.

What changes would you like to see to the workplace relations system and why?

We believe that the **Workplace Bullying** stop orders are not really preventing or dealing with the issue. It is known that Workplace Bullying is a very real issue in the workplace but firstly we believe it would be very difficult for an individual involved in a genuine case of workplace bullying to make an external complaint – particularly when the order from Fair Work is to simply stop the bullying. This means generally the individual has to continue working with the 'bully' in the same workplace. Focus needs to remain in preventing in the first place but if employers don't ensure a workplace without bullying there unfortunately does need to be real penalties for this – unfortunately then employer might take this real issue seriously. We don't believe that stop orders are enough, if it is proven then impose penalties – someone has to own this issue and if it is Fair Work then it needs to get real about it.

Have existing workplace regulations ever stopped you from doing something you would reasonably like to do? For example, for a business, this might be hiring a new worker or deciding to become an employer in the first place.

I think the area of sham contracting and independent contractors need to be reviewed. Again, this is a subject where many employers do not understand the differences nor the penalties of getting it wrong and there are at times a very fine line in distinguishing independent contractors from employees. It is also difficult at times for employers to do the right thing as in some Industries or occupation types the individual will dictate to the 'employer' regardless of what the employer wants or knows how the relationship should be technically defined. Unfortunately, I don't believe providing more flexibility to employers in this area will make the situation any easier. However, if it was there will need to be some minimum entitlements for independent contractors to ensure there is a fair playing field for all employers and employees for that matter. Whilst like other areas of compliance we believe that employers who try and do or do the right thing will in fact be disadvantaged due to unfair competition with competitors on price due to reduce employment costs. If this was done it would make more flexible to employers it may in fact cause more unfairness to individuals being engaged in some cases.

Although I appreciate that the rules around contracting have, in some ways, come about in an effort to protect workers from being exploited and deprived of workplace entitlements that employees enjoy. However, in my experience, the vast majority of employers/principals and contractors do not fit into this scenario. I find that there are many contractors who genuinely want to operate their own businesses by contracting their services but are prevented from doing so because the law would view their relationship as that of an employer and employee. If contracting was made simpler by allowing

parties to enter into arrangements which genuinely suit them (having full knowledge of the pros and cons of doing so). This could be achieved by requiring contractors to obtain a solicitor's certification that they have had the effect of the contract explained to them (including the foregoing of employee type entitlements) in much the same way that a solicitor's certification is used in a family law context when the parties enter into a binding financial agreement. If that is satisfactory in cases where there is considerable scope for emotional manipulation, there is no good reason why a similar system could not be used in independent contracting arrangements.

Who would you go to for help if you had a workplace issue or needed information about an issue? Are existing systems and organisations working acceptably? If not, what should be done about it?

In our experience, clients come to us with frustrations that they don't get answers from Fair Work or don't get consistent answers for their general queries and therefore of no help.

How much 'red tape' is involved in complying with requirements? What could be done to reduce this, while maintaining a good workplace relations system?

We believe that the legislation is not necessarily difficult to comply with but the issue is more knowing what to comply with and what the specific compliance is. So, for us it is just as much educating our clients as it is as ensuring they do comply to reduce risks, costs and negative workplace relations in their business which has many other negative flow on effects.

With no disrespect, we would say that businesses at times are not even aware of award coverage let alone what award and therefore minimum entitlements. Once businesses are aware the compliance is relatively easy within the constraints of generally the award more so than the National Employment Standards.

If they are not aware, most of the time it is the timing of when they find out of their obligations and what actions they have taken prior to that whether it be; establishing terms and conditions of employment initially or during performance management and termination phases. The difficulties are generally around the actions they have taken prior to finding out what their obligations are.