



**Fair Work**  
OMBUDSMAN

**Review of the *Fair Work Act 2009* definition of**

**‘small business employer’**

# Contents

Contents .....	1
Acknowledgement of Country .....	3
Executive summary .....	4
Context .....	4
Key findings .....	4
1. Background .....	7
Small business employer definition review .....	7
Terms of reference .....	7
The Review's approach .....	8
Consultation .....	9
The workplace relations policy context for small business .....	10
Regulatory impact framework and other costs on business .....	12
2. Small business definitions .....	13
Definitions of small business .....	13
Defining small businesses in the Fair Work Act .....	15
Previous reviews on small business .....	19
3. Acknowledging the 'special circumstances' of small businesses .....	22
The 'special circumstances' of small businesses .....	22
What are the 'special circumstances' of small businesses? .....	23
Whether the 'small business employer' definition sufficiently acknowledges the 'special circumstances' of small businesses .....	26
Stakeholder views .....	26
Acknowledging other business sizes .....	29
4. Balancing the 'special circumstances' of small businesses against impacts on employees .....	30
Accommodations for small businesses in the Fair Work Act .....	30
Paid family and domestic violence leave – an example of delayed implementation .....	32
Stakeholder views on regulatory impact for small businesses .....	32
Supports for small businesses .....	39
Impacts on the rights and entitlements of employees .....	41
Stakeholder views on impact to employees .....	42
Achieving a reasonable balance between the needs of small business employers and employees .....	45
Stakeholder views on a reasonable balance between employers and employees .....	45
Business count data over 10 years for different employing size ranges .....	47

Previous review findings on the impact of the small business definition.....	48
Stakeholder proposals on changing the small business employer definition.....	50
Easy to understand and apply .....	53
Changing employee headcount to achieve balance .....	54
Headcount vs FTE approach.....	60
Regular casuals and seasonal employees .....	63
Other stakeholder views – associated entities, business owners and temporal considerations..	66
Financial turnover .....	67
Factors to consider in changing the definition.....	69
5. Is there a need for interoperability with other small business definitions? .....	70
Stakeholder views on interoperability with other small business definitions .....	71
6. Framework for considering a small business employer definition .....	75
Concluding observations.....	79
Attachment A – Summary of historical small business employer definitions in the workplace relations context prior to the Fair Work Act .....	81
Attachment B – International definitions of small business .....	83
Attachment C – Stakeholder views on different sized businesses under the Fair Work Act.....	86



## Acknowledgement of Country

In the spirit of reconciliation, the Office of the Fair Work Ombudsman acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters and community. We pay our respect to them and their Cultures, and their Elders, past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

### About our artwork: **Stepping forward**

Stepping forward represents taking the next step on the journey towards reconciliation and the potential possible when everyone is included.

Connecting with diverse peoples; meeting, listening and sharing together, can build respect and trust. Working in concert for a common purpose and united in the mission to make meaningful change.

It serves as a reminder of the dynamism and vibrancy of First Nations peoples and the lands from which they come, making the emergence of new ideas and ways of being possible that enables the envisioning of a brighter future.

**Artist:** Timothy Buckley

# Executive summary

## Context

The Fair Work Ombudsman (FWO) was asked by the Australian Government in July 2024 to conduct a Review (the Review) into the small business employer definition in section 23 of the *Fair Work Act 2009* (Cth) (Fair Work Act) to determine if it ‘remains fit for purpose’, and if not, to provide recommendation(s) on how it could be improved.

The terms of reference outlined that the assessment of whether the definition remains fit for purpose was by reference to three key considerations:

- acknowledging the ‘special circumstances’ of small businesses
- the needs and entitlements of employees in small businesses, and
- the simplicity and ease with which the definition can be applied.

Another further consideration was interoperability with other small business definitions in other regulatory frameworks.

The Review, in line with the terms of reference, examined previous reviews which have considered small business employer definitions, assessed available Australian Bureau of Statistics (ABS) data, and undertook targeted stakeholder consultation with small business employer and employee stakeholders, and other relevant Government agencies who use definitions of small business.

Given the FWO’s statutory role as an impartial workplace regulator, we have undertaken consultation to identify any areas of agreement to inform potential options that reflect the shared views of stakeholders. The submissions disclosed disparate views that in some cases were stark. In light of this, and consistent with the FWO’s impartial role, the Review has not advocated for any one stakeholder view over another. Instead, it has presented the views of stakeholders and identified key issues for further consideration by government.

## Key findings

From a workplace relations perspective, the small business employer definition has historically been used in unfair dismissal and redundancy contexts to ease the financial and regulatory burden on small business. In recent years, use of the definition has expanded to lessen, delay or exempt new workplace obligations for small business, particularly in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes legislation).

No previous reviews underpinned by economic or policy expertise have recommended a change to the definition. However, at the time of those reviews, the small business employer definition only applied to Fair Work Act requirements about redundancy and unfair dismissal. Employer stakeholders noted the relative age of previous reviews and suggested that a contemporary assessment was needed.

Employer and employee stakeholders to the Review were generally in agreement as to the ‘special circumstances’ of small businesses in terms of the limited resources of small businesses and the disproportionate impact that regulation can impose.

All employer stakeholders and the Australian Small Business and Family Enterprise Ombudsman (the ASBFEO) considered that the existing small business employer definition, as currently constructed and based on the headcount of fewer than 15 employees, does not sufficiently acknowledge the ‘special

circumstances’ of small businesses, and called for an expansion to the current small business employer definition.

While all employer stakeholders supported changes to the current small business employer definition to broaden its application to more businesses, a range of options were put forward on how this could be achieved, including what the headcount should be, the method of calculating the headcount, whether to include regular casual employees, and whether to exclude associated entities. Only one employer stakeholder suggested a markedly different construction of the small business employer definition that would involve one of several criteria to be met.

Employee stakeholders argued that there was no case for expanding the current definition. This was based on a starting position that employees of small businesses should not be treated any less favourably than non-small business employees, noting the vulnerable characteristics of some employees in small businesses, and arguing that no previous reviews have recommended changing the current definition.

There were mixed views among employer stakeholders on whether the small business employer definition should be aligned to other definitions of a small business. While employer stakeholders questioned the continuing relevance of previous reviews, the Productivity Commission finding that a single harmonised definition could lead to inflexibility and increased costs, and that small business definitions should instead reflect their specific regulatory context,<sup>1</sup> continues to offer a useful perspective when considering the benefits and costs of a change in definition.

**Finding 1:** Employer and employee stakeholders to the Review and the ASBFEO were generally in agreement as to the ‘special circumstances’ of small businesses, including limited human and financial resources, and limited legal and compliance expertise and systems, that makes complying with workplace and other laws disproportionately more burdensome.

**Finding 2:** There were mixed views between employer and employee stakeholders as to the need to amend the small business employer definition in the Fair Work Act, with employer stakeholders and the ASBFEO seeking an expansion to the definition to capture more businesses and employee stakeholders advocating for no change to the definition.

**Finding 3:** A range of proposals to expand the small business employer definition were put forward by employer stakeholders and the ASBFEO. However, there were mixed views by these stakeholders on elements of the definition, including the threshold headcount number, the method of calculating headcount, the inclusion of regular casuals, and the exclusion of associated entities.

**Finding 4:** There were mixed views among stakeholders on the need for aligning the small business employer definition in the Fair Work Act with other small business definitions to achieve greater interoperability. The Review also noted research by the Productivity Commission that found aligning small business definitions across different regulatory frameworks may result in inflexibility and higher costs for businesses.

Given the divergency of stakeholder views on the need for, and how to improve the small business employer definition, the government may wish to consider undertaking further work to evaluate possible options, including regulatory analysis in line with Australia’s Regulatory Impact Analysis

---

<sup>1</sup> Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 32 <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf> (Productivity Commission Small Business Research Report, 2013).

Framework. The Review has noted the potential benefits and disadvantages to changing the various elements of the currently constructed definition, based on stakeholder views, for the purpose of guiding any further work.

Stakeholders also expressed there was a need to consider related issues that were outside of the Review's terms of reference, but are nonetheless important policy questions. Specifically, whether and to what extent the specific accommodations afforded to small business in the Fair Work Act are of practical value to small businesses, and other means by which the government can support small businesses with regulatory burden or compliance with the Fair Work Act. We have noted these issues in the report.

# 1. Background

## Small business employer definition review

On 15 July 2024, the Hon Tony Burke MP, the then Minister for Employment and Workplace Relations, wrote to Anna Booth, the Fair Work Ombudsman, requesting that the Office of the Fair Work Ombudsman conduct a review of the definition of 'small business employer' in the Fair Work Act. This was in response to questioning by some members of parliament during debate for the enactment of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act), about whether the small business threshold in the Fair Work Act remains fit for purpose.

This request was accompanied by the Review terms of reference (below), which have since been updated to reflect that, on 28 October 2024, Senator the Hon Murray Watt, former Minister for Employment and Workplace Relations, extended the original review timeframe from the end of 2024 to 30 June 2025 to accommodate stakeholders that were concerned they would not have the capacity to engage with the Review alongside the statutory review of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, conducted by Emeritus Professor Mark Bray and Professor Alison Preston.

## Terms of reference

### Review of the Fair Work Act 2009 definition of 'small business employer'

#### Terms of Reference

##### Objective

The review is to examine the definition of 'small business employer' in the *Fair Work Act 2009* (Cth) and advise government on whether that definition remains appropriate. In the event the review finds the definition is no longer fit for purpose, recommendations should be made on how it could be improved.

##### Scope

In conducting the review, the Office of the Fair Work Ombudsman should consider:

- the objects of the Fair Work Act, including its objective of 'acknowledging the special circumstances of small and medium sized businesses', and the effectiveness of the current definition in meeting this objective
- that the special arrangements afforded to small businesses must be balanced against the different rights and entitlements of the employees of small businesses compared to the employees of larger businesses
- the construction of the current definition, including the ease with which it can be applied and understood by businesses and workers and whether it remains appropriate
- the need for interoperability of the definition with similar definitions in other Commonwealth laws and requirements, if any, such as those used by the Australian Bureau of Statistics and the Australian Taxation Office, and
- the implications of any proposed amendments to the existing definition of 'small business employer', including for the operation of other provisions in the Act as well as small businesses, workers and government.

The Office of the Fair Work Ombudsman should inform its review and advice through:

- the findings of previous Commonwealth, state and territory government inquiries and reviews into the definition of small business, such as the 2013 Productivity Commission research report *Regulator engagement with small business*,
- consultation with the Department of Employment and Workplace Relations and other relevant government agencies who use definitions of small business, and
- targeted consultation with small businesses and employee representatives.

The review will not consider whether amendments should be made to other definitions of small business outside of the workplace relations portfolio.

### **Deliverables**

The Office of the Fair Work Ombudsman is to provide a final report on its findings and recommendations by 30 June 2025. The report is to be published on the Fair Work Ombudsman's website.

## **The Review's approach**

The Review was limited to considering the appropriateness of the small business employer definition in section 23 (small business employer definition) of the Fair Work Act. It did not extend to assessing the definition of small business used for the purposes of the single interest employer bargaining exclusion in section 249 of the Fair Work Act.

In considering whether the small business employer definition is appropriate and remains 'fit for purpose', the following questions were examined:

- What are the 'special circumstances' of small businesses in the context of the workplace relations framework?
- Whether the small business employer definition appropriately captures small businesses by reference to the 'special circumstances' of small businesses?
- What factors are to be weighed up in considering an appropriate balance between the 'special circumstances' of small businesses against the rights and entitlements of employees of small businesses?
- What factors are to be weighed up in considering whether the definition is easy to apply for employers and employees against the 'special circumstances' of small businesses and the rights and entitlements of employees?
- The need, if any, for interoperability of the small business employer definition in the Fair Work Act with other small business definitions in other Commonwealth laws and requirements.

It was beyond the scope of the Review to consider whether the Fair Work Act and the Fair Work system more broadly, sufficiently acknowledges the 'special circumstances' of small businesses. It was also beyond the scope of the Review to assess whether the small business employer definition was fit for purpose with respect to each accommodation already afforded to small businesses under the Fair Work Act, as this would encompass a detailed consideration of the accommodations, their impact, and the policy intent of each.

While the Review considered the need, if any, for interoperability of the small business employer definition in the Fair Work Act with other small business definitions in other Commonwealth laws and requirements, consideration of a single small business definition across different regulatory frameworks was beyond the scope of the Review.



## Consultation

As required by the terms of reference, the FWO undertook targeted consultation with representatives of small businesses and their employees. This was achieved through the FWO's established tripartite groups.<sup>2</sup> These forums bring together employer and employee representative groups, and FWO senior leaders, with the aim of establishing the best ways to collaborate on furthering the FWO's objectives, priorities and strategic direction. Using these established groups was an efficient and effective way to obtain input from a cross section of industries and representatives of small businesses and their employees.

A consultation paper was prepared by the FWO and circulated to all members of the FWO's tripartite groups on **11 December 2024**, with submissions due **7 March 2025**. Some stakeholders also sought permission to share the consultation paper with affiliate organisations, which duly occurred. The FWO received submissions from 16 organisations.

Additional stakeholder consultation occurred in June 2025. On **5 June 2025**, the FWO invited stakeholders to provide written clarification and/or any additional material on a number of specific areas arising from the submissions (including their experience with flexible working arrangements, business growth, full time equivalent [FTE] calculations and determination of 'regular casuals') by **17 June 2025**. The Review received 'additional material' from 7 stakeholders and their affiliate organisations. The FWO also held a meeting with external stakeholders on **20 June** (external stakeholder meeting), providing an update on the progress of the review, an overview of preliminary findings, and inviting any further feedback from stakeholders prior to the finalisation of the report. The Review received 'additional feedback' from 7 stakeholders and their affiliate organisations.

During the external stakeholder meeting and in subsequent feedback, some employee and employer stakeholders shared reflections on the consultation process and the absence of a specific recommendation regarding reform of the small business employer definition. Key points included the utility of a more iterative process, where stakeholders could engage with each other's submissions – and for facilitated discussion to explore potential areas of agreement. The Review's approach was aligned to the terms of reference, which required the FWO to inform itself through targeted consultation, and by the FWO's role as an impartial regulator. This approach also recognised the diversity of stakeholder views and the various arguments presented across a range of proposals. Guided by the consultation paper, the Review has sought to present an accurate and objective picture of key issues and stakeholder views, noting that the targeted nature of the Review and the focus in the terms of reference on section 23 of the Fair Work Act, means that not all potentially intersecting issues could be fully ventilated. Any decision to amend the current definition is a matter for government, and the findings of the Review can support any such deliberations.

The FWO consulted with the Department of Employment and Workplace Relations (DEWR) as the agency with policy responsibility for administering the Fair Work Act. The FWO also met with staff of the Fair Work Commission (FWC) (the national workplace relations tribunal under the Fair Work Act), who provided information about the FWC's functions and case management processes. Other relevant government agencies who use definitions of small business and have an interest in small business regulation were also consulted. A full list of stakeholders that participated in the Review are at **Table 1** below.

---

<sup>2</sup> Including the Advisory Group of peak organisations (with members from Australian Chamber of Commerce and Industry, Australian Council of Trade Unions, Australian Industry Group, Business Council of Australia and Council of Small Business Organisations of Australia), the Small Business Sub-committee and Industry Reference Groups (including for aged care services; agriculture; building and construction; disability support services; fast food, restaurants and cafes; and higher education).

The Review has also given consideration to an open letter on the small business employer definition signed by members of the House of Representatives on 17 November 2024.<sup>3</sup>

Table 1. List of stakeholders consulted as part of the Review	
Non-government stakeholders	Government stakeholders
<ul style="list-style-type: none"> <li>• Australian Chamber of Commerce and Industry (ACCI)</li> <li>• Australian Council of Trade Unions (the ACTU)</li> <li>• Australian Industry Group (Ai Group)</li> <li>• Australian Retailers Association (the ARA)</li> <li>• Australian Services Union (the ASU)</li> <li>• The Business Council of Australia (BCA)</li> <li>• Clubs Australia</li> <li>• CFMEU Construction and General Division (the CFMEU)</li> <li>• Council of Small Business Organisations of Australia (COSBOA)</li> <li>• The Housing Industry Association (HIA)</li> <li>• Master Builders Australia (Master Builders)</li> <li>• Master Grocers Australia (MGA)</li> <li>• Motor Trades Organisations (MTO)</li> <li>• National Disability Services (NDS)</li> <li>• The National Electrical and Communications Association (NECA)</li> <li>• The National Farmers' Federation (the NFF)</li> <li>• The Shop, Distributive and Allied Employees' Association (the SDA)</li> <li>• The Small Business Association of Australia (SBAA)</li> <li>• Surveyors Australia</li> <li>• United Workers Union (UWU)</li> </ul>	<ul style="list-style-type: none"> <li>• Australian Bureau of Statistics (the ABS)</li> <li>• Australian Small Business and Family Enterprise Ombudsman (the ASBFEO) who also provided a written submission</li> <li>• Australian Taxation Office (the ATO)</li> <li>• Department of Employment and Workplace Relations (DEWR)</li> <li>• Fair Work Commission (the FWC)</li> <li>• Department of the Treasury (Treasury)</li> </ul>

## The workplace relations policy context for small business

A number of stakeholders made submissions about the broader policy context for small business under the Fair Work Act, and areas where, in the stakeholders' views, there is need for further inquiry. While these matters are beyond the terms of reference, the Review considered it important to acknowledge these additional views because they reflect policy positions that frame stakeholder views on the small business employer definition.

<sup>3</sup> The letter was addressed to the Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, and was signed by Allegra Spender MP, Kate Chaney MP, Kylea Tink MP, Zali Steggall OAM MP, Dr. Helen Haines, Dr. Monique Ryan, Dr. Sophie Scamps and Zoe Daniel MP, <https://www.dewr.gov.au/download/16874/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/39627/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/pdf>.

ACCI recommended that there be a ‘meaningful revaluation of the so-called exemptions in the Fair Work Act for small businesses’ as ‘they do not operate to provide genuine, meaningful relief to small businesses’.<sup>4</sup> Ai Group advocated for a ‘comprehensive review’ of the Fair Work Act and Fair Work system, suggesting that ‘approaches to regulating smaller to medium sized businesses (SMEs) should not be evaluated in isolation, separately from reviewing the appropriateness and fitness for purpose of the system/legislation as a whole’.<sup>5</sup> The NFF also called for a ‘comprehensive review of the system’ that would include the workplace relations landscape, the Fair Work Act and award framework.<sup>6</sup> SBAA called for an ‘investigation’ into the broader Fair Work Act framework, suggesting that currently it appears ‘to be designed to provide advantages to unions, medium and large businesses that would appear to represent only 2.8% of business’.<sup>7</sup>

The ACTU suggested that any change to the threshold for the small business employer definition ‘may require a reconsidering of each of the substantive obligations and entitlements themselves, something beyond the scope of the Review and ill-suited to the nature of the relatively confined submission-based consultation process’.<sup>8</sup> The basis for this view, as the ACTU explained, is that the differential treatment of a small business under the Fair Work Act by way of the small business employer definition has occurred at the same time as introducing the obligations generally for business, with the ‘legislature determin[ing] that the applicable regulation would apply to a business with 15 or more employees’.<sup>9</sup> The ACTU also submitted that the Fair Work Act ‘goes to some lengths, in addition to carve outs’ for those defined as small business employers ‘to ensure differential treatment depending on the size of the business and the resources available to it’ and suggested that the Review should not be confined to the small business employer ‘carve-outs’.<sup>10</sup> The ACTU also suggested ‘there are a myriad of initiatives and schemes aimed at assisting smaller employers which should also be taken into account’ in any review.<sup>11</sup>

Most employer stakeholders as well as the ASBFEO considered Australia’s workplace relations system to be complex and that small businesses are disproportionately impacted despite the use of the small business employer definition in the Fair Work Act. The ASBFEO observed that the definition is ‘no longer reflective of ... the increasing weight and complexity of workplace regulations’.<sup>12</sup>

While the Review acknowledges the stakeholder views on these broader policy considerations, the Review was confined to the terms of reference and has where relevant in the report, attempted to explain why certain views in the submissions have been considered beyond the scope of the Review.

Finally, the Review also notes that stakeholder views about the operation of Fair Work Act provisions are likely to be given further detailed consideration in the statutory reviews of the Closing Loopholes legislation. These views have been included in the report because they are relevant to the consideration of the regulatory burden on small business, however, in line with the terms of reference, the Review makes no findings about the adequacy or otherwise of the substantive provisions considered.

---

<sup>4</sup> ACCI submission, p. 3 [7].

<sup>5</sup> Ai Group submission, p. 2 [6]–[7].

<sup>6</sup> NFF submission, p. 8.

<sup>7</sup> SBAA submission, pp. 9, 16.

<sup>8</sup> ACTU submission, p. 8 [21].

<sup>9</sup> Ibid.

<sup>10</sup> Ibid p. 6 [15].

<sup>11</sup> Ibid p. 6. [16].

<sup>12</sup> ASBFEO submission, p. 1.

## Regulatory impact framework and other costs on business

The Review did not undertake a regulatory impact analysis, as this was not specifically requested in the terms of reference. Additionally, no clear options emerged to be able to evaluate. Despite this, the Review did apply concepts of regulatory burden and other financial costs to consider the various accommodations already afforded to small business employers through the definition in the Fair Work Act.

The Review notes that the BCA suggested that the FWO commission independent analysis of the Business Longitudinal Analysis Data Environment dataset to support the Review.<sup>13</sup> For the reasons above, this analysis was not undertaken. However, the Review acknowledges its potential value and that it could be considered as part of any further work. The Office of Impact Analysis' Regulatory Burden Measurement Framework involves an approach to calculating the increase or decrease in costs on business and individuals imposed by a policy or policy changes. Using the framework, regulatory costs include the following compliance costs:

- administrative costs, which are costs incurred by regulated entities primarily to demonstrate compliance with the policy, usually record keeping and reporting, and
- substantive compliance costs, which are costs incurred to deliver the outcomes being sought (usually purchase and maintenance costs). This includes the costs of operation, providing training to employees to meet regulatory requirements, the costs of providing information for third parties and the costs of professional services needed to meet regulatory requirements, for example, legal, tax and accounting advice.<sup>14</sup>

Compliance costs are of particular relevance in considering how the current small business employer definition is used in the Fair Work Act to reduce the regulatory impact on small business. However, it is important to note there are other costs that are not taken into account in measuring regulatory burden. These include non-compliance and enforcement costs, such as costs that arise when businesses or individuals fail to comply, including costs incurred in court and tribunal processes or through action necessary for the business or individual to ensure compliance. Other costs that are excluded are opportunity costs, business-as-usual costs and costs that may arise indirectly from the impact of changes, such as changes to market structure and competition. The cost of employee wages for example is not a compliance cost, except where employee wages are attributable to compliance activities to meet a particular policy.

For the Review, the use of the term 'regulatory burden' will reflect the definition above. However, the Review will also consider that some of the small business accommodations in the Fair Work Act also operate to reduce the 'financial costs' on employers that would not be considered as part of the regulatory burden measurement framework. These accommodations are outlined in **Table 3**, with some, for example, delaying the application of a particular entitlement from commencing as compared to a non-small business, or providing an exemption from a financial or monetary obligation that applies to non-small businesses. The Review notes that many stakeholder submissions appear to use terms such as 'regulatory burden' and/or 'red tape' broadly to mean any cost on small businesses arising from complying with an obligation. This did not pose an issue for the Review, given, as explained above, the Review considered both regulatory costs and other financial costs in broad terms.

---

<sup>13</sup> The Business Longitudinal Analysis Data Environment (BLADE) is an economic data tool combining tax, trade and intellectual property data with information from ABS surveys to provide a better understanding of the Australian economy and businesses performance over time.

<sup>14</sup> Department of Prime Minister and Cabinet Office of Impact Analysis, *Regulatory Burden Measurement Framework*, 2024, pp. 1–2, <https://oia.pmc.gov.au/sites/default/files/2024-02/regulatory-burden-measurement-framework.pdf>.

## 2. Small business definitions

### Definitions of small business

There is no universal definition of small business across Commonwealth statutes. A non-exhaustive list of small business definitions across different Commonwealth regulatory and policy frameworks outside of the Fair Work Act is broadly summarised at **Table 2**. Two frequently cited definitions of small business are the ATO definition of small business and the business range of fewer than 20 employees used by the ABS. It should be noted that the ABS does not define a small business as such, but rather collects and organises data into different business ranges based on employee headcount. The FWO has sought further business data from the ABS, which is set out in subsequent **Chapters 3** and **4**.

Table 2. Summary of definitions of small business in other Commonwealth legislative frameworks	
Regulatory framework/agency	Small business definition
<b>Australian Bureau of Statistics (ABS)</b>	Collects data on a range of business sizes, including publicly available statistics on small businesses employing less than 20 people.
<b>Australian Taxation Office (ATO)</b> ( <i>Income Tax Assessment Act 1997</i> - Section 328.110 and subsection 152.10 (1AA))	<p>An entity is a small business entity for an income year if it carries on a business in that year and has an aggregated turnover of less than \$10 million.</p> <p>A small business for the purpose of capital gains tax is an individual, partnership, company or trust that:</p> <ul style="list-style-type: none"> <li>• is running a business</li> <li>• has an aggregated turnover of less than \$2 million.</li> </ul>
<b>Australian Securities &amp; Investment Commission (ASIC)</b> ( <i>Corporations Act 2001</i> - Subsection 45A(2))	<p>A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following:</p> <ul style="list-style-type: none"> <li>• the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than \$25 million</li> <li>• the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million, or</li> <li>• the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.</li> </ul>
<b>Office of the Australian Information Commissioner</b> ( <i>Privacy Act 1988</i> - Section 6D)	<p>A business is a small business at a time in a financial year (the current year) if:</p> <ul style="list-style-type: none"> <li>• its annual turnover for the previous financial year is \$3 million or less, or</li> <li>• If there was no time in the previous financial year when the business was carried on, its annual turnover for the current year is \$3 million or less.</li> </ul>

Table 2. Summary of definitions of small business in other Commonwealth legislative frameworks	
Regulatory framework/agency	Small business definition
<b>Australian Competition and Consumer Commission (ACCC)</b> <i>(Competition and Consumer Act 2010 Schedule 2 (Australian Consumer Law) - Section 23)</i>	<p>A contract is a small business contract if it is for the supply of goods or services, or a sale or grant of an interest in land, where at least one party to the contract satisfies either or both of the following:</p> <ul style="list-style-type: none"> <li>at the time the contract is made the party has fewer than 100 employees, or</li> <li>the party's turnover is less than \$10 million for the party's last income year that ended at or before the time when the contract is made.</li> </ul> <p>In calculating the number of persons a party employs, casual employees are not counted unless they are employed on a regular and systematic basis, and part-time employees are to be counted as an appropriate fraction of a full-time equivalent.</p>
<b>Workplace Gender Equality Agency (WGEA)</b> <i>(Workplace Gender Equality Act 2012 - Section 4)</i>	<p>The WGEA Act does not define a 'small business' as such. It defines a 'relevant employer' including certain employers with 100 or more employees. Relevant employers are required to submit a gender equality report to WGEA. If an employer's headcount drops below 100, they are still required to submit a report to WGEA until their workforce falls below 80 employees.</p> <p>For the purposes of assisting small businesses with pay equity, WGEA 'defines a "small business" as any employer with less than 100 employees, that is, employers who are not required to report to the Agency under the WGEA Act'.<sup>15</sup></p>
<b>The Australian Small Business and Family Enterprise Ombudsman (the ASBFEO)</b> <i>(Australian Small Business and Family Enterprise Ombudsman Act 2015 - Section 5)</i>	<p>A business is a small business at a particular time in a financial year if it has fewer than 100 employees at that time or either:</p> <ul style="list-style-type: none"> <li>its revenue for the previous financial year was \$5 million or less, or</li> <li>if there was no time in the previous financial year when the business was carried on — its revenue for the current financial year is \$5 million or less.</li> </ul> <p>In counting employees, part-time employees are to be counted as an appropriate fraction of a full-time equivalent.</p>

<sup>15</sup> Workplace General Equality Agency, *Pay equity for small business*, p. 1, [https://www.wgea.gov.au/sites/default/files/documents/small-business-guidance\\_website\\_0.pdf](https://www.wgea.gov.au/sites/default/files/documents/small-business-guidance_website_0.pdf).

## Defining small businesses in the Fair Work Act

Reducing financial and regulatory burden on small businesses under the Fair Work Act has its origins in a determination made by the then Australian Conciliation and Arbitration Commission in 1984 in the *Termination, Change and Redundancy Test Case* (1984 TCR case).<sup>16</sup> The decision introduced minimum award standards for termination and redundancy and impacted various industrial awards.<sup>17</sup> However it exempted small businesses from paying redundancy entitlements.<sup>18</sup> Since this decision, differential treatment of small business employers to reduce financial and regulatory burden has operated in some form within the workplace relations framework, most notably in the context of unfair dismissal laws and redundancy pay. With the passage of the recent Closing Loopholes legislation, a broader number of Fair Work Act provisions utilise the small business employer definition in section 23 with the intention of minimising the regulatory burden placed on small business.<sup>19</sup>

Section 23 of the Fair Work Act currently defines a national system employer as a small business employer at a particular time if the employer employs fewer than 15 employees at that time. When determining if an employer employs fewer than 15 employees at a particular time, all full-time and part-time employees are counted as well as regular casual employees.<sup>20</sup> The employees of associated entities are also included when determining the number of employees an employer has at a particular time.<sup>21</sup> The operation of the definition has 2 fundamental elements: a) the number of employees, and b) the method of calculating the number of employees. A summary of the history of small business accommodations and the small business employer definition in federal workplace relations legislation is provided at **Attachment A**.

A list of provisions in the Fair Work Act that rely on the section 23 small business employer definition was identified by the Review and is provided at **Table 3** and discussed further in **Chapter 4**.

<b>Provision/ Section</b>	<b>Impact on underlying entitlement or obligation</b>	<b>Amending Act/ commencement date</b>	<b>Type of impact reduced compared with non-small businesses</b>
<b>Redundancy pay</b> (Section 121)	Excludes small business employers from the obligation to pay	<i>Fair Work Act 2009</i> 1 January 2010	Exempted in most circumstances from financial

<sup>16</sup> *Decision – Termination, Change and Redundancy Case*, [1985] F7262 [Australian Conciliation and Arbitration Commission decision] (14 December 1984), pp. 26–27,

<https://www.fwc.gov.au/documents/decisionssigned/html/pdf/f7262.pdf> (1984 TCR Case).

<sup>17</sup> Rosemary Bryant-Smith, 2004, 'Redundancy Test Case', May-June, 2004, Australian Construction Law Newsletter <https://classic.austlii.edu.au/au/journals/AUConstrLawNlr/2004/42.pdf>.

<sup>18</sup> For further background, see *Redundancy Case* - PR032004 [2004] AIRC; (26 March 2004) [https://www.austlii.edu.au/cgibin/viewdoc/au/cases/cth/AIRC/2004/287.html?context=1;query=%27Redundancy%20case%27%20and%20%27PR032004%27%20;mask\\_path=#P493\\_14220](https://www.austlii.edu.au/cgibin/viewdoc/au/cases/cth/AIRC/2004/287.html?context=1;query=%27Redundancy%20case%27%20and%20%27PR032004%27%20;mask_path=#P493_14220).

<sup>19</sup> *Small business exemptions in Closing Loopholes Bill*, joint media release issued by the Minister for Employment and Workplace Relations, the Hon Tony Burke MP, and Minister for Small Business, the Hon Julie Collins MP, on 3 September 2023, <https://ministers.dewr.gov.au/burke/small-business-exemptions-closing-loopholes-bill>.

<sup>20</sup> Fair Work Act s 23(2)(b).

<sup>21</sup> Fair Work Act s 23(3).

**Table 3. Provisions of the Fair Work Act that rely on the section 23 small business employer definition**

Provision/ Section	Impact on underlying entitlement or obligation	Amending Act/ commencement date	Type of impact reduced compared with non-small businesses
	<p>redundancy pay under the National Employment Standards (NES).</p> <p>A small business employer may still be required to pay redundancy pay:</p> <ul style="list-style-type: none"> <li>under an industry specific redundancy scheme contained in a relevant modern award (e.g. Building and Construction General On-site Award and the Plumbing and Fire Sprinklers Award), or</li> <li>in some circumstances where the small business employer was previously a larger business that downsized due to insolvency.</li> </ul>	<p>Note: the addition of a carve out from the small business redundancy exemption in cases of insolvency was introduced as part of the <i>Fair Work Legislation Amendment (Closing Loopholes) Act 2023</i> and commenced operation on 15 December 2023.</p>	<p>costs of paying redundancy pay under the NES and compliance cost of calculating the redundancy pay.</p>
<b>Unfair dismissal</b> (Sections 383(b) and 388)	<p>Increases the minimum employment period for employees of small businesses to be protected from unfair dismissal to 12 months (up from 6 months for employees of non-small businesses).</p> <p>The Small Business Fair Dismissal Code, if followed, provides small business employers with protection against unfair dismissal claims.</p>	<p><i>Fair Work Act 2009</i> 1 July 2009</p> <p>Note: A transitional definition based on fewer than 15 full-time equivalent (FTE) applied in relation to unfair dismissals that occurred before 1 January 2011 instead of the s 23 definition.</p>	<p>Lowers financial costs in defending unfair dismissal claims, and less costly to make decisions about ending employment in the first 12 months.</p>
<b>Family and domestic violence leave</b> (section 106A)	<p>Provides all employees with 10 days of paid family and domestic violence leave each year in the NES, replacing the previous entitlement to 5 days of unpaid leave. Commencement of the paid leave was delayed by 6 months for small business employers and employees to 1 August 2023 after it</p>	<p><i>Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022</i> 9 November 2022</p>	<p>Delayed regulatory burden costs are spread over a longer period; there is more time to train relevant staff and access resources</p>

**Table 3. Provisions of the Fair Work Act that rely on the section 23 small business employer definition**

<b>Provision/ Section</b>	<b>Impact on underlying entitlement or obligation</b>	<b>Amending Act/ commencement date</b>	<b>Type of impact reduced compared with non-small businesses</b>
	commenced for non-small business employers on 1 February 2023.		provided by the FWC and FWO.
<b>Workplace delegates' rights</b> (Section 350C(3)(b) (iii))	Exempts small business employers from the requirement to provide workplace delegates who are employees with reasonable access to paid time during normal working hours for the purposes of related training.	<i>Fair Work Legislation Amendment (Closing Loopholes) Act 2023</i> 15 December 2023	Exempted from financial cost of providing paid time for the purposes of related training, and compliance costs associated with implementation (training staff, processes).
<b>Exemption from increased penalties for selected civil remedy contraventions</b> (Section 546(2AA)(c))	Excludes small business employers from higher maximum penalties that courts may impose for selected civil remedy contraventions.	<i>Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024</i> 27 February 2024	Although technically not part of regulatory burden, lower financial penalties have an impact on small business.
<b>Casual employment – employee choice mechanism</b> (Section 66AAB)	Provides that casual employees of a small business employer must have been engaged for at least 12 months (compared to 6 months for non-small businesses) before they may be eligible to notify their employer they wish to change to permanent employment.  Given that periods of employment prior to 26 August 2024 do not count for the purposes of that service threshold, this mechanism effectively has a delayed commencement for small business employers compared to non-small business employers.	<i>Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024</i> 26 August 2024	Lower financial cost (derived from labour costs and time to make assessments of employee choice notifications and/or conversion requests).

Table 3. Provisions of the Fair Work Act that rely on the section 23 small business employer definition			
Provision/ Section	Impact on underlying entitlement or obligation	Amending Act/ commencement date	Type of impact reduced compared with non-small businesses
	Prior to 26 August 2024, small business employers were exempt from the requirement to offer casual conversion to casual employees, although their employees were entitled to request conversion.		
<b>Casual Employment Information Statement (CEIS)</b> (Section 125B)	Limits the obligation placed on small business employers with regards to providing the CEIS to casual employees by only requiring them to provide the CEIS to casual employees at the beginning of employment and after 12 months of employment (compared to non-small business employers who also have to provide the CEIS to casual employees after 6 months of employment and after every 12 months of employment).	<i>Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024</i> 26 August 2024	Reduces costs of providing and keeping records of the provision of CEIS to employees (administrative cost)
<b>Regulated labour hire arrangement orders</b> (Section 306E(1)(c))	Where the Fair Work Commission is satisfied that a 'regulated host' is a small business employer, it will not be able to make a 'regulated labour hire arrangement order', being an order that the labour hire/regulated employees must be paid at least what they would receive under the host's covered employment instrument (such as an enterprise agreement).	<i>Fair Work Legislation Amendment (Closing Loopholes) Act 2023</i> 1 November 2024 (the date from which labour hire orders can take effect)	Small businesses exempted from substantive and administrative costs of complying with various obligations that apply when regulated hosts are covered by a regulated labour hire arrangement order.
<b>Criminalising intentional wage underpayments</b> (Section 327B)	A small business employer is protected from referral by the FWO for possible criminal prosecution in relation to an underpayment if the FWO is satisfied that they have complied with the terms of the Voluntary Small Business Wage	<i>Fair Work Legislation Amendment (Closing Loopholes) Act 2023</i> 1 January 2025	Small businesses provided with guidance and pathway to avoid exposure to criminal prosecution.

Table 3. Provisions of the Fair Work Act that rely on the section 23 small business employer definition			
Provision/ Section	Impact on underlying entitlement or obligation	Amending Act/ commencement date	Type of impact reduced compared with non-small businesses
	Compliance Code in relation to that underpayment.		
<b>Right to disconnect</b> (Section 333M)	The right to disconnect provisions in Part 2-9, Division 6 of the Fair Work Act do not apply to small business employers until 26 August 2025 (compared to 26 August 2024 for non-small business employers).	<i>Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024</i> 26 August 2024	Delayed regulatory burden costs are spread over a longer period; there is more time to train relevant staff and access resources provided by the FWC and FWO.

## Previous reviews on small business

A range of reviews have previously examined, to differing degrees, the appropriateness of the small business employer definition contained in section 23 of the Fair Work Act. While no recommendations about an overarching change to the small business employer definition resulted from these reviews, both the 2012 DEWR review *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation* (2012 DEWR Fair Work Act review) and the 2015 Productivity Commission's *Workplace Relations Framework* public inquiry (2015 Productivity Commission Workplace Relations Framework Inquiry) noted stakeholder submissions that called for an increase to the threshold to 20 or fewer than 20 employees, specifically in the context of the unfair dismissal provisions.<sup>22</sup>

The 2013 Productivity Commission's *Regulator Engagement with Small Business – Research report* (2013 Productivity Commission Small Business Research Report) examined the interaction between regulators and small businesses in Australia, with a key focus on how regulatory practices affect compliance costs. While the report advocated for minimising compliance costs for small business where possible, it did not support a universal definition for small business, arguing that 'adopting a single harmonised definition ... could lead to inflexibility and higher costs'.<sup>23</sup>

<sup>22</sup> Department of Education, Employment and Workplace Relations, *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, 2012, p 212, <https://www.dewr.gov.au/download/14529/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/29762/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/pdf> (DEWR Fair Work Act review, 2012); Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 598, <https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>. (Productivity Commission Workplace Relations Framework Inquiry, 2015).

<sup>23</sup> Productivity Commission, *Small Business Research Report*, 2013, p. 14, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

COSBOA observed that these reviews were conducted some years ago and that the current workplace relations context has changed significantly since that time.<sup>24</sup> This observation has been taken into consideration in relevant parts of the Report.

More recently, the 2022 Senate Education and Employment Legislation Committee, in its *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Inquiry Report* called for an increase to the small business employer threshold specifically for single interest employer authorisations, and this recommendation has subsequently been legislated into section 249 of the Fair Work Act. While the section 249 definition is not part of this Review, it is considered as part of assessing the need for aligning the section 23 definition of small business employer with other definitions. A high-level summary of the key findings of these reviews is provided at **Table 4** and discussed further in relevant chapters of the report.

Table 4. Reviews that examine the small business employer definition	
Review	Summary
<b>DEWR (2012)</b> - <a href="#">Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation</a>	<p>A three-member panel reviewed the Fair Work Act and the <i>Workplace Relations Amendment (Transition to Forward with Fairness Act) 2008</i>. The Panel assessed the operation of the Fair Work Act and the extent to which its effects have been consistent with the objects in section 3 of the Fair Work Act.</p> <p>In the context of the unfair dismissal provisions, the review acknowledged submissions advocating for an increase in the small business 15 employee threshold, including to align it with the ABS definition of fewer than 20 employees.<sup>25</sup></p> <p><b>The review noted:</b> No recommendation was made to change the small business employer definition. The review explained that the small business employer definition within the Fair Work Act ‘reflects the long-standing small business exemptions established in the Australian Conciliation and Arbitration Commission’s Termination, Change and Redundancy decision of 1984 ...’<sup>26</sup></p>
<b>Productivity Commission (2013)</b> - <a href="#">Regulator Engagement with Small Business Research Report</a>	<p>The Productivity Commission undertook a study to benchmark regulator approaches to engagement with small business in order to improve the delivery of regulatory objectives for communities and reduce unnecessary compliance costs.</p> <p>The study involved consideration of the different definitions of small businesses. It concluded that ‘it is neither feasible nor appropriate to develop a single definition (qualitative or quantitative) of small business that would be suitable for all regulator purposes’.<sup>27</sup></p> <p><b>The Productivity Commission recommended:</b> ‘Governments should not impose upon regulators a single definition of small business as this could lead to inflexibility and higher costs for some businesses and for the community more generally. Policy makers and regulators are best</p>

<sup>24</sup> This feedback was provided during the stakeholder meeting on 20 June 2025.

<sup>25</sup> DEWR Fair Work Act review, 2012, p. 212.

<sup>26</sup> Ibid.

<sup>27</sup> Productivity Commission Small Business Research Report, 2013, p.32, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

Table 4. Reviews that examine the small business employer definition	
Review	Summary
	placed to define small business in ways that are practical and appropriate for their regulatory area. <sup>28</sup>
<b>Productivity Commission (2015) - <a href="#">Workplace Relations Framework, Inquiry Report</a></b>	<p>The Productivity Commission was requested to assess the performance of the workplace relations framework focussing on key social and economic indicators and examining the Fair Work Act against its stated aims and objects.</p> <p>The inquiry considered the definition of small business in the context of the unfair dismissal provisions. The report recognised stakeholder submissions advocating for the small business employer definition to be aligned with the ABS definition of fewer than 20 employees.</p> <p><b>The Productivity Commission noted:</b> '[F]or the purposes of applying unfair dismissal regulations, shifting from the existing definition of small business to one involving a larger number of employees would probably not be warranted.'<sup>29</sup></p>
<b>Senate Education and Employment Legislation Committee, (2022) - <a href="#">Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Inquiry Report</a></b>	<p>The report contains an overview of the Bill, submissions from stakeholders and recommended amendments to the Bill.</p> <p>The Senate Education and Employment Legislation Committee noted views expressed by some stakeholders which considered the Fair Work Act's current definition of small business employer to be too restrictive when viewed in the context of contemporary workplaces. Conversely, other stakeholders argued that the rights of employees shouldn't be restricted solely because of the size of the business they work for.</p> <p><b>The Senate Committee recommended:</b> 'that the definition of "small business employer", for the purpose of Part 21 of the bill [single interest employer authorisations] be increased from fewer than 15 employees, to fewer than 20 employees, including regular and systematic casuals, based on headcount. The definition of "small business employer" in section 23 of the Fair Work Act 2009 should remain unchanged.'<sup>30</sup></p>

<sup>28</sup> Ibid p. 22.

<sup>29</sup> Productivity Commission Workplace Relations Framework Inquiry, 2015, p. 598, <https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>.

<sup>30</sup> Senate Education and Employment Legislation Committee, *Inquiry report Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* [Provisions], p. v, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/SecureJobsBetterPay/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Report).

### 3. Acknowledging the ‘special circumstances’ of small businesses

Workplace relations laws that are flexible for businesses and that promote productivity and economic growth are part of the Fair Work Act’s object of providing a balanced framework for cooperative and productive workplace relations that promotes economic prosperity and social inclusion.<sup>31</sup> This chapter considers the context and conditions that make up the ‘special circumstances’ of small businesses and whether the definition accounts for these.

Small businesses are significant employers and contributors to the Australian economy. While the ABS does not formally define ‘small business’, it publishes data by employment size ranges. According to publicly available ABS data, businesses with 1 to 19 employees comprise 35% of all businesses (including non-employing entities).<sup>32</sup> As reported in the 2023–24 release of *Australian Industry*, as at June 2024, approximately 5.2 million individuals were employed in businesses with 0 to 19 employees, representing around 39% of the total workforce.<sup>33</sup> A similar proportion was recorded in 2022–23, when small businesses employed roughly 5.3 million people, also accounting for 41% of the workforce.<sup>34</sup> Small businesses recorded a turnover rate (‘churn’) of 5.9%, significantly higher than the 1.6% observed among medium and large businesses, reflecting greater operational volatility.<sup>35</sup> Despite this, they contributed \$589.84 billion in value added during 2022-23, representing 33% of total industry value added to the economy.<sup>36</sup>

#### The ‘special circumstances’ of small businesses

An early inclusion in the Fair Work Act, effective from 1 July 2009, was to add an additional item to the Object of the Act at paragraph 3(g) such that ‘acknowledging the special circumstances of small and medium-sized businesses’<sup>37</sup> is one element, among a number of others, of providing ‘a balanced framework for cooperative and productive workplace relations that promotes national economic and social inclusion for all Australians’. There is no additional commentary in the Explanatory Memorandum or parliamentary debate explaining this inclusion in the Fair Work Act, except for it being a ‘consequential amendment’. However, the inclusion did coincide with the passing of new unfair dismissal provisions in the Fair Work Act that replaced the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) exemption, which restricted unfair dismissal protections to businesses with more than 100 employees. The Fair Work Act unfair dismissal provisions, which continue today, removed that exemption and, through the small business employer definition, replaced it with the following for businesses with fewer than 15 employees:

---

<sup>31</sup> Fair Work Act s 3 ‘Object of this Act’.

<sup>32</sup> ABS, 8165.0 *Counts of Australian Businesses, including Entries and Exits*, June 2020 to June 2024, Table 13a.

<sup>33</sup> ABS, *Australian Industry*, 2023-24, State and territory by employment range, Table 1, [https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/2023-24/81550DO007\\_202324.xlsx](https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/2023-24/81550DO007_202324.xlsx).

<sup>34</sup> ABS, *Australian Industry*, 2022-23, State and territory by business size, Table 1, [https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/2022-23/81550DO007\\_202223.xlsx](https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/2022-23/81550DO007_202223.xlsx).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth); Commonwealth, Parliamentary Debates, *House of Representatives*, 2 June 2009, pp. 5234–5235 (Julia Gillard, Prime Minister), [ParInfo - FAIR WORK \(TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS\) BILL 2009 : Consideration in Detail](#).

- a longer minimum employment period for employees of small businesses to meet to be protected from unfair dismissal (12 months instead of 6 months), and
- the Small Business Fair Dismissal Code, which provides businesses with protection against unfair dismissal claims if the Code is followed.

Initially there was a transitional definition based on FTE rather than headcount to calculate the 15 employee threshold for the purposes of the unfair dismissal provisions. As discussed further in **Attachment A**, the small business employer definition in the context of the unfair dismissal provisions was subject to deliberation and inquiry by Parliament.

Against this background, and in the absence of specific guidance on its meaning, it appears that a plain meaning of the ‘special circumstances of ... small businesses’ was intended. For the purposes of the Review, this phrase has been interpreted to mean the distinct factors and challenges that can be attributable to most small business employers at a micro level (which can be exacerbated by broader macroeconomic factors) that can make compliance with the Fair Work Act comparatively more difficult and costly than for larger businesses.

## What are the ‘special circumstances’ of small businesses?

It is well established that small businesses are often disproportionately affected by compliance costs compared to larger businesses.<sup>38</sup> When regulation imposes a fixed cost, a large business will experience a lower impact than a small business as the bigger business is able to spread the cost across a larger turnover.<sup>39</sup> This can also occur where compliance costs are not fixed as when a business increases in size, the compliance costs may increase but at a decreasing rate.<sup>40</sup>

The 2013 Productivity Commission Small Business Research Report found that small businesses generally have simpler systems and processes to support business management and compliance activities, ‘are less likely to employ staff with specific knowledge in compliance, and are also less likely to be informed about requirements’.<sup>41</sup> In comparison with larger businesses that may have in-house compliance teams, compliance often falls upon the small business owner to manage.<sup>42</sup> Small business owners are required to be skilled across different areas of business activity, including compliance, which typically means they are time-poor.<sup>43</sup> When the Productivity Commission conducted a survey with regulators, 30% cited this as a challenge for their engagement with small businesses.<sup>44</sup>

Small business owners have less time to educate themselves on the regulatory requirements that apply to running their business. The Productivity Commission (2013) found that 38% of regulators reported that small businesses lack awareness of their compliance obligations.<sup>45</sup> ACCI’s recent 2024 Small Business Conditions Survey (ACCI Small Business Conditions Survey) of 378 small businesses reported that around 63% of respondents were *somewhat confident* or *very confident* that they were aware of

---

<sup>38</sup> The Office of Impact Analysis, *Small business impact analysis guidance note*, May 2024, p. 1, <https://oia.pmc.gov.au/sites/default/files/2024-05/small-business.pdf>.

<sup>39</sup> Justin Douglas and Amy Land Pejoska, *Regulation and Small Business* (Economic Roundup, Treasury, Canberra, 28 August 2017), p. 3, [https://treasury.gov.au/sites/default/files/2019-03/p2017-t213722-Roundup\\_Sml\\_bus\\_regulation-final.pdf](https://treasury.gov.au/sites/default/files/2019-03/p2017-t213722-Roundup_Sml_bus_regulation-final.pdf) (Regulation and Small Business, 2017).

<sup>40</sup> Ibid.

<sup>41</sup> Productivity Commission Small Business Research Report, 2013, p. 69, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

<sup>42</sup> Douglas and Pejoska, *Regulation and Small Business*, p. 4, [https://treasury.gov.au/sites/default/files/2019-03/p2017-t213722-Roundup\\_Sml\\_bus\\_regulation-final.pdf](https://treasury.gov.au/sites/default/files/2019-03/p2017-t213722-Roundup_Sml_bus_regulation-final.pdf).

<sup>43</sup> Productivity Commission Small Business Research Report, 2013, p. 69, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

all the 'red tape/regulatory requirements' applicable to their business, with less than a quarter reporting being *not* or *not at all confident* in their knowledge of their 'red tape' requirements and just over 15% of respondents *unsure*.<sup>46</sup>

Small businesses may outsource compliance activities to third parties, such as accountants, human resources consultants and lawyers. However, in ACCI's Small Business Conditions Survey fewer than 5% of respondents reported outsourcing their compliance requirements, suggesting perhaps that a significant majority of small businesses are managing their compliance obligations without external assistance.<sup>47</sup>

The ACCI Small Business Conditions Survey also provides some insight on the time spent on compliance activities per week. Respondents were asked 'how long do you spend seeking to comply with your red tape/regulatory requirements each week?' Of the respondents, 13% reported less than an hour, 29% reported one to five hours, almost 20% reported 6 to 10 hours, around 7% reported 11 to 20 hours, and circa 6% reported over 20 hours per week.<sup>48</sup> This means that, consistent with the 2020 *Productivity Commission's Regulatory Technology Information Paper*, there are 'considerable resources tied-up with regulatory compliance activities'.<sup>49</sup>

The Productivity Commission (2013) also found that when implementing new requirements, a short transition time with an insufficient notification period can be costly for small businesses and may lead to non-compliance.<sup>50</sup> For example, it can prevent small businesses from optimising the timing of their investments in compliance tools to be able to integrate new compliance requirements into their operations.<sup>51</sup> Accommodations like longer periods of adjustment are sometimes offered to small businesses to help them understand their rights and obligations, allow them to seek external advice, and to provide appropriate time for businesses to implement any new changes.<sup>52</sup> This is discussed further in **Chapter 4** in the context of Australia's workplace relations framework, and occurs in other regulatory frameworks. For example, the ATO rolled out Single Touch Payroll in phases, starting with employers with 20 or more employees in July 2018, and extending to employers with 19 or fewer employees in July 2019.<sup>53</sup>

The Review found that it is generally well accepted that small businesses, in comparison to larger businesses, face additional barriers to complying with government regulation, including responding to changes in regulation. Small businesses have limited financial resources and limited in-house support dedicated to human resources, payroll and regulatory compliance. As the Office of Impact Analysis notes, small businesses are more likely to need external advice and/or time to understand and meet

---

<sup>46</sup> ACCI, 2024 *Small Business Conditions Survey*, p. 16.

<sup>47</sup> Ibid p. 11.

<sup>48</sup> Ibid.

<sup>49</sup> Productivity Commission 2020, *Regulatory Technology 2020, Information paper*, p.8, <https://www.pc.gov.au/research/completed/regulatory-technology/regulatory-technology.pdf>.

<sup>50</sup> Productivity Commission Small Business Research Report, 2013, p. 84, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

<sup>51</sup> Ibid.

<sup>52</sup> Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth), p. 67, [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072\\_ems\\_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload\\_pdf/Fair%20Work%20Legislation%20Amendment%20\(Closing%20Loopholes\)%20Bill%202023\\_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072_ems_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload_pdf/Fair%20Work%20Legislation%20Amendment%20(Closing%20Loopholes)%20Bill%202023_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf).

<sup>53</sup> ATO, *STP reporting options*, <https://www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/single-touch-payroll/stp-reporting-options>.

their regulatory obligations.<sup>54</sup> Further, compliance costs are generally proportionally higher for small businesses than larger businesses.<sup>55</sup>

Overwhelmingly, submissions to the Review by employer and employee stakeholders acknowledged these factors as constituting the ‘special circumstances’ of small businesses. Government stakeholders including Treasury, the ATO and the ASBFEO also agreed that small businesses face additional challenges due to their relative limited resources, with the ATO noting that small businesses under their definition can experience compliance challenges relating to a lack of financial literacy and record keeping.

Many employer stakeholders and the ASBFEO also emphasised the associated greater relative costs of complying with workplace relations laws as well as a range of other laws. There was also recognition by some employer stakeholders of the demands on small business owners personally, notably they have no guaranteed employee rights such as leave, workers’ compensation and income.

Many of the ‘special circumstances’, although not labelled collectively as such, are also acknowledged by the *National Small Business Strategy* released in February 2025.<sup>56</sup> This includes the need for small business owners to wear many hats (including to understand legal and regulatory requirements) due to resource restrictions, navigating complex information, advice and support to address multiple challenges while running their business, and managing the acute challenge of balancing work and life.<sup>57</sup>

Further, the Productivity Commission (2013) succinctly described the ‘special circumstances’ of small businesses in relation to the compliance challenge when it stated:

*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>58</sup>

These challenges are recognised across various regulatory regimes, including the Fair Work Act, by differentiating small businesses and reducing regulatory burden and other financial costs that would otherwise disproportionately impact small businesses as compared with larger businesses. This is demonstrated in **Table 2** above which shows various small business definitions used across different Commonwealth regulatory frameworks. Regulators, such as the FWO, also take these ‘special circumstances’ into consideration when developing and providing education and advice to small businesses, and when determining appropriate and proportionate compliance and enforcement activities in matters involving small businesses.

The majority of employer stakeholders noted other factors including economic conditions and/or factors specific to a sector or industry as also necessary when considering the ‘special circumstances’ of small businesses. These views are discussed further below.

---

<sup>54</sup> The Office of Impact Analysis, *Small business impact analysis guidance note*, May 2024, p. 1, <https://oia.pmc.gov.au/sites/default/files/2024-05/small-business.pdf>.

<sup>55</sup> Ibid.

<sup>56</sup> Treasury, *National Small Business Strategy*, 3 February 2025, p. 11, <https://treasury.gov.au/publication/p2025-624843>.

<sup>57</sup> Ibid.

<sup>58</sup> Productivity Commission Small Business Research Report, 2013, p. 2, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

# Whether the ‘small business employer’ definition sufficiently acknowledges the ‘special circumstances’ of small businesses

## Stakeholder views

Employer stakeholders overwhelmingly were of the view that the small business employer definition in section 23 of the Fair Work Act does not sufficiently acknowledge the ‘special circumstances’ of small business in the workplace relations context. In contrast, the ACTU stated it was not a simple “yes or no” proposition because the definition does not stand by itself, and that the Fair Work Act ‘goes to some lengths, in addition to carve outs for employers meeting the “small business employer” definition, to ensure differential treatment depending on the size of the business and the resources available to it’.<sup>59</sup> The ACTU cited various sections of the Fair Work Act that expressly references taking into account the circumstances of businesses, including sections 65A and 76A; both of which require consideration of an employer’s specific circumstances (such as the nature and size of the business) when assessing whether there are reasonable grounds to refuse requests for flexible work or extended unpaid parental leave, respectively.<sup>60</sup>

ACCI submitted that the small business employer definition ‘does not sufficiently acknowledge the special circumstances of small businesses [thus] making it an insufficient definition in the workplace relations context’.<sup>61</sup> ACCI urged consideration of ‘the broader circumstances that are unique to small businesses’ beyond those that are acknowledged or created under the Fair Work Act.<sup>62</sup> HIA similarly urged the Review to consider the ‘wider special circumstances of small and medium business including the current regulatory environment, economic conditions, operating environment including resources and IR/HR expertise available to small business’.<sup>63</sup>

COSBOA noted that the threshold of 15 employees from the 1984 TCR case was focused on redundancy entitlements in the federal Metal Industry Award and that since then, ‘the business landscape has transformed dramatically with technological advances, increased regulatory requirements, and changed operational needs’ as ‘rendering the [current] threshold obsolete’.<sup>64</sup>

The consistent theme running through employer stakeholder submissions was that the environment for small business was sufficiently different to when the small business employer definition was originally created, such that change was warranted.

While the ACTU accepted that the size of a business may affect the proportionate cost of complying with regulation and that the current definition is based on a historical position of the 1984 TCR Case, its view was that previous reviews (in **Table 4**) have not recommended changing the definition, and ‘that there has not been any demonstrable change to the circumstances facing small business to medium sized business which would warrant moving the threshold’.<sup>65</sup>

The ASU stated that the ‘special circumstances’ of small business are recognised through ‘exempting those employers from providing particular rights and entitlements’.<sup>66</sup> The ASU also considered the current headcount ‘provides a balance when considering the size of employers’ in not being confined

---

<sup>59</sup> ACTU submission, p. 6 [15].

<sup>60</sup> ACTU submission, p. 4 [12].

<sup>61</sup> ACCI submission, p. 4 [16].

<sup>62</sup> Ibid p. 5 [22].

<sup>63</sup> HIA submission, p. 2.

<sup>64</sup> COSBOA submission, p. 2 [8].

<sup>65</sup> ACTU submission, p. 2 [8].

<sup>66</sup> ASU additional feedback, pp. 1–2.

to ‘micro-businesses’ and not prohibiting or limiting how much revenue a business can generate.<sup>67</sup>

While macro-economic factors affect small businesses, and they may do so in a disproportionate way, the ‘special circumstances’ of small business and the use of the small business employer definition has tended to relate to the micro and enduring factors unique to small businesses that remain in spite of economic conditions. These are, as discussed above: limited staff, time and resources and expertise to meet compliance obligations. It is also noteworthy that during significant economic downturns or major events such as the Global Financial Crisis and the COVID-19 pandemic, governments used other means to reduce the impact for business, such as temporary financial assistance, targeted supports and relief from regulatory burden.

### ***Limited financial and human resources to manage compliance obligations***

ACCI largely noted all the challenges referenced in the consultation paper (as discussed above), including limited resources and decreased capacity for small business owners to deal with compliance requirements, and their multiple ‘hats of accountant, research and development, WHS, payroll, human resources, management, and worker’.<sup>68</sup> ACCI also noted Australia’s ‘immensely complex industrial relations’ as being ‘only one aspect of compliance’ that small businesses must comply with along with others that are also complex such as work health and safety (WHS), taxation as well as complexities involving legislation at the various levels of government.<sup>69</sup>

The challenge of small business employers and owners wearing different hats across a myriad of regulatory schemes was reflected in a number of employer stakeholder submissions. For example, the NFF noted that agriculture is one of the most regulated industries, with regulation related to environment, water, food safety, employment, migration, labour laws, animal welfare, land use, trade, financial and taxation reporting, and WHS.<sup>70</sup>

The ARA suggested that the current small business employer threshold ‘does not reflect the operational and financial challenges faced by businesses at the lower end of the spectrum’ with many ‘struggling with compliance costs, cash flow management, and administrative burdens’.<sup>71</sup> Surveyors Australia noted that for its members comprising 85% with less than 20 staff, they faced ‘rising cost pressures’ and that most lack in-house human resources, particularly ‘specialised industrial relations knowledge’.<sup>72</sup> It was further noted that reaching the non-small business threshold requires needing to obtain these resources and ‘adds to the financial pressures’.<sup>73</sup>

MTO suggested that ‘scale and resources are important considerations in determining an appropriate small business employer definition’, as small businesses ‘lack access to both the resources and economies of scale enjoyed by larger businesses’ and ‘are not simply ‘little big businesses’’.<sup>74</sup> MTO suggested that anecdotally, an employee head count of 50 is ‘typically the point at which a business is of sufficient scale to employ dedicated human resources (HR) support’.<sup>75</sup> MTO also cited the 2022 Human Capital Benchmark Report by the Society for Human Resource Management which found that the average human resources staff to employee ratio was 1.7 per 100 employees.<sup>76</sup>

---

<sup>67</sup> Ibid p. 2.

<sup>68</sup> ACCI submission, p. 4 [17].

<sup>69</sup> Ibid p. 4 [18].

<sup>70</sup> NFF submission, p. 2.

<sup>71</sup> ARA submission, p. 2.

<sup>72</sup> Surveyors Australia, p. 2.

<sup>73</sup> Ibid.

<sup>74</sup> MTO, p. 2 [8].

<sup>75</sup> Ibid p. 2 [7].

<sup>76</sup> Ibid p. 2 [7].

NDS, representing disability services providers, noted that its sector is heavily weighted toward client-facing service delivery roles.<sup>77</sup> Based on member feedback that ‘the number of HR administrative roles are relatively similar between an organisation of 15 employees or up to 50 employees’, NDS suggested that the regulatory burden of adapting to new industrial relations would be ‘felt to a similar degree’ across this range of employing size.<sup>78</sup>

Ai Group submitted that it is necessary to consider the financial capacity of small and medium sized businesses.<sup>79</sup> In particular, Ai Group suggested considering the relative earnings and resources of small businesses and the average or medium incomes and typical levels of financial resources of small businesses and how these indicators are growing or contracting yearly, and to compare this with other cohorts of businesses.<sup>80</sup> Ai Group also suggested that ‘as is widely apprehended, many small businesspeople commonly earn amounts comparable to average award minimum wages, or even less than award rates’ and that this should have implications for policy considerations in the Review.<sup>81</sup> They state that key considerations should include:

- a) what small businesses can typically afford/should equitably be required to pay*
- b) small business capacities for compliance with complex requirements, and*
- c) where the balance or balances lie between competing policy purposes and capacities of smaller employers.<sup>82</sup>*

HIA pointed to data indicating small business owners are ‘working harder than ever, with 45% of small business owners working 39 hours or more per week’.<sup>83</sup> ACCI referred to figures reported by the ASBFEO in 2023 that 61% of small business employers with 1 to 19 employees work over 39 hours per week, exceeding the NES.<sup>84</sup> ACCI also noted that small business owners do not have access to workers’ compensation for work-related injuries and are often unable to take time off for what could be attributed to personal leave, adding to the pressures on small business owners.<sup>85</sup>

### ***Sector specific issues and labour market trends***

The ARA suggested that the current small business definition does not account for how different sectors and industries operate, for example, a small retail business not being comparable to a construction small business.<sup>86</sup> Similarly, Clubs Australia said that clubs face unique challenges such as ‘high reliance on casual and part-time staff to accommodate variable trading hours’ and seasonal employment during sporting seasons and major events and that ‘these challenges are exacerbated in regional and remote areas’.<sup>87</sup>

The NFF asserted that most small businesses in the agricultural industry lack resources in navigating ‘administrative and compliance burdens’ with many also being rural or remotely based, and thus adding to the challenge of accessing external or specialist advice.<sup>88</sup> COSBOA suggested the current small business employer definition ‘discourages business growth’, particularly in the hospitality, retail and construction sectors where ‘workforce size does not necessarily correlate with operational

---

<sup>77</sup> NDS submission, p. 1.

<sup>78</sup> Ibid pp. 1–2.

<sup>79</sup> Ai Group submission, p. 9 [55].

<sup>80</sup> Ibid p. 10 [56], [61].

<sup>81</sup> Ibid p. 10 [62].

<sup>82</sup> Ibid p. 10 [62].

<sup>83</sup> HIA Submission, p. 4 citing ABS TableBuilder, Census 2021.

<sup>84</sup> ACCI submission, p 5 [20]; ASBFEO, *Small Business Matters*, June 2023, p. 18.

<sup>85</sup> ACCI submission, p. 5 [20].

<sup>86</sup> ARA submission, p. 2.

<sup>87</sup> Clubs Australia submission, p. 2.

<sup>88</sup> NFF submission, p. 2.

sophistication or resource availability’.<sup>89</sup>

The ASBFEO considered that the current definition does not reflect developments in the labour market citing that ‘[t]he Employment White Paper observed that the Australian labour market is exhibiting a “trend towards part-time employment and more varied and flexible work arrangements”’.<sup>90</sup> This was also acknowledged by Ai Group.<sup>91</sup>

### ***International comparisons***

COSBOA, MTO and SBAA referred to examples of small business definitions used internationally, including by the United Kingdom, New Zealand, European Union, United States, Canada, India and the International Labour Organization. The Review notes that small business definitions used in other countries or regions need to be viewed in context, given the comparatively different systems of regulating employment, and that some are not related to employment regulation. The Review is cognisant of the 2013 Productivity Commission Small Business Research Report findings regarding the need for small business definitions to reflect their regulatory context, and consequently, the Review did not conduct a deep analysis of each country’s or organisation’s definition or the frameworks they operate within.

A table of international definitions of small business is provided at **Attachment B**.

**Finding 1:** Employer and employee stakeholders to the Review and the ASBFEO were generally in agreement as to the ‘special circumstances’ of small businesses, including limited human and financial resources, and limited legal and compliance expertise and systems, that makes complying with workplace and other laws disproportionately more burdensome.

### **Acknowledging other business sizes**

A number of employer stakeholder submissions discussed the need for other sized businesses to be acknowledged i.e. micro and/or medium sized businesses. These views are provided at **Attachment C**.

Whether there should be a definition of micro business and/or a definition of medium business in addition to the small business employer definition in the Fair Work Act is beyond the Review’s terms of reference. However, these views do highlight that when considering a change in the Fair Work Act that carries a regulatory impact on employers, there can be varying impacts that may not be able to be fully understood and assessed for other business sizes when only looking at the impact based on the binary definitions of small business employers versus non-small business employers. Despite this, it can reasonably be surmised that introducing additional tiers would also introduce additional complexity by effectively moving from a 2-tiered or binary approach to an approach with 3 or more different definitions of a business. This would potentially entail high transition costs and ongoing costs to business, employees and regulators (such as the FWC and the FWO) to correctly determine business status at a given time which would need to be weighed against any benefit from providing a greater level of tailoring of regulation.

---

<sup>89</sup> COSBOA submission, p. 2 [11].

<sup>90</sup> ASBFEO submission, p. 1.

<sup>91</sup> Ai Group submission, p. 3 [17].

## 4. Balancing the ‘special circumstances’ of small businesses against impacts on employees

This chapter considers:

- the accommodations for small business in the Fair Work Act by virtue of the small business employer definition
- the impacts of these accommodations for small business employees, and
- the range of proposals put forward by stakeholders to modify the small business employer definition to achieve a reasonable balance between small business employers and employees.

### Accommodations for small businesses in the Fair Work Act

Since the introduction of the Fair Work Act, original provisions and subsequent amendments have traversed discrete topics and relied on the small business employer definition to distinguish and reduce the financial and/or the regulatory impact of new obligations on small businesses. This includes by:

- having less onerous obligations
- being exposed to lesser penalties for non-compliance with some provisions
- being afforded ‘safe harbour’ from certain sanctions in the Fair Work Act, and
- having longer lead-in times to prepare for new or changed obligations.

The table of provisions that use the definition of small business employer in section 23 to provide these accommodations is at **Table 3**.

Broadly, these accommodations in the Fair Work Act have been provided in recognition that small businesses often have limited human and financial resources to ensure compliance with workplace laws and face disproportionate compliance costs compared with larger businesses.

As the Explanatory Memorandum to the original *Fair Work Bill 2008* outlined in the context of the Small Business Fair Dismissal Code:

*... small businesses tend not to have the resources to employ dedicated human resources professionals to help them manage dismissals. By providing a clear process and guidance to follow when dismissing an employee, the Code may help to mitigate any increase in unfair dismissal claims from small business employees, and provide certainty to small business when they need to dismiss an employee.<sup>92</sup>*

As evidenced in **Table 3**, there have been recent efforts to lessen the impact of new workplace obligations for small business, particularly through the Closing Loopholes legislation.

Small business employers are exempt from recent changes to the Fair Work Act that increased maximum civil penalties for certain contraventions of the Fair Work Act.<sup>93</sup> This was the result of a list

---

<sup>92</sup> Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) pp. xlvii–xlvi [r. 225], [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4016](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4016).

<sup>93</sup> Fair Work Act s 546(2AA)(c).

of amendments moved by crossbench senators David Pocock and Jacquie Lambie seeking to make the legislation ‘fairer’ for businesses, which were agreed to by the Parliament.<sup>94</sup>

Small businesses are also exempt from the new requirement to provide workplace delegates with reasonable access to paid time for related training for their role as a workplace delegate, while the remainder of the workplace delegates’ rights provisions still apply to them.<sup>95</sup> As outlined in the relevant Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, this exemption was designed to ‘alleviate the cost burden of the amendments on small businesses’.<sup>96</sup> Small businesses are also exempt from labour hire arrangement orders where the host business is a small business employer. Per the Explanatory Memorandum, this was intended to ‘minimise the impact on small businesses’.<sup>97</sup>

With the introduction of a criminal offence for intentional wage underpayments on 1 January 2025, small business employers have also been afforded a pathway to avoid referral by the FWO for possible criminal prosecution if the FWO is satisfied that the small business employer has complied with the Voluntary Small Business Wage Compliance Code in relation to an underpayment. Compliance with the Voluntary Small Business Wage Compliance Code is ‘intended to provide assurance to small business employers that they will not be referred for criminal prosecution for wage theft under the Fair Work Act’.<sup>98</sup>

The ‘employee choice pathway’ for casuals to convert to permanent employment provides a longer service requirement for small business casual employees of 12 months compared to non-small business casual employees of 6 months.<sup>99</sup> As noted in the Explanatory Memorandum, ‘[t]he longer period provided for small business is appropriate given the significance of change of employment status for small businesses, is intended to allow small business employers additional time to understand their rights and obligations under new Division 4A of Part 2-2’ and is consistent with the eligibility timeframes under the previous casual conversion framework.<sup>100</sup> The effect of these provisions is that small businesses were also afforded a delayed commencement of 6 months compared to non-small businesses before they may be provided with a notice under the ‘employee choice pathway’ mechanism.<sup>101</sup>

Small businesses were also given an additional 12 months to prepare for the right to disconnect as compared to non-small businesses. The entitlement was introduced into the Fair Work Act by an amendment to the Closing Loopholes No. 2 Bill in the Senate and included a delayed

---

<sup>94</sup> Commonwealth, *Parliamentary Debates*, Senate, 7 February 2024, pp 196–197 (David Pocock), [https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/27573/toc\\_pdf/Senate\\_2024\\_02\\_07\\_Official.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/27573/toc_pdf/Senate_2024_02_07_Official.pdf;fileType=application%2Fpdf).

<sup>95</sup> Fair Work Act s 350C(3)(b)(iii).

<sup>96</sup> Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth), p. 139 [829], [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072\\_ems\\_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload\\_pdf/Fair%20Work%20Legislation%20Amendment%20\(Closing%20Loopholes\)%20Bill%202023\\_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072_ems_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload_pdf/Fair%20Work%20Legislation%20Amendment%20(Closing%20Loopholes)%20Bill%202023_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf).

<sup>97</sup> Ibid p. 17 [80].

<sup>98</sup> Ibid p. 165 [965].

<sup>99</sup> Fair Work Act s 66AAB.

<sup>100</sup> Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth), p. 67 [351], [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072\\_ems\\_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload\\_pdf/Fair%20Work%20Legislation%20Amendment%20\(Closing%20Loopholes\)%20Bill%202023\\_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7072_ems_63e58127-2cdd-4b6c-8248-fdd8a3389e30/upload_pdf/Fair%20Work%20Legislation%20Amendment%20(Closing%20Loopholes)%20Bill%202023_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf).

<sup>101</sup> Fair Work Act s 66AAB.

commencement.<sup>102</sup> These types of accommodations provide a longer transition period for existing small businesses, but once commenced, any benefit from this accommodation ceases for small business employers and thereafter employees of all businesses are treated equally. This is further explored below in relation to paid family and domestic violence leave.

## Paid family and domestic violence leave – an example of delayed implementation

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* came into effect on 9 November 2022 and provided all national system employees with access to 10 days of paid family and domestic violence leave in the NES.<sup>103</sup> The entitlement commenced on 1 February 2023 for non-small business employers and on 1 August 2023 for employers that met the small business employer definition on 1 February 2023. The additional 6-month transition period for small business was implemented in recognition of the ‘unique needs of small business with limited human resources’.<sup>104</sup>

The Independent Review of the operation of paid family and domestic violence leave (FDVL Independent Review) in the Fair Work Act noted the delayed commencement of the entitlement for small business employees was intended to support small business in implementing and administering the new entitlement.<sup>105</sup> The FDVL Independent Review found that the entitlement is operating as intended, however concluded that the impact of the entitlement for small business is not yet known.<sup>106</sup> It identified challenges for small business in implementing the new entitlement, including keeping up to date with legislative change, confidentiality, underutilisation of resources and confusion resulting from complexity and ambiguity arising from translation of generic legislative provisions into workplace practices. It also identified a lack of dedicated human resources, infrastructure and systems to administer the entitlement.<sup>107</sup>

While not a conclusion drawn by the FDVL Independent Review, the additional 6-month transition period for small business may have limited the impact of these challenges. Extra implementation time can assist small businesses to get across new requirements without differing treatment once they are in effect. As discussed in **Chapter 2**, delayed implementation of a change for small businesses has been recognised by the Productivity Commission as beneficial in terms of lowering compliance costs through being able to allow small businesses time to optimise investments made to integrate new compliance requirements into their operations and by decreasing the risk of non-compliance. It also provides a longer timeframe by which small businesses can select and procure external expertise or obtain free government services.

## Stakeholder views on regulatory impact for small businesses

Some submissions addressed the extent to which the measures outlined at **Table 3** above, provide relief and reduce regulatory burden for small businesses as compared to non-small businesses. There

---

<sup>102</sup> Amendment sheet 2361, *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.

<sup>103</sup> *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, p. 5.

<sup>104</sup> Explanatory Memorandum of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, pp. 1–2, [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6882\\_ems\\_805554bf-e778-4e8b-9820-9c463ff038bf/upload\\_pdf/JC007042.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6882_ems_805554bf-e778-4e8b-9820-9c463ff038bf/upload_pdf/JC007042.pdf;fileType=application%2Fpdf).

<sup>105</sup> Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E., 2024, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*, Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia, pp. 22–23, <https://www.dewr.gov.au/download/16523/final-report-independent-review-fair-work-amendment-paid-family-and-domestic-violence-leave-act-2022/38294/final-report-independent-review-fair-work-amendment-paid-family-and-domestic-violence-leave-act-2022/pdf>.

<sup>106</sup> Ibid pp. 76, 81.

<sup>107</sup> Ibid pp. 81–82.

were mixed views as to the extent to which the differential treatment of small businesses through the small business employer definition alleviates regulatory and cost burdens for small business.

ACCI contended that the provisions in the Fair Work Act with differential treatment of small businesses has ‘limited practical effects’ and ‘negligible impact to the operations of small businesses’ but acknowledged that ‘it is critical to understand that provisions to assist small businesses are critical to their sustainability and their ability to provide stable employment’.<sup>108</sup> MTO considered that with the exception of redundancy pay, the Fair Work Act ‘provides little, if any, genuine relief for small business employers’.<sup>109</sup> The MTO also considered that whilst the longer lead-in times for the ‘employee choice pathway’ and the right to disconnect provide additional time to prepare for the changes, ‘the burden to a small business is ultimately the same – meaning that for all practical purposes, they bear a higher regulatory burden than their big business competitors once those provisions take effect’ and as such ‘are trivial’.<sup>110</sup>

Similarly, the NFF submitted that:

*these concessions merely tinker at the edges of a bigger issue. The relief which they provide is intended to address workplace relations complexity and the way in which it unfairly burdens small operators... the concessions amount to just nine changes to the Fair Work requirements. Four of those are arguably just procedural. A number of the remainder are reintroduced through the Awards system. And frequently the changes simply modify timing and implementation. In the end, only a handful of Fair Work Act requirements are subject to consistent meaningful concessions.*<sup>111</sup>

COSBOA outlined some of the compliance and administrative challenges for businesses in the range of 15 to 49 employees in respect of implementing the casual employment changes, workplace delegates’ rights, the right to disconnect and the criminal wage underpayments offence and higher civil penalties.<sup>112</sup> This was in support of COSBOA’s recommendation to lift the headcount in the small business employer definition to less than 50 FTE.<sup>113</sup>

Other employer stakeholders such as the ARA submitted that expanding the definition of small business would help to alleviate some of the burdens such as ‘red tape’, time spent on compliance and financial stress.<sup>114</sup>

The ASBFEO suggested that on reaching the 15 headcount threshold, smaller employers are ‘losing access to special considerations such as a fair dismissal code, delayed commencement of certain new provisions, and the Voluntary Small Business Wage Compliance Code’.<sup>115</sup> The ASBFEO also highlighted the need for right-sized regulation for small business, which it broadly describes as being ‘risk informed, proportionate, relevant and responsible to the “real life” circumstance’ of small business.<sup>116</sup> They stated that ‘while there is a logic to shaping tailored requirements that are more readily and confidently implementable by small [business] employers’, this is a ‘poor substitute’ to right-sizing

---

<sup>108</sup> ACCI submission, p. 9 [28], 12 [32].

<sup>109</sup> MTO submission, p. 3 [11].

<sup>110</sup> Ibid p. 6 [26]–[27].

<sup>111</sup> NFF submission, p. 3.

<sup>112</sup> COSBOA submission, pp. 5–6 [31]–[37].

<sup>113</sup> Ibid p. 1 [4].

<sup>114</sup> ARA submission, p. 3.

<sup>115</sup> ASBFEO submission, p. 1.

<sup>116</sup> ASBFEO, *Energising enterprise: 14 steps to boost Australia’s small and family businesses*, p. 9.

<https://www.asbf eo.gov.au/policy-advocacy/policy-insights/14-steps-boost-australias-small-and-family-businesses>.

regulation.<sup>117</sup>

The ACTU ‘object[ed] to the implication ... of all regulation being a “burden” to business’, pointing to some of the ‘substantial benefits’ such as a level playing field for fair competition and providing a framework for ‘mature and productive systems of industrial relations’.<sup>118</sup>

Stakeholder views on the specific provisions with differential treatment for small businesses are discussed below.

### **Redundancy pay**

ACCI considered the exclusion of small businesses from the requirements to make redundancy payments was a ‘sensible approach acknowledging the special circumstances of small businesses, particularly since redundancies may be critical to ensuring the continuity of the business’.<sup>119</sup> However, ACCI also submitted that this exemption should be introduced into awards, noting that there are approximately 10 awards with redundancy pay obligations for small business and given this, ‘the special circumstances of small businesses have not been treated as equal’.<sup>120</sup> The FWC confirmed that 10 awards have redundancy clauses which interact with small businesses differently to the NES, either because they contain industry-specific redundancy schemes that apply to small business employers to the exclusion of the NES, or because they supplement the NES by providing for redundancy pay to employees of a small business.<sup>121</sup>

MTO submitted that the case for a redundancy exemption threshold from less than 15 employees to less than 50 employees has strengthened.<sup>122</sup> MTO suggested employee mobility between employers has ‘increased significantly’, referencing ABS statistics showing that 57.3% of employees have been in their current job less than 5 years and that 1 in 5 employees have been in their job for less than 12 months.<sup>123</sup> MTO also submitted that the ‘vast majority of employee mobility is voluntary’ citing ABS statistics of an annual retrenchment rate of 1.7%, or approximately 10% of those leaving a job, including owners managers closing their businesses down for economic reasons.<sup>124</sup> MTO further submitted that ‘whilst redundancies are not commonplace, an exemption from having to pay severance pay in addition to these other termination-related payments, can literally determine whether a small business operator remains solvent and continues to operate as a going concern’ and that a higher threshold of less than 50 employees ‘would therefore assist to address the high business failure rates for small businesses’ above the current threshold of less than 15 employees.<sup>125</sup>

The ACTU contended that unlike some of the other provisions in the Fair Work Act that rely on the definition of small business, the obligation to pay redundancy payments under the NES in section 119 of the Fair Work Act is primarily a matter of ‘removing substantive financial obligations on employers

---

<sup>117</sup> ASBFEO submission, pp. 1–2.

<sup>118</sup> ACTU submission, p 7. [19].

<sup>119</sup> ACCI submission, p. 10 [29].

<sup>120</sup> Ibid pp. 6 [25], 10 [29].

<sup>121</sup> The 10 awards that provide for redundancy entitlements for an employee of a small business outside of the NES include Black Coal Mining Industry Award 2020, Building and Construction General On-site Award 2020, Dredging Industry Award 2020, Joinery and Building Trade Award 2020, Mannequins and Models Award 2020, Manufacturing and Associated Industries and Occupations Award 2020, Mobile Crane Hiring Award 2020, Textile, Clothing, Footwear and Associated Industries Award 2020, and Timber Industry Award 2020.

<sup>122</sup> MTO submission, p. 4 [14].

<sup>123</sup> Ibid citing the ABS, Working Arrangements, August 2024 (released 9 December 2024).

<sup>124</sup> Ibid. Data seems to be originally from the ABS, *Job mobility*, February 2024, <https://www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release>. In this release, "10.9% of those leaving a job, including owners managers closing their businesses down for economic reasons". Otherwise, data in this paragraph is accurate/up to date.

<sup>125</sup> MTO submission, p. 4 [16].

and substantive benefits from employees’, and that the ‘justifications of lack of payroll and/or HR expertise or functions appear minimally relevant’.<sup>126</sup> The ACTU therefore considered that the primary policy justification for redundancy pay is ‘largely limited to a “capacity to pay”’ and noted that employers can currently apply to the FWC under section 120 of the Fair Work Act to vary an obligation to pay redundancy payments, including to nil, if the employer is unable to pay the amount.<sup>127</sup>

The ACTU also referred to passages of the Full Bench of the then Australian Industrial Relations Commission *Redundancy Case*<sup>128</sup> which considered a small business exemption for severance pay. Parts of the passages to which the ACTU referred to included:<sup>129</sup>

*At [272]: ... As a general proposition the employees of small businesses are entitled to some level of severance pay. The evidence establishes that the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as those employed by medium and larger businesses. It is also clear that the level of the exemption is to some extent arbitrary and can give rise to inequities in circumstances where a business reduces employment levels over time.*

*[273]: While some small businesses lack financial resilience and have less ability to bear the costs of severance pay than larger businesses, the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay ...*

The ACTU concluded that the issues raised in the Australian Industrial Relations Commission case, although going beyond the scope of the Review, would ‘weigh heavily against any recommendation ... that the current definition, as it applies to the redundancy payments, should be amended to expand the definition of small business’.<sup>130</sup>

### **Unfair dismissal**

On the Fair Work Act’s unfair dismissal provisions, ACCI argued that they do not simplify the unfair dismissal considerations for small businesses unless compliance with the Small Business Fair Dismissal Code is demonstrated.<sup>131</sup> ACCI contended that ‘the Small Business Fair Dismissal Code Checklist, while clarifying that it is not a requisite for compliance with the Code, has in practice been treated as such’.<sup>132</sup> MTO’s view on the Small Business Fair Dismissal Code was that ‘this protection is minimal at best with the Fair Work Commission having long ago acknowledged that the Code and Checklist are of “dubious value” where there are disputed facts or an element of doubt about the reasonableness of the employer position’.<sup>133</sup>

ACCI also suggested that the unfair dismissal provisions do not ‘provide any simplification for small business employers with respect to general protections applications involving dismissal’ given employees can bring a claim at any point in their employment.<sup>134</sup> MTO also noted that the Small Business Fair Dismissal Code and the extended employment qualifying period do not provide ‘any protection for small business employers in defending a general protections claim’ with small business employers also subject to a reverse onus in those matters.<sup>135</sup>

---

<sup>126</sup> ACTU submission, p. 8 [23].

<sup>127</sup> Ibid p. 9 [24].

<sup>128</sup> PR032004 [2004] AIRC 287 (26 March 2004).

<sup>129</sup> ACTU submission, p. 9 [25].

<sup>130</sup> Ibid p. 9 [26].

<sup>131</sup> ACCI submission, pp. 6–7 [25].

<sup>132</sup> Ibid.

<sup>133</sup> MTO submission, p. 6 [24].

<sup>134</sup> ACCI submission, pp. 6–7 [25].

<sup>135</sup> MTO submission, p. 6 [24].

The ACTU submitted that it is wary of small business employees being treated differently from other employees on unfair dismissal and that the FWC is capable of determining qualitatively when a dismissal has been unfair, and that the criteria in section 387 of the Fair Work Act already contains criteria of whether a dismissal was harsh, unjust or unreasonable that 'is directly relevant' to small businesses.<sup>136</sup> The ACTU also noted that it is 'unaware of *any* credible study that has demonstrated that the unfair dismissal laws', including the provisions related to small business employers, 'have had any effect on productivity or employment'.<sup>137</sup> For these reasons, the ACTU did not support limiting access to unfair dismissal for employees.<sup>138</sup>

### ***Exemption from reasonable access to paid training for workplace delegates***

ACCI considered that the workplace delegates' rights provisions in the Fair Work Act that alleviates small businesses from paying for training for workplace delegates acknowledges the 'limited capacity of small businesses'.<sup>139</sup> Recognising that this exemption affords small businesses 'less onerous obligations', MTO noted that it is the only exemption among the new rights for union nominated delegates, and employers are still required to 'understand and effectively navigate the proper exercise of a union nominated workplace delegate's rights and powers as they arise' and to 'provide reasonable access to workplace facilities'.<sup>140</sup> MTO specifically mentioned new requirements to provide workplace delegates and eligible employees covered by an award reasonable access to workplace facilities, including a room to hold discussions, noticeboard, lockable filing cabinet, and printers.<sup>141</sup>

The ACTU noted that the provisions requiring non-small businesses to provide 'reasonable' paid time off for workplace delegates' training also requires that consideration be given to the size, nature and resources of the employer to determine what is reasonable.<sup>142</sup> The ACTU also submitted that there is 'little independent quantitative or qualitative research to determine the effect of these provisions on small to medium sized businesses', but that based on what the union understands is a smaller number of workplace delegates in these businesses, the ACTU would be 'greatly surprised' if the provisions were having an impact on smaller businesses not covered by the definition.<sup>143</sup> Similarly ACCI submitted that workplace delegates would represent 'an extremely small fraction of employees'.<sup>144</sup>

### ***Exemption from increased penalties for selected civil remedy contraventions***

In relation to the increased penalties for selected civil remedy contraventions, ACCI submitted that while it excludes small businesses from higher maximum penalties, it doesn't provide 'any simplification of obligations and requirements in order to comply with the Fair Work Act' and has 'limited impacts on small businesses'.<sup>145</sup> MTO also did not consider that being exposed to lesser penalties for non-compliance with certain provisions of the Fair Work Act reduced regulatory burden stating '[r]ather, it is a lower maximum penalty for a small business being able to comply with a proportionately higher regulatory burden'.<sup>146</sup>

The ACTU submitted that these laws do not increase regulatory burden on employers in an administrative sense, but that they 'increase *potential* civil penalties as an incentive for greater

---

<sup>136</sup> ACTU submission, p. 10 [29].

<sup>137</sup> Ibid p. 10 [30].

<sup>138</sup> Ibid p. 10 [31].

<sup>139</sup> ACCI submission, p. 7 [25].

<sup>140</sup> MTO submission, p. 5 [20].

<sup>141</sup> Ibid.

<sup>142</sup> ACTU submission, pp. 10–11 [32].

<sup>143</sup> Ibid p. 11 [33].

<sup>144</sup> ACCI submission, p. 10 [29].

<sup>145</sup> Ibid p 7. [25].

<sup>146</sup> MTO submission, p 7 [28].

compliance with existing obligations’ and that it is too early to assess their impact or the exemption for small businesses.<sup>147</sup>

### ***Changing from permanent to casual employment – employee choice mechanism***

On the employee choice mechanism for casual employees seeking to change to permanent employment, ACCI acknowledged that it affords a greater period of time before an employee in a small business can make a request and takes account ‘for hiring and categorisation circumstances of small businesses’.<sup>148</sup> However, ACCI considered that the procedure for dealing with such a request ‘has not been simplified for small businesses’; ‘they are still required to familiarise themselves with the procedure’ and are ‘held to the same response requirements’ as non-small businesses with ‘far greater resourcing’.<sup>149</sup>

The ACTU considered it was too early to determine the impact of the employee choice laws on business, noting that employees of small businesses will be able to access the new mechanism at the earliest from 26 August 2025.<sup>150</sup>

### ***Casual Employment Information Statement***

On the requirement to provide employees with the Casual Employment Information Statement (CEIS), ACCI submitted that small businesses have to provide it to casual employees at 12 months of employment even though they are required to do so at the time of commencing employment, and that this ‘does not recognise the limited HR capacity of small businesses’ and therefore the ‘special circumstances’ of small businesses.<sup>151</sup> It is noted that non-small businesses have an ongoing requirement to provide the CEIS to casual employees every 12 months.

The ACTU noted that the new provisions commenced on 26 August 2024 and as such, their impact is yet to be fully worked through by employers and employees.<sup>152</sup> However, the ACTU considers they are ‘very minor obligations’ and notes that the FWO has a copy of the CEIS on its website and clear instruction on whether to provide it and when, and that the FWO also suggests that the CEIS can be provided by sending a link to the relevant FWO webpage.<sup>153</sup>

### ***Exemption from regulated labour hire arrangement orders***

ACCI noted that it is not clear how many small businesses will be excluded by the exemption of small business employers from regulated labour hire arrangement orders but viewed it as accommodating the ‘special circumstances’ of small businesses.<sup>154</sup>

### ***Application of the Voluntary Small Business Wage Compliance Code***

In relation to the Voluntary Small Business Wage Compliance Code, ACCI made the point that small businesses must demonstrate their conduct of underpayment was not intentional for the Code to apply which is in line with the legislative requirements and that ‘it is not clear that the Code will have any tangible impact on small businesses’.<sup>155</sup> The MTO argued that ‘given the test for criminal prosecution under the Fair Work Act is intentionality, it may be argued that in practice, it [the Voluntary Small Business Wage Compliance Code] provides no additional “safe harbour” than afforded to any

---

<sup>147</sup> ACTU submission, p. 11 [34].

<sup>148</sup> ACCI submission, p. 7 [25].

<sup>149</sup> Ibid.

<sup>150</sup> ACTU submission, p. 11 [35].

<sup>151</sup> ACCI submission, p. 8 [25].

<sup>152</sup> ACTU submission, p. 14 [42].

<sup>153</sup> Ibid.

<sup>154</sup> ACCI submission, p. 8 [25].

<sup>155</sup> Ibid, p. 8 [25].

other employer’ citing that the Code provides that ‘a failure by a small business employer to pay an applicable amount to, on behalf of, or for the benefit of, an employee must not be intentional’.<sup>156</sup>

According to the ACTU, given the criminal wage underpayments offence only commenced on 1 January 2025, ‘it is too early to review the impact of the laws’ and the Voluntary Small Business Wage Compliance Code on small and medium sized businesses.<sup>157</sup>

### ***Delay of the right to disconnect provisions***

On the delay of the new right to disconnect provisions, which are already in effect for non-small businesses, ACCI noted that once the provisions commence (on 26 August 2025), small businesses will not be exempt and the provisions ‘will have no specific application to small businesses in acknowledgement of their specific circumstances’.<sup>158</sup> ACCI also noted that there is no specific requirement for the size of a business to be taken into account when determining whether an employee’s refusal to respond to communication by an employer outside of working hours is unreasonable.<sup>159</sup> The ACTU’s view was that the right to disconnect imposes ‘no direct additional obligations on an employer’ but gives employees the right to refuse to monitor, read or respond to unreasonable communication from an employer outside of employees’ working hours.<sup>160</sup> The ACTU also contended that any utility from the delay of right to disconnect provisions would ‘be speculative’.<sup>161</sup>

### ***Other differential treatment of small businesses in the Fair Work Act***

In addition to the provisions that use the definition of small business employer, the ACTU noted in its submission that there are also a number of provisions of the Fair Work Act that take into account the circumstances of businesses, including the size of the business.<sup>162</sup> The ACTU submitted that compared to the differential treatment of businesses based on the small business employer definition, these provisions appear ‘in many respects, a fairer way of addressing any issues of capacity that employers may face, than a black or white/in-or-out threshold test based on the number of employees employed by an employer at a particular point in time’.<sup>163</sup>

An example of these provisions noted by the ACTU is section 62 of the Fair Work Act which provides that in determining whether additional hours are reasonable or unreasonable, one of the factors that must be considered includes the needs of the workplace or enterprise.<sup>164</sup> A number of factors also consider the employee’s circumstances including any risk to health and safety, the employee’s personal circumstances (including family responsibilities), whether the employee is entitled to receive overtime, payments or other compensation for working additional hours, and the nature of the employee’s role and level of responsibility. It could be said that the factors aim to strike a balance between the employer’s need for additional hours and the employee’s personal circumstances. The ACTU points to a number of similar provisions,<sup>165</sup> noting that these provisions may be ‘fairer’.<sup>166</sup>

---

<sup>156</sup> MTO submission, p. 6 [23].

<sup>157</sup> ACTU submission, p. 13 [39].

<sup>158</sup> ACCI submission, pp. 8–9 [25].

<sup>159</sup> Ibid.

<sup>160</sup> ACTU submission, p. 13 [40].

<sup>161</sup> Ibid.

<sup>162</sup> ACTU submission, p. 4 [12] citing Fair Work Act s 3(g), s 62, s 65A, s 76A, s 108, s 114, s 33M, s 350C, s 357, ss 387(f) and (g).

<sup>163</sup> ACTU submission, p. 5 [14].

<sup>164</sup> Ibid p.4 [12].

<sup>165</sup> Ibid citing Fair Work Act s 3(g), s 62, s 65A, s 76A, s 108, s 114, s 33M, s 350C, s 357, ss 387(f) and (g).

<sup>166</sup> Ibid p. 5 [14].

To further illustrate the point of differential treatment of small businesses beyond those that use the small business employer definition, the ACTU suggested that a business may only have 10 employees but have a strong capacity to effectively implement its obligations, and points to data, extracted in **Table 10** below, that shows that the most common type of business that employs between 1 to 14 people is “Management Advice and related consulting services”.<sup>167</sup> The Review notes that a definition that is to capture a range of businesses with similar as well as unique circumstances, is likely to produce edge or marginal cases. Some small businesses that may be financially well-resourced and relatively sophisticated, will be less impacted by regulatory obligations compared to other small businesses. However, as discussed in **Chapter 3**, it is generally accepted and well established that the majority of small businesses have limited human and financial resources when compared with larger businesses.

That the Fair Work Act allows for the circumstances of small business to be taken into account in a number of other provisions of the Fair Work Act, beyond those that specifically use the small business employer definition, does support ‘acknowledging the special circumstances of small business’. However, consideration of these provisions is beyond the terms of reference of the Review as they do not assist in examining whether the small business employer definition itself is adequate in terms of being calibrated to capture those businesses that can be characterised as having ‘special circumstances’ unique to small businesses.

While supporting different views as to whether the definition should change, some stakeholders argued that the small business employer definition should not be considered in isolation – in the case of the ACTU this was in support of the status quo, while ACCI and Ai Group called for a review of the small business employer definition as part of a broader review of the Fair Work Act. Again, this was beyond the terms of the Review but may be an important consideration for the government in any subsequent deliberations.

## Supports for small businesses

Small businesses have access to additional government funded resources and supports to alleviate the costs associated with new and ongoing workplace relations obligations. These supports, while tailored for small businesses themselves, in so far as they help achieve higher rates of compliance, have a direct impact on employees as well.

Small business is an enduring priority for the FWO due to the ‘special circumstances’ of small business, including the absence of internal human resources and payroll expertise, and a reliance on the FWO’s resources to understand and comply with their workplace obligations. The FWO provides a small business helpline and a dedicated Employer Advisory Service (EAS) that provides small businesses with free written technical advice on their Fair Work Act rights and obligations. The FWO also offers the online Small Business Showcase which provides information, tools and education resources for small business employers on their workplace rights and obligations.<sup>168</sup> These education resources include fact sheets, guides, templates and free training on topics of interest to small business owners. The FWO builds awareness of these resources and small business rights and obligations through social media posts and a bi-monthly newsletter. The FWO also engages with small business and provides small business a voice within the FWO through the Small Business Sub-committee, which informs the FWO’s work relating to small business, including educative and compliance initiatives.

The FWO has been funded by successive governments to provide targeted support to small business. This includes funding for the EAS originally provided for in the 2020-21 MYEFO, and subsequently continued through the Federal Budget 2024-25. The 2022-23 Federal Budget also provided funding to

---

<sup>167</sup> Ibid pp. 5–6 [14].

<sup>168</sup> Fair Work Ombudsman, ‘Small Business Showcase’, <https://smallbusiness.fairwork.gov.au/>.

the FWO to support small business to understand and implement the 10 days of paid family and domestic violence leave entitlement.

Similarly, the FWC website provides a dedicated small business hub which has tailored information for small business employers on workplace obligations and FWC processes. This includes information on assistance for small business, workplace disputes, dismissal rules, and various online learning modules. The FWC also runs the Workplace Advice Service which allows eligible small businesses to access free legal help on topics like dismissal, general protections, bullying at work and sexual harassment at work. The FWC also has a Small Business Reference Group that provides feedback on their initiatives and assists to improve their services for small businesses.<sup>169</sup>

The additional supports for small business were recognised by some stakeholders, although views diverged on their adequacy and effectiveness, with some submissions (the ARA, NECA, the NFF) arguing that more tailored and targeted support was needed.

The ACTU noted that ‘there are a myriad of initiatives and schemes aimed at assisting smaller employers’, specifically noting the FWO’s support and resources for this cohort.<sup>170</sup> The ASU also stated that there are services provided by the FWO to assist small businesses with workplace relations.<sup>171</sup> The ASBFEO’s submission also acknowledged the FWO’s and the FWC’s ongoing efforts to provide relevant and timely information to small businesses, but suggested that additional support would be welcomed – specifically making recommendations for the creation of a fully interactive decision-support tool based on the FWO’s static *Guide to self-auditing your business* resource and the creation of a Small Business division within the FWC, led by a dedicated Small Business Commissioner.<sup>172</sup>

The NFF similarly referenced the FWO’s educational resources but said that smaller businesses in particular may not be ‘technically sophisticated enough to identify the correct resource and adapt it to their particular circumstances’.<sup>173</sup> It more broadly considered there to be ‘a lack of resources required to adequately navigate the administrative and compliance burdens’ of the Fair Work Act.<sup>174</sup> In addition to, or in the absence of, a review of the Fair Work system more broadly, the NFF ‘strongly recommended more practical, meaningful’ and ‘tailored support’ for small businesses, including providing ‘“the answer” to a given problem in a timely fashion, rather than more documents and webpages which are general in nature and frequently just restate laws in slightly plainer language’.<sup>175</sup> The NFF however noted that this was ‘not the fault of the FWO’ but that ‘it is simply the nature of generalised “education and resources” and the task which the FWO has been set’.<sup>176</sup> It suggested that ‘something more specific is required’ that ‘goes straight to the circumstances of the business and the issues they are managing’.<sup>177</sup> The NFF also noted that where there is tailored support for the business community, this should be ‘open to all small businesses, including farmers and the farming sector’.<sup>178</sup>

NECA called for increased guidance and education targeted at small businesses, including an expansion of the FWO’s small business helpline and tailored checklists.<sup>179</sup>

---

<sup>169</sup> Fair Work Commission, ‘Stakeholder User Groups’, <https://www.fwc.gov.au/about-us/commission-engagement-activities/stakeholder-user-groups>.

<sup>170</sup> ACTU submission, p. 6 [16].

<sup>171</sup> ASU additional material, p. 2.

<sup>172</sup> ASBFEO submission, pp. 3–4.

<sup>173</sup> NFF submission, p. 3.

<sup>174</sup> Ibid p. 2.

<sup>175</sup> Ibid pp. 2–3.

<sup>176</sup> Ibid p. 3.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid pp. 3–4.

<sup>179</sup> NECA submission, p. 4.

Ai Group suggested that the FWO could ‘assist users through worked examples and calculation tools for any FTE based definition, depending on the approach adopted’.<sup>180</sup> In the context of determining regular casual status, the ARA called for ‘more comprehensive guidance to small business to assist them in determining whether their casual employees meet the definition’.<sup>181</sup>

The Review notes that there are various tailored supports for small businesses to assist them to meet their workplace obligations under the Fair Work Act. Consideration of the needs of small business are factors in debate around new laws, with implementing agencies such as the FWO regularly receiving funding to support small business with specific laws (including, for example, paid family and domestic violence leave and the right to disconnect). While appreciating the current supports available, some employer stakeholders would like to see more. The Review acknowledges that supports for small business employers to meet their Fair Work Act obligations is an important element in looking at the Fair Work Act system as a whole and an important consideration when assessing the regulatory impact on small business. However, it was beyond the scope of the Review to evaluate the effectiveness of the available supports for small businesses in the Fair Work system.

## Impacts on the rights and entitlements of employees

In reducing the regulatory impact of some provisions on small business employers through the small business employer definition, there is a corresponding impact on the bundle of rights and entitlements of small business employees as compared with non-small business employees. For example, employees of small business employers:

- need to have been employed by their employer for a longer period of time to be able to make an unfair dismissal claim or, if they are a casual employee, to exercise employee choice to become a permanent employee
- have no access to redundancy pay under the NES (except in limited circumstances)<sup>182</sup>, although they may have access under a modern award
- are not entitled to reasonable access to paid time for the purposes of related training for their role as a workplace delegate
- for casual employees, the CEIS is provided to them on a less frequent basis than employees of non-small business employers, and
- have experienced delayed access to certain rights and entitlements as a result of longer implementation lead times afforded to small business employers (currently this applies to the right to disconnect and the ‘employee choice pathway’ but previously applied to paid family and domestic violence leave).

An important policy consideration for the small business employer definition is the relative proportion of vulnerable employees working in small businesses compared with those in non-small businesses. For example, small businesses with fewer than 20 employees are a significant employer of apprentice and trainee workers, employing 42% of this cohort of workers.<sup>183</sup> The relative proportion of vulnerable employees in small businesses has been mainly addressed by the ACTU and UWW which are discussed further below.

---

<sup>180</sup> Ai Group submission, p. 4. [24].

<sup>181</sup> ARA submission, p. 3.

<sup>182</sup> Fair Work Act s 121(4) deals with the small business redundancy exemption.

<sup>183</sup> Data as at 31 December 2023 in ASBFEQ, *Apprentices and trainees employed by small business*, September 2024, p. 2, [https://www.asbfeo.gov.au/sites/default/files/2024-10/Apprentices%20and%20Trainees%20Employed%20by%20Small%20Business\\_September%202024.pdf](https://www.asbfeo.gov.au/sites/default/files/2024-10/Apprentices%20and%20Trainees%20Employed%20by%20Small%20Business_September%202024.pdf).

## Stakeholder views on impact to employees

On the corresponding impact to the rights and entitlements of employees from the provisions that apply differently to small businesses through the small business employer definition, ACCI's overall view was that they have an 'extremely limited impact on employees' and the current definition is 'imbalanced in favour of employees'.<sup>184</sup> MTO 'reject[ed] the inference that fairer and more proportionate regulation for small businesses necessitates a diminution in the status of employees'.<sup>185</sup>

The ACTU submitted that the 'special circumstances' of small businesses are appropriately dealt with in the substantive provisions and/or through 'the extensive information and assistance made available by the FWO'.<sup>186</sup> The ASU stated that small businesses' 'special circumstances' are recognised through exemptions for employers and that the rights and entitlements of members 'should not be unnecessarily or unfairly curtailed because of the size of their employer'.<sup>187</sup>

Submissions by the ACTU and ACCI specifically addressed how each of the 9 areas with different treatment for small business in **Table 3** impact on employees. As a result, this chapter largely focuses on these submissions.

### ACCI submission

ACCI asserted that the only rights or entitlements that are displaced for small business employees relate to redundancy pay and paid time for workplace delegates and that all other rights (in **Table 3**) are 'merely delayed'.<sup>188</sup> The ability to bring a general protections application, ACCI argued, 'dramatically decreases any impact of the small business minimum employment period in [unfair] dismissals'.<sup>189</sup>

With respect to increased penalties for selected civil remedies, ACCI argued that these provisions are 'not tied to the rights and entitlements of employees' and thus irrelevant to considering the impact of the small business employer definition on employees.<sup>190</sup> Similarly, ACCI considered that the criminal wage underpayments offence provisions, while relating to payments owed to employees, 'do not minimise or displace an employee's entitlements' and are therefore irrelevant.<sup>191</sup>

ACCI also submitted that the delayed period before a casual employee can make a request to be made permanent through the employee choice pathway does not displace an employee's ability to request conversion to permanent employment and is 'clear acknowledgement of the hiring constraints of small businesses, and their limited capacity to manage such requests in such close proximity to the commencement of the casual employee's commencement'.<sup>192</sup>

On the less frequent obligation to provide the CEIS by small business employers to casual employees compared to non-small business employers, ACCI noted that the CEIS is already 'easily accessible on the FWO's website', and suggested that it is unlikely that on receiving the first CEIS an employee would have forgotten the nature of their employment. ACCI further submitted that 'there is no inherent right or entitlement conferred upon employees in this provision'.<sup>193</sup>

---

<sup>184</sup> ACCI submission, p 12. [32].

<sup>185</sup> MTO submission, p. 4 [17].

<sup>186</sup> ACTU submission, p. 7 [18].

<sup>187</sup> ASU additional feedback, pp. 1–2.

<sup>188</sup> ACCI submission, p. 12 [30].

<sup>189</sup> Ibid p. 10 [29].

<sup>190</sup> Ibid pp. 10–11 [29].

<sup>191</sup> Ibid p 11. [29]

<sup>192</sup> Ibid, p. 11 [29].

<sup>193</sup> Ibid.

ACCI noted that workplace delegates' rights do not extend to all employees but are 'unique to those persons who hold the position of delegate in a relevant union'.<sup>194</sup> ACCI suggested the entitlement to paid training time for workplace delegates therefore does not displace any entitlement to employees, 'but to those who are workplace delegates, representing an extremely small fraction of employees'.<sup>195</sup>

With respect to the delayed commencement of the right to disconnect provisions, ACCI considered that once they commence, all employees will be entitled, however acknowledged that the delay is for the purpose of allowing small businesses additional time to adjust.<sup>196</sup>

### **The ACTU and UWU submissions**

In considering the impact of any expansion of the small business employer definition in the Fair Work Act to include more employees, the ACTU and UWU considered the relative vulnerability characteristics of employees working in small businesses. The ACTU argued that 'for the same reasons that are often used to justify exemptions for small business' such as a lack of human resources expertise, employees of small business are 'generally recognised as *more* vulnerable than employees in larger businesses'.<sup>197</sup> The ACTU asserted that small business employees 'appear more likely to be less well paid' citing the observation in the Fair Work Commission 2023-2024 Annual Wage review that award reliant employees 'are more likely to be employed by a small business (35.6%) than for the workforce as a whole (25.7 per cent)'.<sup>198</sup>

The ACTU also referenced ABS Employee Earnings and Hours Survey data to highlight 'the vulnerability of employees at smaller businesses' noting that 'employees working for employers with fewer than 20 employees earn a median wage of \$33 per hour, below the national median of \$38' and were 'more likely to be potentially underpaid' with 'up to 4.5% of permanent employees aged 21 and over working at a business with fewer than 20 people [and being] paid below the national minimum wage of \$23.23 an hour, far higher than the 1.9 percent workforce-wide average'.<sup>199</sup> The ACTU also noted that small businesses are more likely to employ young and casual workers with almost 20% of small business employees aged 15 to 24, compared to 16.7% for all businesses and that 26.6% of these employees are in casual employment compared to 21.9% for all businesses.<sup>200</sup> Drawing on this data, the ACTU argued that there is a 'credible public policy argument that workers facing higher levels of vulnerability and insecurity at small businesses need more protection, and not less'.<sup>201</sup>

UWU contended that in considering any change to the small business employer definition, consideration be given to the characteristics of employees who are likely to be affected and the types of industry they work in.<sup>202</sup> To illustrate this, UWU focussed on the industries where its members work - hospitality, contract cleaning, security services and early childhood education and care.

UWU noted figures in the consultation paper that showed that increasing the small business employer definition to less than 20 employees would capture a further 30,000 businesses.<sup>203</sup> UWU submitted that many of these additional businesses would likely be cafés and restaurants and that 'significant numbers of employers in industries such as contract cleaning, security and early childhood education

---

<sup>194</sup> Ibid p. 10 [29].

<sup>195</sup> Ibid.

<sup>196</sup> Ibid p. 12 [29].

<sup>197</sup> ACTU submission, p. 2 [9].

<sup>198</sup> Ibid pp. 2-3 [9].

<sup>199</sup> Ibid.

<sup>200</sup> Ibid, p. 3 [10].

<sup>201</sup> Ibid.

<sup>202</sup> UWU submission, p. 2.

<sup>203</sup> Ibid.

and care may also be captured’.<sup>204</sup> UWU noted for example, that hospitality workers are typically young, work in a highly casualised industry ‘with little to no job security’.<sup>205</sup> Specifically, UWU submitted that the average age of a hospitality worker is 26; ‘there is a high proportion of migrant workers and workers that have experienced wage theft, harassment and bullying in the workplace;’ and that employees are generally award-dependent and low-paid with median weekly earnings of \$1,300 compared with the all-industry median of \$1,700.<sup>206</sup> UWU also provided other examples where there may be significant numbers of workers with vulnerable characteristics:

- contract cleaning is ‘dominated by small businesses’ with workers who are ‘largely award-dependent’, with ‘low median weekly earnings of \$1,192’, and migrant workers are ‘vulnerable to many forms of exploitation, more so when they are on a visa with work restrictions’,<sup>207</sup> and
- early childhood education and care (ECEC), with ‘79% of all ECEC providers’ being ‘small single-service operators of centre-based day care’, and a ‘female dominated sector with women making up 92.1% of the workforce’.<sup>208</sup>

While not quantifying how many employees would be impacted by an expanded small business employer definition in the industries that UWU represents its members in, UWU argued that any increase to the definition would cover more vulnerable employees in these industries, including those that are low-paid, young, female and from a migrant background.<sup>209</sup> Ai Group in its submission noted that data would need to ‘be properly scrutinised on proportions of “vulnerable” employees by business size, and there would need to be some consensus on which cohorts of employees should be deemed to be “vulnerable”’.<sup>210</sup> Ai Group recommended ‘caution’ in ‘proceeding on the basis that there is a higher proportion of “vulnerable” employees working in smaller businesses’ and ‘what should be made of such a point to the extent it could be made out’.<sup>211</sup>

In consideration of the ACTU’s and UWU’s submissions discussing the vulnerability of some employees in small businesses, such as those who are lower paid, casual, young, female and/or migrant workers, the Review notes that recent amendments to the Fair Work Act have sought to counter these vulnerable characteristics, including through the new ‘employee choice’ casual conversion mechanism, the addition of ‘promoting job security and gender equality’ to the Fair Work Act objective, and greater access to flexible working arrangements.

While it is beyond the Review’s terms of reference to evaluate the rights and protections for employees generally and those targeted at more vulnerable cohorts, it is acknowledged by the Review that there are a range of provisions in the Fair Work Act that seek to remedy the vulnerability of certain employees, including those in small businesses. Further, the FWO has an enduring commitment to vulnerable workers to prioritise assisting and educating vulnerable or ‘at risk’ workers, including young workers and migrant workers.

---

<sup>204</sup> Ibid.

<sup>205</sup> Ibid p. 3.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid p. 4.

<sup>208</sup> Ibid p. 5.

<sup>209</sup> Ibid p. 6.

<sup>210</sup> Ai Group submission, pp. 11–12 [66]–[69].

<sup>211</sup> Ibid p. 12 [69].

## Achieving a reasonable balance between the needs of small business employers and employees

In addition to ‘acknowledging the special circumstances of small and medium-sized business’, the Object of the Fair Work Act in section 3 relevantly includes:

*to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*

*(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality ...*

*(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders,*

*...*

*(e) ... enabling fairness and representation at work ..., protecting against unfair treatment..., providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms ...*

Ensuring a balance between the ‘special circumstances’ of small and medium-sized business and the impact on employees’ rights and protections has been extensively debated in the context of unfair dismissal laws, with differing views on where that balance lies with respect to the definition of small business employer.

The Object of the unfair dismissal provisions provides that there is a need to ‘establish a framework for dealing with unfair dismissal that balances:

- (i) the needs of business (including small business); and
- (ii) the needs of employees ...’<sup>212</sup>

The ASBFEO, in its 2019 *Review of the Small Business Fair Dismissal Code*, noted ‘there are compelling social policy grounds to ensure unfair dismissal laws strike the right balance between employers, employees and the broader community, including those who are vulnerable in the labour market’.<sup>213</sup>

In its submission to this review, the ASBFEO further articulated that ‘in workplace relations, a sensible balance needs to be struck between reducing compliance obligations for small-business employers and ensuring employees of small businesses receive the same substantive protections and entitlements as employees of larger businesses’.<sup>214</sup>

## Stakeholder views on a reasonable balance between small business employers and employees

Stakeholders were asked whether the small business employer definition, particularly the number of employees, provides a reasonable balance between recognising the ‘special circumstances’ of small businesses and reducing regulatory burden, and the needs, rights and entitlements of employees.

In answering this question some stakeholders, as illustrated above, took the approach of considering each of the provisions with different treatment of small businesses based on the small business

---

<sup>212</sup> Fair Work Act s 381(1)(a).

<sup>213</sup> ASBFEO, *Review of the Small Business Fair Dismissal Code*, August 2019, p. 6, <https://asbfeo.gov.au/sites/default/files/2021-11/ASBFEO%20FINAL%20AUGUST%202019.pdf>.

<sup>214</sup> ASBFEO submission, p. 2.

employer definition, while other stakeholders answered this question by highlighting certain issues or providing an overall view.

With all employer stakeholders of the view that the small business employer definition does not adequately recognise the ‘special circumstances’ of small businesses, it followed that they also did not think there was an appropriate balance between the ‘special circumstances’ of small businesses and the needs, rights and entitlements of employees.

The ARA submitted that the current definition ‘disproportionately burdens small businesses, creating a disincentive for employment growth’ and that an increase from 14 to 15 employees ‘currently triggers additional regulatory requirements, acting as a structural barrier to scaling up’.<sup>215</sup> The ARA characterised the balance as ‘ensuring that small business can grow sustainably while maintaining fair protections for workers’.<sup>216</sup>

COSBOA and MTO both submitted that they receive anecdotal feedback from their respective members on businesses deliberately limiting their growth to stay under the fewer than 15 employee threshold. COSBOA stated that ‘active decisions are being made by small businesses to limit, defer or reduce hiring decisions to ... remain under the threshold’ and that their members have ‘raised concerns’ that the threshold acts as a barrier to growth.<sup>217</sup> NECA made a similar point saying that many small businesses ‘deliberately limit their headcount to stay under the threshold, even if it means turning down work or contracting out rather than hiring in-house’ and that the ‘sharp cutoff at 15 employees creates a psychological threshold that distorts workplace planning’.<sup>218</sup> MTO noted that ‘a significant number of small business operators in the automotive industry have made the decision to downsize ... their businesses’ with ‘a commonly cited reason’ being the ‘administrative and compliance burden associated with employing staff’.<sup>219</sup>

COSBOA cited ABS data that in 2023–24, businesses with 1 to 4 employees decreased by 1.4% while all other business sizes showed growth,<sup>220</sup> and that businesses with 5 to 19 employees was the only employment range to record a fall in employment (a decrease by 6.1%),<sup>221</sup> which it argued ‘strongly suggests that regulatory barriers are constraining natural business evolution around the 15-employee headcount threshold’.<sup>222</sup> The NFF similarly suggested that agricultural businesses are halting their growth and ‘bunching’ near the 15 headcount threshold to stay within the small business employer definition, citing ABS data that while 98% of all agricultural businesses employ fewer than 20 people, only approximately 1 to 2% hire between 15 to 19 employees.<sup>223</sup> Drawing on publicly available data from the ABS Counts of *Australian Businesses, including Entries and Exits*, July 2020 to June 2024, the NFF also referenced ‘rates of business survival’ for different business sizes (1 to 4, 1 to 19, 20 to 199, and 200+ employees) for the four year period and noted ‘how challenging it is for the smallest firms to grow and sustain’.<sup>224</sup> The NFF further suggested that the regulatory threshold of the small business

---

<sup>215</sup> ARA submission, p. 2.

<sup>216</sup> Ibid p. 3.

<sup>217</sup> COSBOA additional material, pp. 2–3.

<sup>218</sup> NECA submission, p. 4.

<sup>219</sup> MTO additional material, p.2.

<sup>220</sup> ABS, 8165.0 *Counts of Australian Businesses, including Entries and Exits*, <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

<sup>221</sup> ABS, *Australian Industry*, 2023–24 financial year, <https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release>.

<sup>222</sup> COSBOA additional material, p. 2.

<sup>223</sup> NFF additional material, p.3; ABS, *Counts of Australian Businesses, including Entries and Exits*, July 2020–June 2024 <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

<sup>224</sup> Ibid pp. 3–4.

employer definition 'may be dampening the natural progression of successful small ventures into larger entities by introducing sharp new risks at that point'.<sup>225</sup>

In the next section, custom ABS business count data spanning the past 10 years is presented to illustrate the relative composition of employing businesses of different sizes within the labour market. However, ABS publications do not provide explanatory context for changes in business size or the survival rates of businesses, nor do they attribute such changes to business behaviour or intent. These issues are complex, and determining the underlying factors would require extensive economic analysis which is beyond the scope of this Review.

From the employee stakeholder perspective, both the ACTU and UWU considered there was a lack of evidence that the small business employer definition is preventing business growth, with the ACTU stating they are 'unaware of any quantitative data or credible evidence that demonstrates the current threshold... inhibits business growth'<sup>226</sup> and UWU reiterating this sentiment.<sup>227</sup>

Surveyors Australia noted that its industry was using more part-time arrangements with an increase in women from 3 to 5% and the employment of vocational and university students.<sup>228</sup> Surveyors Australia said that 'given the added compliance costs of going over 15 employees', the current small business employer definition provided a disincentive to offer flexible work options.<sup>229</sup> This will be discussed in the 'Headcount vs FTE approach' section further in this chapter.

Employee stakeholders argued that there was no case for expanding the current definition based on a starting position that employees of small businesses should not be treated any less favourably than non-small business employees and expanding the definition would mean more workers are excluded from rights and protections.<sup>230</sup> The ACTU considered that the 'special circumstances' of small business, such as limited financial and human resources, are circumstances that have not changed.<sup>231</sup> It was argued that for these reasons, employees in small businesses are more vulnerable.<sup>232</sup> As discussed above (see 'Stakeholder views on impact to employees' section), the employee stakeholders also highlighted the vulnerable characteristics of some employees in small businesses, particularly young, casual, female and migrant worker cohorts.<sup>233</sup> The ACTU also submitted that no previous review has recommended changing the current definition.<sup>234</sup>

While stakeholders were generally in agreement in their needing to be balance between the interests of small business employers and the interests of their employees in the workplace relations context, employer stakeholders considered that the current definition does not achieve balance while employee stakeholders considered there was no case for change.

## Business count data over 10 years for different employing size ranges

As discussed above, some stakeholders have referred to ABS data in support of the view that the fewer than 15 employee threshold is constraining employment growth. The FWO has obtained business count data from the ABS for the last 10 years for different employment size ranges.

---

<sup>225</sup> Ibid p. 4.

<sup>226</sup> ACTU additional material, p. 3.

<sup>227</sup> UWU additional material, p. 2.

<sup>228</sup> Surveyors Australia submission p. 2.

<sup>229</sup> Ibid.

<sup>230</sup> ACTU submission p. 4 [12]; UWU submission p. 2; ASU additional feedback p. 1.

<sup>231</sup> ACTU submission p. 2 [8]; ACTU additional feedback p. 5.

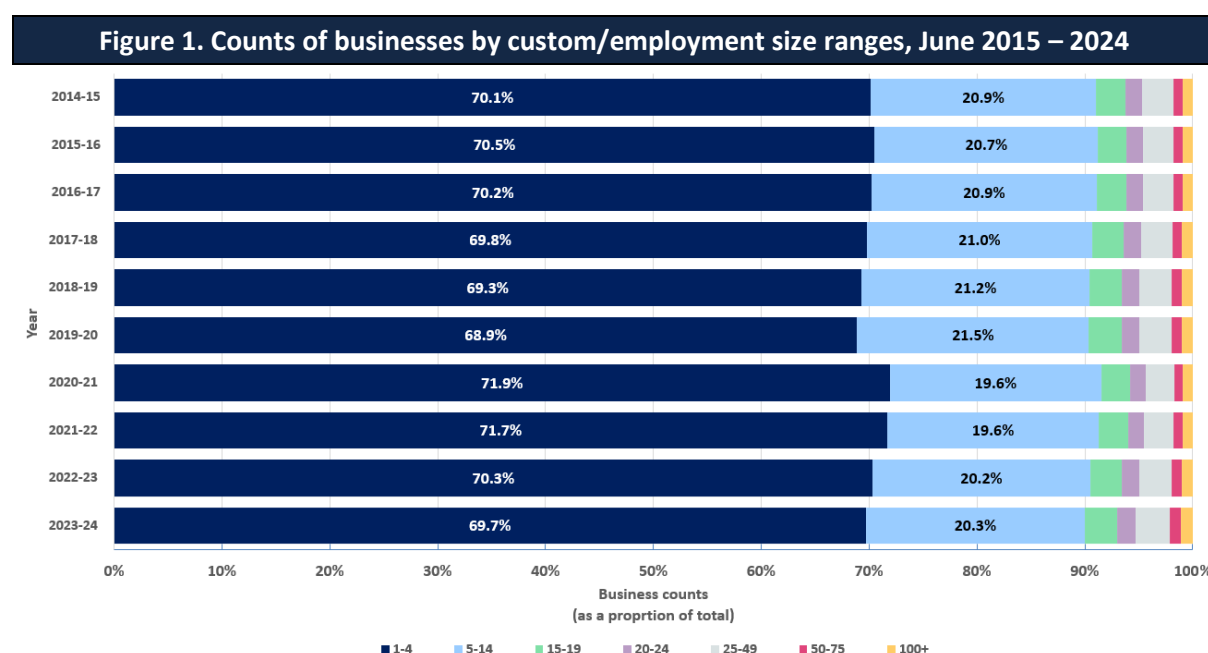
<sup>232</sup> ACTU submission p. 2 [9].

<sup>233</sup> ACTU submission p. 3 [10]; UWU submission pp. 3–6.

<sup>234</sup> ACTU submission p. 2.

**Figure 1** shows the change in total business numbers across employment size ranges from 2014–15 to 2023–24. Over the 10-year period, the total number of businesses grew from just over 830,000 to nearly 1 million. The smallest businesses (1–4 employees) consistently represent the largest segment (dark blue), accounting for approximately 70–72% of all businesses, although their share has slightly declined in recent years. Businesses with 5–14 employees form the next largest group, contributing around 20–21%. The remaining categories (15–19, 20–24, 25–49, 50–75, 100+) have remained relatively small and stable, each comprising 1–3% of the total. Notably, during the COVID-affected years (2020–21 and 2021–22), there was a modest uptick in the 1–4 employee category, potentially reflecting shifts in employment structures.

Based on this data, the Review notes that with the exception of the 1–4 employment size range, the counts of businesses in each employment size range has largely remained consistent over the 10-year period.



## Previous review findings on the impact of the small business definition

The small business employer definition has been considered in previous reviews. The 2012 DEWR Fair Work Act review (at **Table 4**) involved a comprehensive review and evaluation of the Fair Work Act, focusing on whether the legislation is working as intended. As part of this wider review, the report examined the definition of ‘small business employer’, particularly in the context of unfair dismissal laws. The report noted that in comparison to the preceding Work Choices legislation, which provided exemptions to unfair dismissal for employers with fewer than 100 employees, the Fair Work Act’s small business employer definition would lead to ‘increased regulatory impact’ for more employers and would ‘clearly benefit’ more employees by providing them with greater access to unfair dismissal protections.<sup>235</sup> The report also canvassed the divergent stakeholder views on the coverage of unfair dismissal laws: employer groups generally advocated for reducing coverage (e.g. by increasing the threshold, or basing it on an FTE application rather than a straight headcount) due to the additional burden it placed on employers,<sup>236</sup> while unions and community groups supported broader coverage of

<sup>235</sup> DEWR Fair Work Act review, 2012, pp. 230–231, <https://www.dewr.gov.au/download/14529/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/29762/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/pdf>

<sup>236</sup> Ibid p. 212.

the provisions (including by reducing the qualifying period for all employees to 3 months or abolishing it completely).<sup>237</sup>

The 2015 Productivity Commission Workplace Relations Framework Inquiry (also at **Table 4**) involved a detailed and broad ranging assessment of Australia's workplace relations framework, taking into account current laws, institutions and practices. It examined some of the challenges faced by small businesses, most notably in relation to the modern award system, unfair dismissal provisions and compliance costs and burdens incurred relative to larger businesses. The report noted that 'there is a large degree of arbitrariness in defining small business, including through the use of definitions based on sales turnover or the number of employees' but stated that a business with around 15 employees is likely to have access to some form of human resources knowledge and, coupled with available FWC resources, would mean that 'it is reasonable that businesses of such size would be able to meet relevant employment standards' (for the purposes of unfair dismissal provisions).<sup>238</sup> As a result of these available supports, the report suggested that 'shifting from the existing definition of small business to one involving a larger number of employees would probably not be warranted'.<sup>239</sup>

COSBOA raised that these reviews were undertaken some years ago and that the current workplace relations context has changed significantly since that time.<sup>240</sup> By contrast, the ACTU submitted that 'the circumstances in which the prior reviews took place have not materially changed' and that their outcomes 'should properly be afforded significant weight'.<sup>241</sup>

These previous reviews must be considered in context. The 2012 DEWR Fair Work Act review was undertaken within 2 years of the substantive Fair Work Act commencing. The 2015 Productivity Commission Workplace Relations Framework Inquiry did focus on the impact of the Fair Work Act on small business, but ultimately did not see the need for changing the small business employer definition particularly in relation to the unfair dismissal provisions. In both reviews, the small business employer definition applied in limited circumstances to unfair dismissal and redundancy pay. Further, at the time of the Fair Work Act review, the small business employer definition as it applies today had only been in effect from 1 January 2011, with a transitional FTE based small business employer definition operating for 18 months prior. However, what can be gleaned from these reviews is that insofar as the small business employer definition applied to unfair dismissal and redundancy pay, there was no recommendation to change the definitions at that time. These provisions arguably remain the most significant for small business when compared to other small business accommodations.

**Finding 2:** There were mixed views between employer and employee stakeholders as to the need to amend the small business employer definition in the Fair Work Act, with employer stakeholders and the ASBFEO seeking an expansion to the definition to capture more businesses and employee stakeholders advocating for no change to the definition.

---

<sup>237</sup> Ibid p. 213.

<sup>238</sup> Productivity Commission Workplace Relations Framework Inquiry, 2015, pp. 597–598, <https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf>.

<sup>239</sup> Ibid p. 598.

<sup>240</sup> This feedback was provided during the stakeholder meeting on 20 June 2025.

<sup>241</sup> ACTU additional feedback, p. 5.

## Stakeholder proposals on changing the small business employer definition

In the consultation paper, in line with the terms of reference, stakeholders were specifically asked the following questions:

- whether the headcount component of the small business employer definition provides a reasonable balance between the ‘special circumstances’ of small businesses and reducing regulatory burden, and the rights and entitlements of small business employees, and
- whether the small business employer definition is easy to apply from the perspective of both the employer and employee and what improvements could be made to the definition if the goal is reducing regulatory burden for employers while balancing entitlements of employees.

In response to these overlapping questions, **Table 5** below provides a high-level overview of stakeholder perspectives as to what the small business employer definition should be. The Review emphasises that the table is intended to provide a broad snapshot only and does not purport to capture the nuances of each stakeholder’s position on the elements of the definition – these are discussed in the main body of the report. Further, the table does not capture some elements that were raised in a few submissions, such as ‘associated entities’ and turnover. These elements are similarly discussed in the main body of the report.

The following sections will examine these proposals in terms of achieving both balance between employers and employees and an easy to apply definition. First, the key positions and proposals of stakeholders are provided.

Both the ACTU and UWU did not consider that a change to the current definition was warranted, primarily on the basis that recognising the ‘special circumstances’ of small business should not lessen the rights and entitlements of employees.<sup>242</sup> The CFMEU and the SDA supported the submissions of the ACTU.<sup>243</sup>

The ASU also supported the ACTU’s submissions and provided that there should be no change to the definition, which they see as ‘easy to understand for both employees and employers’ and reflecting ‘a balanced view of the “special circumstances” of small business’.<sup>244</sup>

All employer stakeholders advocated for a more expansive definition of small business employer on the basis that it would achieve a more appropriate balance between employers and employees.

The ASBFEO and the NFF each advocated for a higher headcount of fewer than 20 employees, although with different caveats. The ASBFEO’s proposal excluded all casual employees, while the NFF suggested an FTE approach that excludes seasonal employees.<sup>245</sup>

A number of employer organisations including ACCI, the ARA, HIA, NECA and Surveyors Australia recommended the headcount threshold be increased to fewer than 25 employees, but with differing views on whether to support an FTE application and whether or not regular casuals should be included within the definition. It is also noted that in an open letter, a group of independent members of

---

<sup>242</sup> ACTU submission, p. 2; UWU submission, p. 2.

<sup>243</sup> CFMEU additional material, p. 1; SDA additional material.

<sup>244</sup> ASU additional material, pp. 1–2.

<sup>245</sup> ASBFEO submission, pp. 2–3; NFF submission, p. 7.

parliament also supported increasing the headcount to ‘at least 25 employees’, but did not provide views on any of the other elements of the definition.<sup>246</sup>

COSBOA, MGA (via support for COSBOA’s submission) and MTO all proposed thresholds of fewer than 50 employees based on an FTE basis. COSBOA and MGA also expressly supported removing all casuals, with the MTO seeming to also support this view suggesting it would be ‘a simple solution’ to the ‘inherent challenge’ in determining regular casuals.<sup>247</sup> The MTO also sought to remove both employees of associated entities and business owners from the definition.<sup>248</sup> NDS also proposed lifting the headcount to fewer than 50 employees but suggested a ‘split definition’ where the increased headcount definition would only apply to ‘regulatory and administrative provisions’ for the purpose of ‘relieving regulatory burden’ for the business but ‘not where this erodes the rights and protections of employees’.<sup>249</sup>

Ai Group advocated for a multi-option approach to defining a small business, whereby only one of the following criteria need be met: (i) headcount (ii) FTE (iii) the definition of small business under section 328.110 of the *Income Tax Assessment Act 1997* (Cth), which is based on earnings and turnover, or (iv) any other legislated definitions of small business.<sup>250</sup> This approach could facilitate flexibility around what a small business is, and account for industry or sector specific differences and challenges, for example, hospitality compared to construction. However, the Review was mindful of the risks that this multi-option approach, similar to having multiple definitions of businesses (e.g. micro and medium), could add. Additionally, transitioning to a differently constructed definition could involve significant adjustment costs. These factors would need to be weighed against any potential benefits of adopting a broader definition of a small business.

Table 5. Breakdown of stakeholder positions on the small business employer definition			
Organisation	Proposed headcount	Supports changing to FTE application	Supports inclusion of regular casuals (current approach)
The ACTU	<15	No	Yes
UWU	<15	No	Yes
The CFMEU (supports the ACTU position)	<15	No	Yes
The SDA (supports the ACTU position)	<15	No	Yes

<sup>246</sup> The letter was addressed to the Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, and was signed by Allegra Spender MP, Kate Chaney MP, Kylea Tink MP, Zali Steggall OAM MP, Dr. Helen Haines, Dr. Monique Ryan, Dr. Sophie Scamps and Zoe Daniel MP, <https://www.dewr.gov.au/download/16874/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/39627/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/pdf>.

<sup>247</sup> COSBOA submission, p. 1 [4]; MGA submission, p. 1; MTO submission, p. 2 [6]; MTO additional evidence, pp. 3–4 [14]–[15].

<sup>248</sup> MTO submission, p. 7 [28]–[32].

<sup>249</sup> NDS submission, p. 2.

<sup>250</sup> Ai Group submission, pp. 6–7 [42].

Table 5. Breakdown of stakeholder positions on the small business employer definition			
Organisation	Proposed headcount	Supports changing to FTE application	Supports inclusion of regular casuals (current approach)
The ASU	<15	No	Yes
Ai Group	No proposed number. Instead proposes multiple definitions based on either – (i) headcount (ii) FTEs (iii) the definition of small business under the <i>Income Tax Assessment Act 1997</i> (Cth), or (iv) any other legislated definitions of small business.	Yes	No
The ASBFEO	<20	Not specifically addressed	No
The NFF	<20 (minimum)	Yes	Suggested clarifying and excluding irregular casuals e.g. particularly seasonal or intermittent workers in agriculture.
ACCI	<25	No	Yes
The ARA	<25	Yes	Not specifically addressed
HIA	<25 (minimum)	Not specifically addressed	Not specifically addressed
NECA	<25	No	Yes
Surveyors Australia	<25	No	Not specifically addressed
Clubs Australia	<25	Yes	Not specifically addressed
COSBOA	<50	Yes	No
MGA (supports COSBOA position)	<50	Yes	No
MTO	<50	Yes	No, however this is qualified
NDS	<50, but only for the purpose of relieving regulatory burden, rather than limiting rights of employees. NDS's proposed change to definition would not apply to for example, redundancy pay or unfair dismissal provisions since in their view, this would limit the rights of employees.	Not specifically addressed	Yes

Table 5. Breakdown of stakeholder positions on the small business employer definition			
Organisation	Proposed headcount	Supports changing to FTE application	Supports inclusion of regular casuals (current approach)
Master Builders	Not specifically addressed, but states that the minimum threshold should not be reduced to less than what is currently provided.	Not specifically addressed	Yes
SBAA	5 – 19 employees  Calls for agreement between state, territory and Commonwealth governments for a single definition of micro, small and medium sized enterprises (MSMEs), based on the ABS 2024 number of Australian businesses measured by employment size. <sup>251</sup>	Submission did not make any specific proposals relating to these provisions, but more broadly called for an impact analysis to be undertaken, and the Fair Work Act and NES to be reviewed and updated to better reflect MSMEs.	

## Easy to understand and apply

Section 23 of the Fair Work Act uses a headcount of fewer than 15 employees to define small business employers. It does not involve determining FTE. However, there are qualifications in calculating the headcount, including:

- a temporal element of calculating ‘at a particular time’ and not, for example, calculating over a period of time or at a certain time of the year (subsection 23(2)(a))
- that only a ‘regular casual employee’ is included, meaning only those casuals employed on a regular and systematic basis are included (subsection 23(2)(b)), and
- that associated entities are taken to be one entity, requiring employees who work for an associated entity to be included in the headcount (subsection 23(3)).<sup>252</sup>

There is also a qualification specific to dismissal or termination of an employee’s employment. Subsection 23(4) of the Fair Work Act provides that the headcount ‘at a particular time’ is to include the employee who is being dismissed or whose employment is being terminated, and any other employees of the employer who are also being dismissed or whose employment is also being terminated.

Determining a ‘regular casual employee’ at a particular time involves determining whether the employee is a casual employee under section 15A of the Fair Work Act, and whether the employee has been employed by the employer on a ‘regular and systematic basis’.<sup>253</sup> The FWC provides examples of what may constitute employment on a ‘regular and systematic basis’.<sup>254</sup> On the meaning of the ‘regular and systematic basis’, the FWO’s *Your Guide to Casual Employment* also provides that ‘generally, if

<sup>251</sup> ABS, *Counts of Australian businesses, including Entries and Exits*, July 2020 – June 2024, <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

<sup>252</sup> An ‘associated entity’ is defined by section 50AAA of the *Corporations Act 2001*. This may require examination of whether there is sufficient ‘control’ of one entity over another. See Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation press, 7<sup>th</sup> ed, 2021), p. 419 [17.14].

<sup>253</sup> Fair Work Act s 15A (definition of ‘regular casual employee’).

<sup>254</sup> FWC, ‘Periods of service as a casual employee’, <https://www.fwc.gov.au/periods-service-casual-employee>.

there has been a pattern of ongoing work and an expectation that this will continue this may be considered as employment as being worked on a regular and systematic basis'.<sup>255</sup>

Albeit with qualifications, headcount is a simpler approach than determining FTE, which accounts for total hours worked across a business' workforce. For example, a business employing 15 full-time employees, and a comparable business employing 25 employees with a mix of full-time, part-time and casuals, could have similar or equivalent total hours worked across the business – but have different obligations as an employer. This example raises consideration of balancing the utility of a definition that is easy to apply, against one that may in certain circumstances be considered to create different treatment under the law for employers depending on their staffing profiles.

There were mixed views among stakeholders on the relative ease and simplicity of understanding and applying the current small business employer definition, and by comparison to alternative proposals to change certain elements, including using total headcount compared to an FTE count, and the practicalities of including 'regular casuals'. These views are considered further in subsequent sections.

Staff of the FWC acknowledged that they receive queries from both employers and employees, (particularly employees), about how to calculate the size of a business in relation to unfair dismissal claims. Employees are not necessarily privy to their colleagues' employment status or the overall size of the business. If an employer believes the employee is not eligible to make an unfair dismissal claim against them (for example, if they think the employee has incorrectly categorised them as a non-small business employer and they have not met the 12-month service threshold), they are able to raise a jurisdictional objection. As part of the objection process, parties will usually first take part in a conciliation conference to see if they can resolve the issue in a less formal setting. If unsuccessful, the objection may proceed to a jurisdictional hearing where the issue is decided.

The FWO's EAS has only received a small number of enquiries (7 in total were identified since 2023) about the small business employer definition, with most of these enquiries relating to whether certain types of employees (casuals, directors and contractors) would fall under the definition or querying what counts as an associated entity. While it is difficult to draw any definitive conclusions, the limited number of enquiries might suggest the small business employer definition is not an issue about which many small businesses seek advice from the EAS on.

The subsequent sections will consider the ease and simplicity of the small business employer definition with respect to the different viewpoints of stakeholders on whether, and how, to change the definition. As is evident, considering an easy to apply definition is intertwined with considering a balanced definition as between employees and employers.

## Changing employee headcount to achieve balance

The most defining element of the current small business employer definition is 'employee headcount'. There were varying stakeholder views as to what the suitable employee headcount number should be in achieving balance between the interests of small business employers and the rights and entitlements of small business employees in the Fair Work Act. As will be discussed in subsequent sections, the other elements of the definition also have an impact on how expansive or limited the definition can be depending on the treatment of casuals and whether employees are counted using the simpler headcount method or an FTE calculation.

In broad terms, increasing the employee headcount in the section 23 definition of small business employer would increase both the total number of businesses afforded the small business employer

---

<sup>255</sup> FWO, *Your guide to casual employment*, 2025, p. 8, <https://www.fairwork.gov.au/sites/default/files/2025-03/fg-your-guide-to-casual-employment.pdf>.



accommodations in the Fair Work Act and the overall number of employees whose collective set of rights and entitlements are comparatively less than employees in non-small businesses.

The FWO procured specific data from the ABS to assist the Review to understand Australian business sizes in the economy by the number of employees.<sup>256</sup> The headcount figures presented in this analysis include all employees – i.e. full-time, part-time, and casual employees – without distinguishing between regular and irregular casual employment. Therefore, the data may overstate employee headcount where there is a high proportion of non-regular casual employees. However, this is the best available data and there is no other reliable way to discount non-regular casual employees from the data.

Using the data, the Review analysed various small business size ranges to understand the potential effects on the counts of business and persons employed if the headcount threshold under the definition was increased. This analysis includes the following employment size ranges based on proposals provided to the Review: 1–4 employees, 1–14 employees, 1–19 employees, 1–24 employees, 1–49 employees and 1–75 employees. However, the ABS was unable to provide data that could be relied upon for the sum of employment for businesses with 1 to 4 employees.<sup>257</sup>

**Table 6** presents the counts and proportions of businesses within each cumulative size range up to an employment size range of 75 employees. 93% of businesses for all size ranges employ fewer than 20 employees, with a significant concentration in the 1–4 employee range. As employment size increases, the cumulative proportion of businesses also marginally increases, indicating that larger businesses are less common.

<b>Employment size range</b>	<b>No. of businesses</b>	<b>Proportion of all employing businesses (employing 1–100+)</b>
<b>Employing 1–4</b>	693,558	69%
<b>Employing 1–14</b>	895,865	90%
<b>Employing 1–19</b>	925,758	93%
<b>Employing 1–24</b>	942,366	94%
<b>Employing 1–49</b>	974,474	98%
<b>Employing 1–75</b>	984,185	99%
<b>All employing businesses (employing 1–100+ employees)</b>	<b>999,161</b>	<b>100%</b>

<sup>256</sup> ABS 2025, tailored data request – employment by business size classes, 2023-24, data provided May 2025 (customised report).

<sup>257</sup> As advised by the ABS, ‘the sum of employment for businesses with 1 to 4 employees has not been provided due to a bias in the underlying data set that causes an overestimation in employment business of that employment range. This is primarily caused by the inclusion of new ABN registrations, who’ve registered for PAYG and thus we impute them as an employer using that stated expected number of employees, nearly always in the 1 to 4 range, but do not go on to employ people or many people at all’.

<sup>258</sup> Based on ABS 2025, tailored data request – employment by business size classes, 2023-24, data provided May 2025 (customised report).

**Table 7** presents employee headcount data, segmented by both individual and cumulative employment size ranges. While the ABS does not provide exact headcount figures for businesses employing 1-4 people,<sup>259</sup> the business counts in **Table 6** indicate that such businesses are numerous. This suggests that businesses within the 1-4 employee range make a substantial contribution to overall employment.

Leaving aside the 1–4 employing size range, businesses with 5–14 employees account for the highest proportion of total headcount, comprising 40% of the overall workforce for businesses employing between 5 and 75 employees. This indicates that enterprises within this size category play a significant role in employment. Slightly more than half (52%) of all employees in the specified size ranges are employed at firms with between 5–19 employees.

<b>Table 7. Sum of headcount by employment size range (individual vs. cumulative employment size ranges)<sup>260</sup></b>					
<b>Individual employment size ranges</b>			<b>Cumulative employment size ranges</b>		
<b>Employment size range</b>	<b>Sum of headcount</b>	<b>Proportion</b>	<b>Employment size range</b>	<b>Sum of headcount</b>	<b>Proportion</b>
<b>Employing 5–14</b>	1,666,448	40%	<b>Employing 5–14</b>	1,666,44	40%
<b>Employing 15–19</b>	499,692	12%	<b>Employing 5–19</b>	2,166,140	52%
<b>Employing 20–24</b>	363,134	9%	<b>Employing 5–24</b>	2,529,274	60%
<b>Employing 25–49</b>	1,083,318	26%	<b>Employing 5–49</b>	3,612,592	86%
<b>Employing 50–75</b>	588,341	14%	<b>Employing 5–75</b>	4,200,933	100%
<b>Total (employing 5–75)</b>	4,200,933	100%			

The ABS data presented in **Table 8** analyses the change in business counts that would result from increasing the headcount of the small business employer definition.

<b>Table 8. Different options by impact on business counts<sup>261</sup></b>			
<b>Employment size range</b>	<b>No. of businesses</b>	<b>Increase by No. of businesses from current definition baseline</b>	<b>Increase by % of businesses from current definition baseline</b>
<b>Current definition baseline: Employing 1–14</b>	895,865		
<b>Employing 1–19</b>	925,758	+29,893	+3.3%
<b>Employing 1–24</b>	942,366	+46,471	+5.2%
<b>Employing 1–49</b>	974,474	+78,609	+8.8%

**Table 8** shows that an increase from 1–14 employees to 1–19 employees would capture an additional 3.3% or 29,893 businesses. From 1–14 employees, an increase to 1–24 employees would capture an additional 5.2% or 46,501 businesses and an increase to 1–49 would capture an additional 8.8% or 78,609 businesses.

<sup>259</sup> See above n 257.

<sup>260</sup> Based on ABS 2025, tailored data request – sum of headcount by different employment size ranges, 2023–24, data provided May 2025 (customised report).

<sup>261</sup> Based on ABS 2025, tailored data request – employment by business size classes, 2023–24, data provided May 2025 (customised report).

The corresponding data of the number of employees impacted by an increase in the headcount for the employment sizes ranges presented by stakeholders is represented in **Table 9**.

<b>Employment size range<sup>263</sup></b>	<b>Sum of headcount</b>	<b>Increase in headcount (from 5-14 baseline):</b>	<b>Proportion of employed people in Australia (as at March 2025)<sup>264</sup> (%)</b>
<b>Employing 5–14</b>	1,666,448		11.4%
<b>Employing 5–19</b>	2,166,140	+499,692	14.9%
<b>Employing 5–24</b>	2,529,274	+862,826	17.4%
<b>Employing 5–49</b>	3,612,592	+1,946,144	25.0%

As explained above, the analysis is limited as it excludes the 1–4 employment size range.<sup>265</sup> It therefore is unable to show the total number of employees that would be impacted by an increase in headcount to the small business employer definition, representing an underestimation. However, it is possible to look at the change in the number of employees captured as the definition expands. To make this more meaningful, the Review then calculated how large this change is with respect to the total workforce.

In this way, **Table 9** shows that expanding the employment range from 5–14 to 5–19 employees, results in a 3.4 percentage point increase in the total workforce captured, raising it to 14.9% or by 499,692 employees. Expanding the employment range from 5–14 to 5–24 employees, results in a 6.0 percentage point increase in the total workforce captured, raising it to 17.4% or by 862,826 employees. Expanding the employment range from 5–14 to 5–49 employees, results in a 13.6 percentage point increase in the total workforce captured, raising it to 25.0%, or by 1,946,144 employees.

Variations in employment size ranges have a notable impact on the number of employees captured. Although headcount data for businesses with 1–4 employees is unavailable, it is still evident that expanding the employment size range results in a proportionally larger increase in employees captured compared to businesses. For instance, increasing the range from 1–14 to 1–49 leads to an 8.8% increase in the number of employing entities included. Meanwhile, expanding the employment range from 5–14 to 5–49 employees, results in a 13.6 percentage point increase in workforce coverage to 25.0% — a figure that would be even higher if the 1–4 range were included. This is an expected and logical outcome: as the employment size range broadens, it encompasses larger businesses that employ more people. Consequently, even a modest increase in the number of businesses covered by the definition can yield a disproportionately large increase in the number of employees covered.

Therefore, in balancing needing to take the ‘special circumstances’ of small businesses into account against the rights and entitlements of employees impacted, it is essential to consider that increasing the employee headcount in the definition of a small business employer results in a proportionally greater impact on the workforce.

It was beyond the scope of the Review to analyse each of the options presented by stakeholders in terms of the regulatory and financial impact on employers and employees through assessing every provision that uses the small business employer definition. However, the data provides a starting point

<sup>262</sup> Based on ABS 2025, tailored data request – sum of headcount by different employment size ranges, 2023–24, data provided May 2025 (customised report).

<sup>263</sup> Note that 1–4 employment size range data is unavailable. See above n 257 for explanation.

<sup>264</sup> Based on total employment of 14,567,200 as per March 2025 *Labour Force data*, ABS.

<sup>265</sup> See above n 257 for explanation.

for any further analysis to understand how an expanded definition based on headcount may impact certain provisions of the Fair Work Act (that use the small business employer definition) and therefore on employers and employees.

***Profile of industries in the small business employer definition***

**Table 10** lists the top industries in each employment size ranges based on business counts. Although the specific order of the top industries varies across all ranges, there is a noticeable pattern, with all industries remaining unchanged in the top ten, regardless of the employment size range.

<b>Rank</b>	<b>Employing 1–4</b>	<b>Employing 1–14</b>	<b>Employing 1–19</b>	<b>Employing 1–24</b>	<b>Employing 1–49</b>
1	Management Advice and Related Consulting Services	Management Advice and Related Consulting Services	Cafés and Restaurants	Cafés and Restaurants	Cafés and Restaurants
2	Computer System Design and Related Services	Cafés and Restaurants	Management Advice and Related Consulting Services	Management Advice and Related Consulting Services	Management Advice and Related Consulting Services
3	Electrical Services	Computer System Design and Related Services	Computer System Design and Related Services	Computer System Design and Related Services	Computer System Design and Related Services
4	Road Freight Transport	Electrical Services	Electrical Services	Electrical Services	Electrical Services
5	House Construction	House Construction	House Construction	House Construction	House Construction
6	Cafés and Restaurants	Road Freight Transport	Road Freight Transport	Road Freight Transport	Road Freight Transport
7	Engineering Design and Engineering Consulting Services	Engineering Design and Engineering Consulting Services	Engineering Design and Engineering Consulting Services	Engineering Design and Engineering Consulting Services	Engineering Design and Engineering Consulting Services
8	Carpentry Services	Hairdressing and Beauty Services	Hairdressing and Beauty Services	Hairdressing and Beauty Services	Hairdressing and Beauty Services
9	Hairdressing and Beauty Services	Carpentry Services	Carpentry Services	Carpentry Services	Carpentry Services
10	General Practice Medical Services	General Practice Medical Services	General Practice Medical Services	General Practice Medical Services	General Practice Medical Services

<sup>266</sup>Based on aABS 2025, tailored data request – employment by business size classes by ANSZIC classes, 2023–24, data provided May 2025 (customised report).



**Table 11** lists the top industries in each employment size range based on headcount. As per the other data presented, headcount data for the employing range of 1–4 was discounted due to unreliability of the data.<sup>267</sup> When considering the 5–14 and 5–19 employment size ranges, the only differences in the top industries are:

- House Construction appears in the 5–14 range but does not appear in the 5–19.
- Road Freight Transport appears in the 5–19 range but does not appear in the 5–14 range.

The other industries listed in these ranges are consistent, indicating that the top core industries remain largely the same, with only slight variations as the employment size range increases.

When broadening the range to 5–24, we see the following additional industry appearing:

- Pharmaceutical, Cosmetic, and Toiletry Goods Retailing

This industry is included in the 5–24 range but not in the smaller ranges (5–14 and 5–19). This indicates that as the employment size range increases, new industries start to appear, reflecting their significance in employing larger workforces, and subsequently employing more people.

Rank	Employing 5–14	Employing 5–19	Employing 5–24	Employing 5–49
1	Cafés and Restaurants	Cafés and Restaurants	Cafés and Restaurants	Cafés and Restaurants
2	Takeaway Food Services	Takeaway Food Services	Takeaway Food Services	Takeaway Food Services
3	Real Estate Services	Real Estate Services	Real Estate Services	Management Advice and Related Consulting Services
4	Electrical Services	Management Advice and Related Consulting Services	Management Advice and Related Consulting Services	Child Care Services
5	General Practice Medical Services	General Practice Medical Services	Electrical Services	Pharmaceutical, Cosmetic and Toiletry Goods Retailing
6	Management Advice and Related Consulting Services	Electrical Services	General Practice Medical Services	Computer System Design and Related Services
7	Hairdressing and Beauty Services	Hairdressing and Beauty Services	Computer System Design and Related Services	Real Estate Services
8	Dental Services	Computer System Design and Related Services	Pharmaceutical, Cosmetic and Toiletry Goods Retailing	Pubs, Taverns and Bars
9	House Construction	Dental Services	Hairdressing and Beauty Services	Electrical Services
10	Computer System Design and Related Services	Road Freight Transport	Road Freight Transport	Road Freight Transport

<sup>267</sup> See above n 257 for explanation.

<sup>268</sup> Based on ABS 2025, tailored data request – sum of headcount by different employment size ranges by ANZSIC classes, 2023-24, data provided May 2025 (customised report).



The key point that can be inferred from this data is that by increasing the employment size range from 1–14 up to 1–49, there are few changes in the industries that are included in the top ten, either by looking at the business counts or the sum of headcount data (noting unavailable data for the 1–4 employing size range).

However, a number of these industries have higher-than-average proportions of vulnerable employees, including visa holders, young workers, apprentices and trainees. For example, Café and Restaurants and Takeaway Food Services have relatively higher proportions of young and low-income workers. These groups often face unique challenges and risks in the workplace, making them more susceptible to exploitation and non-compliance with labour laws. It follows that an increase to headcount as part of the small business employer definition would result in more vulnerable employees being impacted. However, the extent to which this would occur, and in which particular sectors, would require further detailed analysis.

## Headcount vs FTE approach

A number of submissions, including from the ACTU, the ASBFEO and NDS, acknowledged that headcount was simpler to apply, with the ACTU noting that the main benefit of the definition is that it is ‘capable of being applied objectively in a relatively timely way’<sup>269</sup> and the ASBFEO noting that the headcount definition ‘has the virtue of simplicity and relative ease of compliance for small business employers’.<sup>270</sup> In its submission, ACCI stated that while businesses typically count their staffing numbers by way of FTE, ACCI itself ‘does not consider that an FTE basis for the definition would necessarily [be] any easier for either [employer or employee] to understand’<sup>271</sup> and ‘opposes any suggestions to alter the way in which the definition of small business employer is constructed’.<sup>272</sup>

Other stakeholders including COSBOA, MTO, UWU and the NFF also acknowledged that many businesses are already familiar with using FTE calculations for managing rosters and payroll. COSBOA stated that Australian workforce management providers such as ADP and Microkeeper ‘confirm that their small business clients routinely use FTE calculations for multiple business functions’<sup>273</sup> and that an analysis of 3 payroll platforms serving over 180,000 businesses show that 94% of businesses with 10 to 20 employees can ‘immediately provide their current FTE count within 0.2 of a position’.<sup>274</sup> MTO further noted that ‘many jobs ... are advertised on an FTE equivalent basis’.<sup>275</sup> For this reason, the NFF argued that an FTE approach would be no more confusing or difficult for employers to apply than one using a total headcount – it would be a ‘simple matter of swapping fulltime hours for employee numbers in the calculus’<sup>276</sup> – and that, ‘if anything, the headcount test is more confusing in practice, given the nuance of who to count (regular casuals, associated entities, etc.)’.<sup>277</sup> Other stakeholders agreed. Ai Group stated in its submission that it is ‘confident an FTE based approach could be developed which is equally straightforward to apply’, particularly if the FWO provided assistance with worked examples and calculation tools;<sup>278</sup> and COSBOA provided ‘there is no doubt that applying full time equivalents as the methodology would be a demonstrably easy measure for small business ... and impose limited operational impact’.<sup>279</sup>

---

<sup>269</sup> ACTU submission, p. 14 [43].

<sup>270</sup> ASBFEO submission, p. 2.

<sup>271</sup> ACCI submission, p. 13 [35].

<sup>272</sup> Ibid.

<sup>273</sup> COSBOA additional material, p. 3.

<sup>274</sup> Ibid.

<sup>275</sup> MTO additional material, p. 3.

<sup>276</sup> NFF submission, p. 5.

<sup>277</sup> NFF additional material, p. 6.

<sup>278</sup> Ai Group submission, p. 4 [24].

<sup>279</sup> COSBOA additional material, p. 4.

The ACTU and UWU also noted that employers have experience with calculating FTE, but did not support an FTE approach. The ACTU pointed out that Australia's industrial relations system has used FTE instead of headcount for the purposes of the small definition previously (under a transitional arrangement after commencement of the Fair Work Act),<sup>280</sup> and concluded that 'that experience was not a positive one, involving a greater level of uncertainty for employees and employers alike'.<sup>281</sup> UWU submitted that 'using FTE in lieu of headcount will mean more workers lose ... entitlements to workplace rights and protections'<sup>282</sup> and did not support the view that 'using FTE would be less confusing or complex for small business employers'.<sup>283</sup> They further posited that an FTE approach would confuse employees and make it more difficult for them to determine whether they are employed by a small business, as 'employees may not be aware of the FTE figure for their co-workers'.<sup>284</sup> The ACTU agreed, stating that 'from the perspective of employees, the move to FTE would make the threshold almost impossible to determine with any confidence'.<sup>285</sup>

The NFF further submitted that a straight headcount approach does not take into account the 'realities' of a 'business and the circumstances of employees', and that an FTE approach is a 'more accurate reflection of a business's capacity and resourcing'.<sup>286</sup> Submissions from COSBOA and MTO echoed these sentiments, with COSBOA arguing that expanding the definition to 50 FTE (excluding casuals) would 'better [reflect] the realities of modern business operations'<sup>287</sup>, and MTO positing that an FTE basis would provide 'a more accurate proxy for determining the resources available to the employer'.<sup>288</sup> Clubs Australia also commented that 'count[ing] all employees equally, regardless of hours worked ... distorts workforce size', particularly in the context of clubs which have a 'small full-time core, supplemented by fluctuating casual staff'.<sup>289</sup>

Ai Group also made several points against the 'simplistic' headcount approach, noting that:

- the approach discourages flexible arrangements such as part-time or casual employment, thereby 'reducing job opportunities' and discouraging certain modes of employment – particularly for 'parents and carers, many of whom are women'.<sup>290</sup>
- employers no longer have the degree of control that they once did in determining an employee's status, as employees now have greater rights and entitlements to request flexible working arrangements, particularly since the Secure Jobs, Better Pay legislation.<sup>291</sup> Ai Group noted the increasing difficulty for an employer to 'maintain that a job must be done on a full-time basis' if an employee has sought flexibility under the Fair Work Act resulting in businesses having less autonomy and control over whether or not they actually remain a small business for the purposes of the Fair Work Act.<sup>292</sup>
- the headcount approach also has limited benefits from an employer's perspective compared to other stakeholders (such as individual employees) – and that employers are arguably the

<sup>280</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* Schedule 12A.

<sup>281</sup> ACTU additional material, p. 4 [10].

<sup>282</sup> UWU additional material, p. 2.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> ACTU additional material, p. 5 [13].

<sup>286</sup> NFF submission, p. 6.

<sup>287</sup> COSBOA submission, p. 3 [14].

<sup>288</sup> MTO submission, p. 7 [31].

<sup>289</sup> Clubs Australia submission, pp. 3–4.

<sup>290</sup> Ai Group submission, p. 4 [18].

<sup>291</sup> Ibid p. 5 [26]–[29].

<sup>292</sup> Ibid p. 5 [30]–[32].

group whose interests need to be most considered, given that they are the ones who are most impacted by the definition and how it is applied.<sup>293</sup>

- nothing significantly changes once a business goes past the 15-employee threshold – a business employing 14 full-time employees has the same financial and administrative capacities as one that employs 28 part-time employees who work the equivalent amount of hours, yet one is treated differently to the other.<sup>294</sup>

Other employer organisations including COSBOA, MTO and the NFF agreed with Ai Group’s reasoning that the current headcount approach can disincentivise employers from providing flexible working arrangements, with COSBOA stating that its members report that it ‘creates a demonstrable disincentive for them ... to offer flexible work arrangements’.<sup>295</sup> The NFF similarly stated that its members report that a part-time or seasonal worker working a few hours a week “has the same weighting as a full-time employee working 38 hours” under the current test’.<sup>296</sup> MTO submitted that ‘a business should not miss out on small business employer status as a result of providing flexible working arrangements to its employees’.<sup>297</sup>

Employee stakeholders tested the notion that small businesses are disincentivised from offering flexible working arrangements as a result of the headcount threshold, with the ACTU stating that it ‘is unaware of any published evidence or research that demonstrates [this] claim’.<sup>298</sup> UWU made a similar point and also noted that ‘casual and part-time hours of work is a common employment arrangement for employees in small businesses’.<sup>299</sup> It used the example of the accommodation and food services industry, where small businesses ‘make up a significant proportion of the ... industry (44%)’ and where ‘both part-time and casual work is prevalent’.<sup>300</sup> The ACTU referenced the HR Institute’s *Hybrid and Flexible Working Practice in Australia Workplaces Report 2025* regarding flexible work, noting that the small business threshold was not reported as one of the identified challenges to offering flexible work in the HR Institute’s survey.<sup>301</sup> The ACTU further observed that ‘while some forms of flexible work may involve part-time or casual arrangements, it would be a mistake to conflate those types of arrangements with the broader notion of flexible work’, which can include remote work, flexible hours and time-in-lieu.<sup>302</sup>

If the objective is to treat businesses exactly the same based on their employees’ hours of work, rather than number of employees employed, FTE methodology provides a more nuanced approach. However, from a broader viewpoint of considering the needs of employees, a headcount approach can be considered to be more accessible for employees to be able to understand and assess whether they are in a position to either informally or formally raise and/or pursue a matter about an entitlement.

Using unfair dismissal as an example, a permanent employee who has worked for more than 6 months but less than 12 months, has had their employment terminated, and is considering making an unfair dismissal application to the FWC, would want to know if they are an employee of a small business employer or a non-small business. The employee would need to be a non-small business employee to have met this eligibility criterion under the unfair dismissal provisions – new small business employees

---

<sup>293</sup> Ibid p. 3 [17f].

<sup>294</sup> Ibid pp. 5–6 [33]–[35].

<sup>295</sup> COSBOA additional material, p. 1.

<sup>296</sup> NFF additional material, p. 2.

<sup>297</sup> MTO additional material, p. 3.

<sup>298</sup> ACTU additional material, p. 1.

<sup>299</sup> UWU additional material, p. 1.

<sup>300</sup> Ibid pp. 1–2.

<sup>301</sup> ACTU additional material, p. 1.

<sup>302</sup> Ibid p. 2 [5].

have a 12-month minimum employment period compared to 6 months for non-small businesses. In addition, if the employee has completed the minimum employment period and the employer is a small business employer, then the Small Business Fair Dismissal Code would have to be considered. A headcount approach may make it be easier for the employee to determine whether they can make the application and the relevance of the Code. They do not need to know the exact hours worked by employees and how to properly apply an FTE methodology.

There are counter arguments in overstating the simplicity of the headcount approach, with employer stakeholders citing the inclusion of regular casuals as a particularly complex issue, discussed more below. It may still be difficult for an employee to know headcount if there are associated entities involved and if employees are on leave. As discussed above, however, some employer stakeholders also considered the headcount approach to be preferable on the basis of minimising complexity for small businesses.

## Regular casuals and seasonal employees

The inclusion of ‘regular casuals’ within the definition was another aspect that generated significant discussion among stakeholders. Some stakeholders, such as the ACTU, UWU and NDS, expressed no objection to this requirement and supported maintaining the current approach.<sup>303</sup> Others such as the NFF, the ARA and ACCI raised concerns about its complexity and practical application, but accepted that it formed part of the definition. The ASBFEO, Ai Group, COSBOA and MTO advocated to remove casual employees from the definition altogether.

ACCI, the ARA, Ai Group, COSBOA and the NFF all highlighted the difficulty and confusion that small business employers face in interpreting who qualifies as a ‘regular casual’. The ARA noted that determining which casual employees meet the criteria could be ‘highly technical’ and ‘often requires complex legal analysis’, requiring small businesses to assess factors such as the nature, pattern and expectation of ongoing work.<sup>304</sup> While not explicitly objecting to including regular casuals in the definition, the ARA called on the FWO to provide more guidance (in the form of a comprehensive guide) to assist small businesses to determine which of their employees counted as ‘regular casuals’.<sup>305</sup>

COSBOA said that including regular casuals in the definition created ‘significant complexity and uncertainty for businesses’.<sup>306</sup> They also noted that ‘casuals are not included in an FTE calculation and whether the definition methodology remains as a headcount or changes to FTE has no impact on any issue associated with this question’.<sup>307</sup> Their submission called for the removal of all casual employees from the definition, suggesting that this would provide ‘greater certainty and stability in determining business size, allow businesses more flexibility in managing seasonal variations, encourage employment by removing barriers to hiring casual employees and align with other regulatory frameworks such as the ACCC’s small business contract provisions’.<sup>308</sup>

The NFF stated that the concept of a ‘regular casual’ is ‘inherently ambiguous, and fluid’, and a ‘highly technical question’ that only ‘a workplace relations practitioner who is familiar with the relevant case law’ would be able to accurately assess.<sup>309</sup> The NFF raised further issues including borderline cases, complexity undermining the simplicity of the headcount, ambiguity being litigated in unfair dismissal cases and exposing small business to disputes and litigation, and employers potentially restricting ‘how

---

<sup>303</sup> NDS submission, p. 3.

<sup>304</sup> ARA submission, p. 3.

<sup>305</sup> Ibid.

<sup>306</sup> COSBOA submission, p. 2 [9].

<sup>307</sup> COSBOA additional material, p. 4.

<sup>308</sup> COSBOA submission, p. 7 [41].

<sup>309</sup> NFF submission, pp. 5, 9.

they engage casuals to avoid creating a “regular” pattern’.<sup>310</sup> They submitted that the FWO should issue ‘clearer, binding guidance on how casual employment status is determined’, and clarify whether a casual employee not rostered for several months counts for the headcount, and what document or record-keeping is sufficient to confirm the end of engagement.<sup>311</sup>

MTO considered that the ‘simplest solution’ to challenges in determining ‘regular casuals’ would be to ‘remove casual employees from the small business employer definition headcount altogether’.<sup>312</sup> Alternatively, if the threshold ‘is not raised to “less than 50 employees”’, they recommended clarifying in the small business employer definition that a regular casual must ‘have a reasonable expectation of continuing employment by the employer on a regular and systemic basis (at the relevant time)’, and ‘be working (or rostered to work)’.<sup>313</sup>

Both COSBOA and Ai Group highlighted the new casual employment reforms that were introduced by the Closing Loopholes No. 2 Act, which creates the ‘employee choice pathway’ for eligible casual employees to change to full or part-time permanent employment.<sup>314</sup> COSBOA stated that the new framework for casual employees will create ‘substantial administrative work’ for businesses with 15–49 employees, who will have to manage ‘sophisticated assessment and conversion processes’ including (among others) an assessment of casual employment patterns, maintenance of records to demonstrate compliance, and implementation of new systems to track casual employment within their business.<sup>315</sup> Ai Group also noted that since the definition of small business employer under the Fair Work Act was created, there have been substantial changes to both how casual employment is defined, and of the ability for casuals to convert their employment status.<sup>316</sup> It noted that with recent amendments to the casual employment framework, ‘employers now have reduced capacity to sustainably object to the conversion of casual employees to ongoing work’.<sup>317</sup> Ai Group suggested that casual employees should be removed from the definition, stating ‘it is not clear on what basis casual employees should continue to count towards the definition of small business’.<sup>318</sup>

The ASBFEO also advocated to exclude casual employees, arguing that the current definition no longer reflects the evolving labour market or the ‘increasing regulatory complexity’ that businesses face.<sup>319</sup> Its submission cited Treasury’s 2023 *Working Future: The Australian Government’s White Paper on Jobs and Opportunities*, noting that there is a growing trend in the Australian labour market towards part-time employment and flexible working arrangements which is leading to a growing number of smaller employers ‘reaching the 15 headcount threshold’ and ‘losing access to special considerations’.<sup>320</sup>

Submissions from ACCI, the ACTU and UWU accepted the inclusion of ‘regular casuals’ within the definition but observed that it could cause confusion from an employee perspective, noting that employees within a business may find it difficult to determine whether other colleagues count as a ‘regular casual’ or not.<sup>321</sup> The ACTU noted this in turn would make it more difficult to determine if their employer meets the small business threshold.<sup>322</sup> UWU noted that this could impact young workers, as

---

<sup>310</sup> NFF additional material, pp. 7–9.

<sup>311</sup> Ibid pp. 9–10.

<sup>312</sup> MTO additional material, p. 4.

<sup>313</sup> Ibid.

<sup>314</sup> These changes came into effect from 26 February 2025 for non-small businesses and comes into effect from 26 August 2025 for small businesses.

<sup>315</sup> COSBOA submission, p. 5. [31].

<sup>316</sup> Ai Group submission, p. 11 [65].

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> ASBFEO submission, pp. 2–3.

<sup>320</sup> Ibid, p. 1.

<sup>321</sup> ACCI submission, p. 13 [34]; ACTU submission, pp. 14–15 [45]; UWU submission, p. 5.

<sup>322</sup> ACTU submission, pp. 14–15 [45].

well as those ‘new to working in Australia’, who ‘may find this confusion a barrier to seeking entitlements where they may in fact be eligible’.<sup>323</sup>

The ACTU also submitted that if a small business employer definition is to be maintained, the headcount basis and regular casual concept is ‘imperfect’ but ‘appears superior to the other mooted alternatives’.<sup>324</sup> The ACTU provided examples of what they considered was uncertainty in FWC decisions regarding the term ‘regular casual employee’ ‘to illustrate the difficulties employees face in establishing their rights and protections and the variations to those rights that can ... occur without the employee having any control (or even knowledge) of their legal position’.<sup>325</sup> They ‘strongly oppose[d]’ the exclusion of regular casuals from the headcount submitting that it would result in favourable treatment of employers that use regular casuals, ‘expand a significant loophole in the regulatory framework’, and ‘incentiv[ise] casual employment ... counter to the Albanese Government’s reforms seeking to increase secure work’.<sup>326</sup> The ASU supported the position of the ACTU broadly suggesting, although not specific to regular casuals, that ‘the current definition may present some interpretative challenges at the margins, yet it continues to be effective in fulfilling its intended purpose’.<sup>327</sup> The ACTU also submitted that if there was to be a change in how casuals are to be counted, ‘they would seek to include more of those casual employees ... who may not fit within the current definition of regular casual employee’.<sup>328</sup>

Master Builders’ position was that ‘the compilation of employee types be all inclusive, based on a headcount at any particular time’.<sup>329</sup> It stated that ‘this would ensure consistency in the application of the definition in line with the current legislation’.<sup>330</sup>

COSBOA also submitted that the current definition ‘fails to account for the seasonal nature of many industries’.<sup>331</sup> Clubs Australia agreed, noting that ‘the small business definition does not account for the nature of the club industry workforce’ relating to event driven or seasonal work.<sup>332</sup> The NFF stated in its submission that the definition ‘should expressly exclude seasonal employees’.<sup>333</sup> The NFF contended that including short-term employees who are employed on a non-ongoing basis (e.g. fruit pickers and packers, farm-related jobs such as lambing, calving and shearing) would ‘artificially [expand] the size of a business’s workforce’.<sup>334</sup> It submitted that in these cases, a seasonal employee may be regarded as a ‘regular casual’ and therefore be counted for the purposes of determining the status of an employer, and concluded that ‘this should not be possible’.<sup>335</sup>

The Review notes the FWC’s and the FWO’s resources and service offerings available to both employers and employees on determining the employment status of an employee. The new casual employee definition has been in effect since 26 August 2024 so it could reasonably be assumed that the upfront transition costs to employers may largely have already occurred. The issue remains whether the ongoing costs of understanding and where necessary applying the correct definition of ‘regular casual’

---

<sup>323</sup> UUU submission, p. 5.

<sup>324</sup> ACTU additional material, p. 7 [22].

<sup>325</sup> Ibid, pp. 5–7; *Xiaoqi Yuan v Winston Group Australia Pty Ltd* [2023] FWC 2124 (12 September 2023); *Hong Yang Chan v Boogie House Hotpot Pty Ltd* [2024] FWC 1181 (24 July 2024); *David Able v Farmers Arms Creswick Pty Ltd* [2024] FWC 1463 (26 June 2024).

<sup>326</sup> ACTU additional feedback, pp. 3–4 [14]–[16].

<sup>327</sup> ASU additional feedback, p. 2.

<sup>328</sup> ACTU additional feedback, p. 4 [15]–[16].

<sup>329</sup> Master Builders additional material, p. 2.

<sup>330</sup> Ibid.

<sup>331</sup> COSBOA submission, p. 2 [9].

<sup>332</sup> Clubs Australia submission, p. 3.

<sup>333</sup> NFF submission, p. 7.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

requires further consideration in examining whether ‘regular causals’ should be included in the small business employer definition. This may be part of the statutory review of the Closing Loopholes No. 2 Act which must commence no later than 26 February 2026.

## Other stakeholder views – associated entities, business owners and temporal considerations

Few stakeholders variously expressed views on the inclusion of associated entities and business owners in the small business employer definition. One stakeholder also raised the temporal aspect of the definition.

Two employer organisations, the NFF and MTO, submitted that the inclusion of employees of associated entities makes the definition harder to apply. While the NFF called it ‘justifiable as an anti-avoidance provision’, it argued that its inclusion ‘shatters any notion that the [definition] is “easy to apply”’.<sup>336</sup> MTO recommended removing the inclusion of employees of associated entities.<sup>337</sup> It argued that many small business owners ‘are not aware of the need to aggregate employees for disparate businesses in the headcount’.<sup>338</sup> It also submitted that including employees of associated entities ‘means that an employer’s status as a small business ... is often contested by employees as a matter of course – particularly in unfair dismissal claims – as the employee will generally have no visibility as to the employer’s associated entity status’.<sup>339</sup> Alternatively, MTO suggested redefining and limiting it to associated entities ‘that operate with a sufficient practical nexus as to afford a sharing/pooling of resources (e.g. HR function)’.<sup>340</sup>

The ACTU, UWW and the SDA expressed strong opposition to excluding associated entities from the definition. The ACTU considered that excluding associated entities would ‘provide motivation for businesses to undertake corporate restructures’ and ‘[enable] businesses to avoid their obligations with almost complete impunity simply by creating multiple employee entities in the one business’ with ‘significant impact on workers’ rights and entitlements’.<sup>341</sup>

The SDA agreed with the ACTU and noted excluding associated entities ‘could be exploited by businesses as a means to avoid their obligations’.<sup>342</sup> UWW also agreed with the ACTU and also stated it held concerns that the current small business employer definition ‘does not fully capture business relationships and related entities adequately, meaning that some businesses may qualify as small businesses when that may not genuinely be the case’ citing examples of trusts and franchising arrangements.<sup>343</sup> UWW submitted that franchisors may exert control over a franchisee, from ‘significant operational decisions, through to the use of software and payroll systems, opening hours and staffing levels’; that ‘an individual may also be the director of multiple franchises from the same franchisor’; and that ‘in effect ... this means many franchise employees may not receive entitlements that they would otherwise receive if working for a larger employer, despite a franchisee having access to resources many small businesses do not’.<sup>344</sup> UWW further noted that ‘franchises may have access to the franchisor’s human resources and legal advice; however they may still be considered a small business ... and therefore subject to the Small Business Fair Dismissal Code’.<sup>345</sup> UWW submitted that

---

<sup>336</sup> Ibid p. 9.

<sup>337</sup> MTO submission, p. 7 [29].

<sup>338</sup> Ibid p.7 [28].

<sup>339</sup> Ibid p. 7 [30].

<sup>340</sup> Ibid p. 7 [29].

<sup>341</sup> ACTU additional feedback, p. 3 [10].

<sup>342</sup> SDA additional feedback.

<sup>343</sup> UWW additional feedback, p. 2.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

this ‘can have a “chilling effect” on employees of franchises (particularly in industries where there is high staff turnover) ... and may influence employees’ decisions to collectivise and seek to improve wages and conditions, because they hold fears about having their employment terminated without access to the same protections against unfair dismissal’.<sup>346</sup>

MTO further recommended excluding business owners and individuals ‘who are directly related to the entity from which they receive payments (e.g. family members of a family business, shareholders of a company, beneficiaries of a trust)’ from the total headcount, noting that such ‘closely held payees are similarly differentiated from other arm’s length employees in the Single Touch Payroll reporting requirements that apply to some small businesses’.<sup>347</sup>

The Review acknowledges concerns that determining associated entities can involve additional complexity for an employer, and that its inclusion can make it more difficult for employees to determine a business’s status. However, the Review notes that the inclusion of associated entities in the small business employer definition is based on an existing legal definition under the *Corporations Act 2001* (Cth) (Corporations Act).<sup>348</sup> As such, employers, or their advisors, are already required to be familiar with understanding and applying this part of the definition where applicable.

NDS discussed the temporal element of the definition (which requires that employers be aware of their daily headcount) as a source of uncertainty for small businesses as to when provisions would apply.<sup>349</sup> It proposed replacing the ‘particular time’ condition with a calculation of employee headcount as of the last day of the month prior, suggesting that this would ‘provide greater certainty’ about the applicability of relevant provisions to employers and employees, ‘better accommodate any employee changes throughout the year’, and ‘provides a significant opportunity to reduce regulatory burden’ for businesses.<sup>350</sup> However this issue was not raised by other stakeholders.

## Financial turnover

Turnover as part of the small business employer definition was raised in some submissions. Historically, turnover has not been an element of the small business employer definition.

Ai Group, as part of its proposed multi-option approach, suggested that turnover could be used as one distinct way to define a small business (the others being headcount and FTE), citing other definitions such as ‘small proprietary company’ in the Corporations Act and ‘small business contract’ in the Australian Consumer Law.<sup>351</sup> It submitted that it ‘is not possible to “recognise the special circumstances of small businesses” without also reckoning with their relative earnings and resources, compared to all businesses, and other cohorts of businesses’ and ‘the average or median incomes and typical levels of financial resources of small businesses ...’.<sup>352</sup> Ai Group also suggested that the determination of the 15 employee threshold in the 1984 TCR ‘seems to have based on the lesser financial capacities of smaller businesses, particularly capacity to pay ... redundancy pay’ rather than ‘based on [the] complexity of lesser capacity for compliance with complicated dismissal requirements’.<sup>353</sup>

In support of lifting the headcount threshold in the small business employer definition to fewer than 50, MTO noted that it would be ‘consistent’ with part of the definition of ‘small proprietary company’

---

<sup>346</sup> Ibid.

<sup>347</sup> MTO submission, p. 7 [32].

<sup>348</sup> Corporations Act 2001 section 50AAA.

<sup>349</sup> NDS submission, p. 3.

<sup>350</sup> Ibid.

<sup>351</sup> Ai Group submission, pp. 7–8 [45]–[46].

<sup>352</sup> Ibid p. 10 [55].

<sup>353</sup> Ibid p.10 [57]–[58].

under the Corporations Act which includes, as one criterion, a headcount of ‘fewer than 50’.<sup>354</sup> MTO noted that ‘other financial elements of the small business test (i.e. assets and turnover)... [are] inappropriate in the workplace relations context’.<sup>355</sup>

COSBOA alluded to turnover by citing international frameworks that use it as a criterion in their definitions, but did not otherwise present a view on the potential use of this metric.<sup>356</sup> In noting a number of small business definitions in Australia and internationally, the SBAA also cited some turnover based definitions, including the ATO’s small business definition and an approach used by India to classify businesses that considers turnover as a criterion.<sup>357</sup> However, no view was expressed on whether turnover should be part of the small business employer definition.<sup>358</sup>

The ACTU contended that any alternative approaches to the number of employees used by other legislative frameworks, such as financial turnover of the business, ‘may at least from the perspective of employees, lack any transparency with financial information about small and medium sized businesses usually being unavailable ...’.<sup>359</sup> They noted similar concerns that a multi-option approach, particularly one with financial criteria, would complicate the definition where ‘details may only be available many months after the end of the financial year and may never be available to employees’.<sup>360</sup>

NDS’s submission also referenced turnover noting how the Australian Charities and Not-for-profits Commission (ACNC) defines small, medium and large charities, with small charities defined as those with an annual revenue of under \$500,000. NDS notes that the ACNC requires different reporting and administrative requirements from charities based on these thresholds (with smaller charities having reduced requirements compared to larger ones). It broadly advocated for a similar approach to be adopted in the workplace relations context, streamlining reporting requirements to ease regulatory burden for smaller organisations.<sup>361</sup> The Review notes that while ACNC’s tiered reporting approach – based on annual revenue thresholds – serves a useful administrative function within its specific framework (i.e. between regulator and charity), this model may not translate easily to the workplace relations framework. This is because in a workplace relations context, the definition of small business must also account for employees, whose rights and entitlements are directly affected. As such, the definition must balance administrative simplicity with fairness for all relevant parties.

Master Builders submitted that combining headcount with turnover ‘could be detrimental to small businesses with large turnover due to the nature of building and construction’.<sup>362</sup>

Based on data specifically obtained by the FWO, **Table 12** details the median financial turnover for businesses in each employment size range.<sup>363</sup> Unsurprisingly, the median financial turnover increases with the larger employing size range, indicating that businesses with more employees tend to generate higher revenue.

---

<sup>354</sup> MTO submission, p. 8 [34].

<sup>355</sup> Ibid.

<sup>356</sup> COSBOA submission, p. 4.

<sup>357</sup> SBAA additional feedback, pp. 6–7.

<sup>358</sup> Ibid.

<sup>359</sup> ACTU submission, p. 15 [47].

<sup>360</sup> ACTU additional feedback, p. 3 [12].

<sup>361</sup> NDS submission, p. 4.

<sup>362</sup> Master Builders additional material, p. 3.

<sup>363</sup> ABS 2025, tailored data request – median turnover by different employment size ranges, 2023-24, data provided May 2025 (customised report).

Table 12. Median turnover by employment size range <sup>364</sup>		
Employment size range	Median turnover	Business counts
Non-Employing	\$104,400	1,663,837
Employing 1–4	\$340,611	693,558
Employing 5–14	\$1,311,699	202,307
Employing 15–19	\$2,713,744	29,893
Employing 20–24	\$3,619,448	16,608
Employing 25–49	\$5,594,136	32,108
Employing 50–75	\$11,488,862	9,711
<b>Overall median turnover &amp; Total business counts</b>	<b>\$178,265 (overall median)</b>	<b>2,648,022 (total businesses)</b>

Based on the submissions received, the Review found there was limited support to have a turnover-based small business employer definition, or one in which turnover is a criterion or factor. It is clear that smaller employers characteristically have lower median turnover (with median removing the outlier effect) reflecting their ‘special circumstances’ of lower financial and human resources inputs and outputs. That the small business employer definition does not include turnover reflects that the Fair Work Act’s central role is to regulate the relationship between employers and employees. The 2013 Productivity Commission Small Business Research Report concluded that a small business definition should reflect its regulatory policy objectives, which for the Fair Work Act, in essence, is balancing employer interests with those of employees.

### Factors to consider in changing the definition

The Review has endeavoured to accurately convey the views of stakeholders in terms of where there is some degree of consensus and where there are divergent views on potential changes to the small business employer definition. The Review finds that in making improvements to the small business employer definition there was no clear agreement when viewing the employer stakeholder submissions as to what the headcount would be, what method should be used to calculate the headcount, and whether regular casuals should be included at all in the definition. Excluding associated entities or having turnover as a criterion were only supported in a few employer stakeholder submissions.

In the absence of a regulatory impact analysis, there was limited evidence to draw upon to assist to weigh up the competing views. Given these limitations, and that amending an element of the small business employer definition could have a significant practical impact on affected employers and employees, an overview is provided in **Chapter 6** that synthesises the possible benefits and disadvantages of the different proposals presented. Before addressing this however, **Chapter 5** considers the interoperability of the small business employer definition in the Fair Work Act with different small business definitions.

**Finding 3:** A range of proposals to expand the small business employer definition were put forward by employer stakeholders and the ASBFEO. However, there were mixed views by these stakeholders on elements of the definition, including the threshold headcount number, the method of calculating headcount, the inclusion of casuals, and the exclusion of associated entities.

<sup>364</sup> Based on ABS 2025, tailored data request – median turnover by different employment size ranges, 2023–24, data provided May 2025 (customised report).

## 5. Is there a need for interoperability with other small business definitions?

The terms of reference required the Review to consider the need for interoperability of the small business employer definition in the Fair Work Act with similar definitions in other Commonwealth laws and requirements, if any, such as those used by the ABS and the ATO.

As previously discussed, there are different definitions of small business across Commonwealth statutes (see **Table 2** above for further details). Some definitions of small business are based on headcount while others are based on turnover, or a combination of both.

The differing formulations of a small business definition in these contexts reflects frameworks with differing policy and regulatory objectives. For example, while the definition under the Fair Work Act is more limited, covering approximately 900,000 businesses (as per **Table 6** above), the ATO's definition (based on turnover) is much more expansive, capturing more than 4.7 million active small businesses (including non-employing entities), reflecting its distinct tax-related objectives.<sup>365</sup> Although there has been a desire from some stakeholders for greater alignment or harmonisation of small business definitions across different frameworks in the past, there has not been consensus on this issue.<sup>366</sup> This divergence of opinion was also reflected in stakeholder submissions to the Review.

The 2013 Productivity Commission Small Business Research Report noted that higher costs could result from having a single definition of small business across regulatory frameworks, recommending at the time that:

*Governments should not impose upon regulators a single definition of small business as this could lead to inflexibility and higher costs for some businesses and for the community more generally. Policy makers and regulators are best placed to define small business in ways that are practical and appropriate for their regulatory area.*<sup>367</sup>

Instead, the Productivity Commission concluded that the most appropriate definition should be based on the specific regulatory objective and context which the relevant policy is trying to achieve. Some stakeholders however, such as COSBOA and the SBAA, questioned the applicability of this research given it was undertaken over a decade ago and the workplace relations context has changed.<sup>368</sup> However, the Review understands that the 2013 Productivity Commission Small Business Research Report remains the seminal piece of research on the question of harmonisation between various small business definitions, which was confirmed through consultation with Treasury and the ASBFEO.

The Review also observed that there have not been any moves in recent times for a harmonised small business definition to be applied across regulatory regimes. While the recently released *National Small Business Strategy* discusses harmonisation of small business policies and regulation in the context of

---

<sup>365</sup> ATO, November 2024, Speech to IPA National Congress 2024, <https://www.ato.gov.au/media-centre/speech-to-ipa-national-congress-2024>.

<sup>366</sup> Senate Education and Employment Legislation Committee, *Inquiry report Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* [Provisions], p. 63, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/SecureJobsBetterPay/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Report).

<sup>367</sup> Productivity Commission Small Business Research Report, 2013, p. 22, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

<sup>368</sup> SBAA 'additional feedback', p. 4.

equitability and fairness as a guiding principle, it does not specifically discuss harmonisation of the various small business definitions.<sup>369</sup>

In the Fair Work Act, there is one departure from the section 23 definition of small business employer related to the threshold for single interest employer agreements. During its deliberations on *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Secure Jobs, Better Pay Bill), the Senate Education and Employment Legislation Committee (the Committee) received a number of submissions from stakeholders arguing that the small business employer exemption for being required to bargain a multi-enterprise agreement in the single-interest bargaining stream should be increased beyond the current small business employer definition in the Fair Work Act.

In its report, the Committee noted these concerns and recommended that for the purposes of single-interest stream exemption the bar should be set at fewer than 20 employees, noting ‘that an increase from fewer than 15, to fewer than 20 employees, for the single-interest stream exemption, will provide the certainty that small businesses have called for, but will not exclude too many workplaces that it would be appropriate for the single-interest stream to cover ...’.<sup>370</sup> Based on the Committee’s recommendation, the Secure Jobs, Better Pay Bill was amended to lift the single interest employer bargaining exemption to apply to businesses with fewer than 20 employees based on headcount. The Committee also noted that ‘moving to a “full-time equivalent” measure may be confusing for small businesses and is subject to fluctuate quite significantly’.<sup>371</sup>

## Stakeholder views on interoperability with other small business definitions

The Review was limited to considering the interoperability between the Fair Work Act small business employer definition with various small business definitions. While some stakeholders responded directly to this question, others took a broader approach and provided their views on harmonisation across small business definitions. Some stakeholders (Ai Group and COSBOA) noted that their responses had been constrained by the terms of reference and that they would have responded to the question of harmonisation if it was within scope.<sup>372</sup> Given the different approaches taken in responding, the Review cautions against drawing any overall conclusions from stakeholders’ submissions on whether stakeholders support harmonisation of small business definitions more broadly.

With this caveat in mind, in general, there were mixed views among stakeholders for greater consistency or interoperability between the Fair Work Act small business employer definition and other small business definitions.

ACCI, the ACTU and Clubs Australia all acknowledged that the different definitions serve specific purposes within their respective legislative frameworks, with the ACTU highlighting that the ‘definitions ... appear to have differing policy objectives underpinning them and little day-to-day overlap in how they are practically applied’.<sup>373</sup> ACCI however did note that the numerous definitions

---

<sup>369</sup> Treasury, *National Small Business Strategy*, 3 February 2025, p. 38, <https://treasury.gov.au/publication/p2025-624843>.

<sup>370</sup> Senate Education and Employment Legislation Committee, *Inquiry report Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* [Provisions], p. 63, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/SecureJobsBetterPay/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Report).

<sup>371</sup> Ibid.

<sup>372</sup> This feedback was provided during the stakeholder meeting on 20 June 2025.

<sup>373</sup> ACTU submission, p. 15 [49].

further added to the regulatory burden of small business owners, who needed to be across all of the varied definitions and how they applied.<sup>374</sup>

The ASBFEO agreed, noting that while there is a certain ‘attractiveness’ to harmonisation, there are ‘sound policy reasons for [the] divergence’ in definitions.<sup>375</sup> They pointed out that ‘regulators of taxation or market disclosures’ focus on ‘the financial characteristics’ of a business, while the headcount of a business is more relevant to workplace regulators and encouraged the government ‘to take a considered approach’ in regard to ‘where and whether harmonisation is practicable or desirable’.<sup>376</sup>

The MTO provided a nuanced response to the need for interoperability. In support of lifting the headcount threshold under the small business employer definition to 50, the MTO noted that this would be ‘consistent’ with the less than 50 employee criterion used by the Corporations Act definition.<sup>377</sup> The MTO further explained that while not a ‘necessary precondition’ for the small business employer definition ‘consistency with the Corporations Act is appropriate, as at less than 50 employees, a small business does not have the resources or scale to be subjected to the same (and proportionately greater) regulatory burden as larger businesses – from both a financial report and workplace relations context’.<sup>378</sup> However, the MTO qualified that ‘where consideration as to regulatory burden is not a relevant factor (i.e. ABS definition), or where the number of employees is not considered (i.e. ATO definition of “small business entity” ...) there is no benefit to interoperability or harmonisation’.<sup>379</sup>

Other stakeholders argued for the need for greater alignment between definitions, with Surveyors Australia stating that ‘consistency is highly desirable’<sup>380</sup>, the NFF calling for ‘a simpler and more coherent regulatory framework for defining small business employers’,<sup>381</sup> and Master Builders recommending ‘the definition of “small business” [be] consolidated across government’.<sup>382</sup>

As described above in **Chapter 4**, Ai Group supported a multi-option approach to the definition. While not strictly advocating for interoperability, its submission pointed out that at least 3 federal legislative frameworks already use a similar approach to define small business – the Corporations Act, the *Competition and Consumer Act 2010* and the *Australian Small Business and Family Enterprise Ombudsman Act 2015* – and that adopting its multi-option approach would reduce the issues that exist with the current Fair Work Act definition.<sup>383</sup> This includes ‘removing or reducing practical challenges created by differing definitions of small businesses ... and address[ing] the interoperability considerations raised in the terms of reference’<sup>384</sup> while more appropriately recognising the special and diverse circumstances of small businesses.<sup>385</sup> The ARA similarly suggested that ‘a more sophisticated framework ... would account for revenue and workforce composition’.<sup>386</sup>

While advocating for a higher headcount, the ARA also submitted that the inconsistency between small business definitions such as those used by the ABS, ATO and within the workplace relations legislation

---

<sup>374</sup> ACCI submission, p. 16 [40].

<sup>375</sup> ASBFEO submission, p. 2.

<sup>376</sup> Ibid, p. 2.

<sup>377</sup> MTO submission, p. 8 [34].

<sup>378</sup> Ibid.

<sup>379</sup> Ibid p. 8 [35].

<sup>380</sup> Surveyors Australia submission, p. 3.

<sup>381</sup> NFF additional material, p. 10.

<sup>382</sup> Master Builders additional material, p. 3.

<sup>383</sup> Ai Group submission, pp. 6–9 [45]–[47].

<sup>384</sup> Ibid p. 9.

<sup>385</sup> Ibid pp. 6–9 [39]–[50].

<sup>386</sup> ARA submission, p. 3.

‘creates confusion for business owners, complicating compliance efforts and administrative processes’ and ‘hinder[s] the development of effective policies that truly reflect the realities of small business operations’.<sup>387</sup> It further suggested that the discrepancy between the definition within the Fair Work Act compared to other legislative definitions (used by the ABS, ATO and ASIC) indicates the Fair Work Act definition ‘does not fully recognise the operational realities of small businesses’.<sup>388</sup> COSBOA echoed these sentiments, asserting that ‘the current threshold’s significant deviation from other regulatory frameworks creates unnecessary complexity’.<sup>389</sup>

HIA emphasised the ‘unquantifiable costs’ to small businesses of having to navigate the numerous definitions and frameworks that apply to them, and stated that the higher threshold that is currently being used as part of single interest employer bargaining arising from the recent Secure Jobs, Better Pay legislation (where the headcount is fewer than 20 employees) suggests that the current definition within the Fair Work Act needs to be increased.<sup>390</sup>

The NFF noted that different small business definitions across Commonwealth and state instruments (such as for statistical or program eligibility purposes), ‘create unnecessary complexity and compliance burdens for small businesses that operate across jurisdictions or must comply with multiple schemes’.<sup>391</sup> It suggested that ‘a harmonised approach – such as consistent use of FTE thresholds or supplementary turnover-based criteria – would improve regulatory certainty, reduce red tape and support better long-term workplace planning’ in the agriculture sector.<sup>392</sup>

SBAA suggested ‘it is crucial ... that a single definition of “Micro, Small and Medium Size Enterprises” (MSMEs) is agreed upon across all Commonwealth, state and territories and interoperability between systems be aligned’.<sup>393</sup> It argued for the use of the ABS definition, noting that DEWR should consider the data and policy benefits that would arise from what it described as new information architecture, taxonomies and interoperability between definitions – particularly to support government initiatives aligned with the FAIR principles – guiding standards for data management that emphasises that data should be Findable, Accessible, Interoperable, and Reusable.<sup>394</sup> SBAA submitted this would help ‘ensure that public data can be accessed efficiently in research, communication and in the provision of crucial products and services’.<sup>395</sup> As well as policy and program alignment and enhanced data collection and research, SBAA provided further evidence that a single small business definition would also provide clarity for business on entitlements, obligations and eligibility, improved and equitable access to support (such as grants and legal protections), and reduced administrative burden.<sup>396</sup>

The Review found that there was not clear agreement among stakeholders on the extent to which the small business employer definition in the Fair Work Act should align with other small business definitions, either with another small business definition or via harmonisation. Further, there has not been any more contemporary research since the 2013 Productivity Commission Small Business Research report testing its conclusion that ‘a single harmonised definition ... could lead to inflexibility

---

<sup>387</sup> Ibid p. 4.

<sup>388</sup> ARA submission, p. 4.

<sup>389</sup> COSBOA submission, p. 2 [12].

<sup>390</sup> HIA submission, p. 5.

<sup>391</sup> NFF additional material, p. 11.

<sup>392</sup> Ibid pp. 10–11.

<sup>393</sup> SBAA submission, p. 11.

<sup>394</sup> GO FAIR, ‘Fair Principles’, <https://www.go-fair.org/fair-principles/>.

<sup>395</sup> SBAA submission, p. 12.

<sup>396</sup> SBAA additional feedback, p. 5.

and higher costs' and the most appropriate definition should be based on the policy area's specific regulatory objective(s) and context.<sup>397</sup>

Some government stakeholders also shared their views on interoperability. Treasury raised that the various definitions of small business in Australia depend heavily on the context and framework in which they sit. Harmonising or creating a single definition would come with real costs for businesses, who would need time to adjust to any changes. While Treasury acknowledged that aligning definitions (including the section 23 small business employer definition in the Fair Work Act) with how the ABS categorises small business could have data matching benefits, they considered that the effort required to align definitions across the various frameworks would likely be resource-intensive with little practical gain. Instead, Treasury suggested that to avoid creating additional definitions going forward, any new policies related to small business should consider leveraging an existing definition wherever practical and/or relevant to the context and framework being considered.

In considering the small business definitions under other jurisdictions, the Review is cognisant of the fact that the policy context of the Fair Work Act has unique elements. Firstly, as mentioned above, the Fair Work Act, as an industrial law, has to balance the interests of employers and employees, and therefore changes to the law that benefit one group, may risk depriving or burdening the other. The second observation relates to the way accommodations for small businesses in the Fair Work Act have evolved. While the Review has not undertaken a detailed analysis of all laws that include small business-specific rules, in some cases at least, these applied to a fairly confined set of requirements or obligations, for example, through providing more relaxed reporting requirements. In the Fair Work Act, on the other hand, the small business employer definition has been used to give small business employers exemptions or accommodations in a range of quite distinct areas of the Fair Work Act, like unfair dismissal, workplace delegates' training, casual conversion or regulated labour hire orders. That makes consideration of any changes to the definition more complex and perhaps explains the diversity of stakeholder views on the subject.

**Finding 4:** There were mixed views among stakeholders on the need for aligning the small business employer definition in the Fair Work Act with other small business definitions to achieve greater interoperability. The Review also noted research by the Productivity Commission that found aligning small business definitions across different regulatory frameworks may result in inflexibility and higher costs for businesses.

---

<sup>397</sup> Productivity Commission Small Business Research Report, 2013, p. 14, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

## 6. Framework for considering a small business employer definition

The Review found that there were varying stakeholder views as to how the small business employer definition should best be formulated to:

- remain fit for purpose in light of its expanded use under the Fair Work Act
- acknowledge the ‘special circumstances’ of small business
- provide an appropriate balance between the ‘special circumstances’ of small business and the rights and entitlements of small business employees, and
- achieve a definition that is simple to understand and apply for both employers and employees but that does not create other challenges for the ‘special circumstances’ of employers.

Overall, union stakeholders (the ACTU, UWU, the ASU, the SDA and CFMEU) did not see any justification for changes that would expand the number of businesses captured by the small business employer definition and increase the number of employees whose rights and entitlements would be different to non-small business employees. While all employer stakeholders advocated for expanding the small business employer definition to achieve what they considered a reasonable balance between the ‘special circumstances’ of small business with the rights and entitlements of employees, there were very different submissions on how to achieve this. For example, stakeholders proposed changing the various elements of the small business employer definition, including:

- the headline number of employees captured
- a headcount versus FTE approach to calculating the number of employees
- the inclusion of regular casuals versus no casuals at all, and
- the inclusion or exclusion of employees in associated entities.

These are summarised in **Table 13** below.

Only Ai Group suggested a definition markedly different from the current formulation with a multi-option approach whereby one criterion only need be met based on headcount, FTE, turnover, or another small business definition in existence.

Based on stakeholder views provided in submissions and research undertaken by the Review, and in the absence of a clear consensus on how to improve the small business employer definition, **Table 13** outlines the factors that the FWO recommends should inform any government consideration of this issue, assuming that a change to the current definition is warranted (noting the current divergence in stakeholder views).

Other aspects, including aligning to other small business definitions, and considering turnover as part of the definition has not been canvassed in **Table 13** given the lack of significant stakeholder support for these options to change the definition at this time.

**Table 13. Analysis of different definition elements**

Definition element	Benefits	Disadvantages
<b>Current headcount</b>	<ul style="list-style-type: none"> <li>• Businesses are already familiar with this threshold of fewer than 15 employees.</li> <li>• Provides a clear, simple and easy to apply/enforceable criterion for determining small business employer status, making it easier for relevant parties (small businesses, regulators, and employees) to determine a business's status and reduces the regulatory/administrative burden for small businesses.</li> <li>• Provides a consistent and objective method for defining small business employers, ensuring that all businesses are assessed using the same criteria.</li> </ul>	<ul style="list-style-type: none"> <li>• Lacks flexibility and arguably fails to take into account the 'special circumstances' of small businesses in certain industries, particularly industries with a higher portion of part-time, casual, or seasonal employees (e.g. agriculture, hospitality).</li> <li>• It may dissuade businesses from hiring part-time or casual employees over full-time employees, thereby disadvantaging employees who don't work full-time.</li> <li>• Any headcount approach with a strict cut off will produce margin or edge cases, for example capturing small yet well-resourced businesses in terms of financial capacity, and relative sophistication to understand and efficiently and effectively meet compliance obligations.</li> </ul>
<b>Increasing the straight-forward headcount</b>	<ul style="list-style-type: none"> <li>• Businesses are already familiar with this approach of counting employees.</li> <li>• Allows for broader coverage, resulting in the reduction of regulatory burden for more businesses overall.</li> <li>• More accommodating to industries that experience seasonal shifts within their workforce.</li> <li>• May encourage business and economic growth by allowing businesses to hire more employees while staying under the threshold.</li> <li>• Relatively easy to apply and determine the status of a business.</li> </ul>	<ul style="list-style-type: none"> <li>• More businesses afforded small business accommodations could have a negative flow-on effect for more employees where it is otherwise not offset by increased productivity leading to higher wages or stronger employment.</li> <li>• More employees would be captured as small business employees, resulting in more employees having different rights and entitlements than non-small business employees, including a longer qualifying period for access to unfair dismissal.</li> <li>• May dilute specific assistance for small businesses if not supported by increased funding, since targeted small business assistance will need to be provided to a larger number of businesses overall.</li> </ul>

Table 13. Analysis of different definition elements		
Definition element	Benefits	Disadvantages
		<ul style="list-style-type: none"> <li>• Rigid and will still produce margin or edge cases in some circumstances and industries.</li> </ul>
<b>Headcount based on FTE</b>	<ul style="list-style-type: none"> <li>• A more nuanced reflection of a business's capacity, since it better takes into account the circumstances of businesses and industries with a higher number of part-time/casual employees.</li> <li>• Results in businesses with equivalent labour inputs but different headcounts being treated equally.</li> <li>• May encourage businesses to offer more flexible work arrangements for their employees.</li> <li>• FTE commonly used by businesses when managing rosters and payrolls.</li> </ul>	<ul style="list-style-type: none"> <li>• Not as simple as a straight-forward headcount, potentially increasing administrative burden for businesses and making it more difficult for employees and regulators to determine the status of a business (e.g. for the purpose of an unfair dismissal claim).</li> <li>• Calculation methodology would likely need to be prescribed in legislation to avoid inconsistencies in how different businesses calculate FTE, with flow on impacts for compliance efforts and administrative processes.</li> <li>• Businesses would require additional support / development of further guidance and resources.</li> <li>• Employees unlikely to have access to information to be able to determine FTE making it more difficult to seek to resolve matters at the workplace level and/or pursue matters courts or tribunals.</li> </ul>
<b>Headcount includes regular casuals and seasonal employees</b>	<ul style="list-style-type: none"> <li>• Provides a more realistic/accurate reflection of a business's capacity (by counting total workforce output).</li> <li>• Ensures consideration of more types of employees, arguably leading to more fair and consistent treatment for all employees under the Fair Work Act regardless of their employment status.</li> <li>• Balances need for simplicity in not having to count all casuals (where it might fluctuate frequently in some</li> </ul>	<ul style="list-style-type: none"> <li>• Having to determine a 'regular casual' can be complex, requires proper consideration and imposes higher administrative burden compared to a simple headcount that wholly includes or excludes certain employees.</li> <li>• Makes it more difficult for employees and regulators to determine a business' status.</li> <li>• Poses challenges for businesses in sectors with higher rates of casual employment or with seasonal/fluctuating workforces</li> </ul>

**Table 13. Analysis of different definition elements**

Definition element	Benefits	Disadvantages
	<p>industries more than others) versus need to accurately capture small businesses</p> <ul style="list-style-type: none"> <li>• May reduce incentive for bad faith employers to misclassify employees to artificially fall below the threshold.</li> </ul>	
<b>Headcount excludes all casuals and seasonal employees</b>	<ul style="list-style-type: none"> <li>• Easy to apply for employees, employers, FWO and FWC.</li> <li>• Less administrative and compliance burden in determining business size at a given point in time (e.g. less contestability in unfair dismissal applications where number of 'regular casuals' is in dispute).</li> </ul>	<ul style="list-style-type: none"> <li>• May create perverse incentives for businesses to employ more casuals and while there is a new employee choice pathway for casuals to request to be made permanent, small business employees have to wait for 12 months before they can do so.</li> <li>• Could enable businesses that have a large number of casuals or seasonal employees to be treated as a small business when in fact they may be bigger by FTE hours worked than many small businesses that don't rely on casuals and seasonal employees.</li> <li>• From an equity perspective, may create unfair competitive advantage to those businesses that employ more casuals and seasonal employees than those that don't or favour certain sectors and industries that have higher levels of casual/seasonal employees.</li> <li>• May incentivise bad faith employers to misclassify employees as casuals or seasonal employees.</li> </ul>
<b>Headcount includes associated entities (per current definition)</b>	<ul style="list-style-type: none"> <li>• May prevent businesses from using associated entities to avoid being treated as a non-small business when they have more employees than the threshold under the small business employer definition, although other</li> </ul>	<ul style="list-style-type: none"> <li>• Administrative burden for employers that need to be aware of the requirement to include employees of associated entities using the Corporations Act definition, including in determining sufficient 'control' (although a business with multiple entities suggests that</li> </ul>

Table 13. Analysis of different definition elements		
Definition element	Benefits	Disadvantages
	<p>small business accommodations in other regulatory frameworks, such as tax concessions, may be more influential in how businesses are structured.</p> <ul style="list-style-type: none"> <li>Arguably simple application for some small business employers, or their professional advisors, as they are required to be aware of the status of their entities for other purposes such as the Goods and Services Tax (GST), and for determining obligations under the Corporations Act.</li> <li>Associated entities may often share resources (and employees), making their inclusion appropriate.</li> </ul>	<p>there's a certain level of sophistication).</p> <ul style="list-style-type: none"> <li>Adds complexity for employees who are unlikely to know and/or determine how their employer is structured.</li> </ul>
<b>Headcount excludes associated entities</b>	<ul style="list-style-type: none"> <li>Easier to apply for employers, employees, and regulators FWO and FWC.</li> </ul>	<ul style="list-style-type: none"> <li>Would depart from Corporations Act which considers a business as including its associated entities.</li> <li>Risks sophisticated businesses using corporate structures to become a small business.</li> </ul>

## Concluding observations

The Review has sought to provide an accurate and impartial account of the key issues and stakeholder perspectives regarding the current small business employer definition in section 23 of the Fair Work Act, identifying both areas of consensus and points of divergence among stakeholders.

There was broad agreement among employer and employee stakeholders, as well as the ASBFEO, on the 'special circumstances' faced by small businesses. These include limited human and financial resources, and constrained legal and compliance capabilities, which can make adherence to workplace and other regulatory obligations disproportionately burdensome.

However, views diverged on whether the current definition should be amended. Employer stakeholders and the ASBFEO advocated for expanding the definition to capture a greater number of businesses, while employee representatives supported retaining the existing definition, citing concerns about the potential impact on employee rights and protections.

Among those supporting change, a range of proposals were put forward, including adjustments to the headcount threshold, the method of calculating headcount, the inclusion of regular casual employees,

and the exclusion of associated entities. These proposals reflect differing views on how best to recognise the diversity of small business structures and operations.

Stakeholders also expressed mixed views on whether the definition in the Fair Work Act should be aligned with other small business definitions used across other regulatory frameworks. While some saw potential benefits in greater interoperability, the Review noted the Productivity Commission's findings that a harmonised definition may reduce flexibility and increase compliance costs, suggesting that definitions should remain context-specific.

Given the divergence of stakeholder views on both the need for, and the approach to, reforming the small business employer definition, the government may wish to consider whether further work is warranted to evaluate possible options. The Review findings can be leveraged for this purpose.

## Attachment A – Summary of historical small business employer definitions in the workplace relations context prior to the Fair Work Act

A precursor to the small business employer definition in the federal workplace relations context initially emerged in 1984 through a determination made by the Australian Conciliation and Arbitration Commission (ACAC) in the *Termination, Change and Redundancy Case*.<sup>398</sup> This case set minimum entitlements for notice to terminate employment relationships and redundancy pay and procedures in the federal Metal Industry Award. The decision restricted access to redundancy entitlements for employees of a small business, which were defined as those employing less than 15 employees. In making this decision, the ACAC was persuaded by arguments put forward by business stakeholders that small business employers were not able to afford the payment of redundancy entitlements.

This exemption subsequently flowed through to other federal awards. In 2004, the Australian Industrial Relations Commission in the *Redundancy Case* determined that the redundancy exemption of businesses with fewer than 15 employees should be removed from safety net awards but with less onerous payment obligations than for non-small businesses.<sup>399</sup> This part of the decision was subsequently overturned and the small business redundancy exemption was restored through federal legislation.<sup>400</sup>

The *Industrial Relations Reform Act 1993* (Cth) introduced the first national entitlement to remedies for unfair dismissal in the federal system.<sup>401</sup> The entitlement was not subject to any exemption for small business. There were numerous attempts from 1997 onwards to introduce an exemption from unfair dismissal protections for businesses with 15 or fewer employees (from 2001 onwards these attempts sought to set the bar at fewer than 20 employees) to align with the exemption to pay redundancy for businesses with fewer than 15 employees that existed in federal awards at the time.<sup>402</sup>

Prior to the Fair Work Act, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) restricted unfair dismissal claims to businesses with more than 100 employees, and legislated redundancy pay as an ‘allowable award matter’ for employers with 15 or more employees.<sup>403</sup>

Initially, the small business employer definition in section 23 of the Fair Work Act was only applicable in relation to determining an employer’s obligation to pay redundancy pay (section 121) and providing a notice of termination (section 123(3)(a)).

On commencement of the Fair Work Act in 2009, the small business employer definition in section 23 only applied to the redundancy pay provisions in the Fair Work Act to exempt such businesses from the obligation to pay redundancy pay under the National Employment Standards. The small business

---

<sup>398</sup> *Decision – Termination, Change and Redundancy Case*, [1985] F7262 [Australian Conciliation and Arbitration Commission decision] (14 December 1984), pp. 26–27, <https://www.fwc.gov.au/documents/decisionssigned/html/pdf/f7262.pdf>.

<sup>399</sup> *Redundancy Case* - PR032004 [2004] AIRC; (26 March 2004) [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AIRC/2004/287.html?context=1;query=%27Redundancy%20case%27%20and%20%27PR032004%27%20;mask\\_path=#P493\\_14220](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AIRC/2004/287.html?context=1;query=%27Redundancy%20case%27%20and%20%27PR032004%27%20;mask_path=#P493_14220).

<sup>400</sup> *Workplace Relations Amendment (Protecting Small Business Employment) Act 2004* (Cth).

<sup>401</sup> See Division 3 – Termination of employment, Subdivision B – Requirements for a lawful termination of employment, *Industrial Relations Reform Act 1993* <https://www.legislation.gov.au/C2004A04653/asmade/text>.

<sup>402</sup> Parliamentary Library Background Note, *Unfair Dismissal and the small business exemption*, Steve O’Neill (11 March 2008) [https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/MU1T6/upload\\_binary/MU1T6.pdf;fileType=application%2Fpdf#search=%22'unfair%20dismissal%20and%20the%20small%20business%20exemption'%22](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/MU1T6/upload_binary/MU1T6.pdf;fileType=application%2Fpdf#search=%22'unfair%20dismissal%20and%20the%20small%20business%20exemption'%22).

<sup>403</sup> See paragraphs 17 and 113, *Workplace Relations Amendment (Work Choices) Act 2005* <https://www.legislation.gov.au/C2005A00153/latest/text>.

employer definition as it applied to the unfair dismissal provisions was a key sticking point during consideration of the Fair Work Act Bill by the Parliament, with the Senate having passed the Bill with amendments that included the small business employer definition increasing from fewer than 15 employees to fewer than 20 employees.<sup>404</sup> This led to the Government rejecting the amendment in the House of Representatives and successfully negotiating and passing a transitional arrangement involving a different definition of small business employer used for the unfair dismissal provisions until the section 23 definition commenced on 1 January 2011.<sup>405</sup> The transitional definition was based on fewer than 15 full-time equivalent employees, rather than fewer than 15 employee headcount.<sup>406</sup>

A small business employer was defined as having fewer than 15 full-time equivalent employees at the earlier of when the person was given notice of the dismissal or immediately before the dismissal.<sup>407</sup> A method statement prescribed how to calculate the number of full-time equivalent employees.<sup>408</sup>

From 1 January 2011, the definition in section 23 has operated in relation to unfair dismissals in line with the current definition of small business employer where all full-time and part-time employees as well as regular casual employees are counted when determining if a business has fewer than 15 employees. As outlined in **Table 3**, the number of Fair Work Act provisions where the small business employer definition is applied has increased since the original enactment of the Fair Work Act as new entitlements and obligations have been legislated.

---

<sup>404</sup> Emma Rodgers (20 March 2009) 'Fielding, Gillard in talks over IR compromise', *ABC*, <https://www.abc.net.au/news/2009-03-20/fielding-gillard-in-talks-over-ir-compromise/1625036>.

<sup>405</sup> Michelle Grattan (march 17 2009) 'Unfair-dismissal changes likely', *The Sydney Morning Herald*, <https://www.smh.com.au/business/small-business/unfairdismissal-changes-likely-20090619-cqyb.html>.

<sup>406</sup> See Schedule 12A of *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* <https://www.legislation.gov.au/C2009A00055/2009-07-02/text>; Commonwealth, *Parliamentary Debates*, Senate, 15 June 2009, p. 3185 (Mark Arbib) *Item 221 – Part XIV (heading)*; *ParlInfo - FAIR WORK (STATE REFERRAL AND CONSEQUENTIAL AND OTHER AMENDMENTS) BILL 2009 : FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009 : Second Reading*.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Ibid.*

## Attachment B – International definitions of small business

International definitions of small business	
Country/ international organisation	Small business definitions and relevant frameworks
<b>Canada</b>	<ul style="list-style-type: none"> <li>1 – 99 employees<sup>409</sup></li> </ul> <p>This is the definition of small business from the Dept of Innovation, Science and Economic Development legislated by the Department of Industry Act and is primarily used for the purposes of statistical data on Canada’s business sector.</p> <p>The Canada Revenue Agency (CRA) has 17 different definitions of Small Business, all of which depend on varying amounts of revenue and employees.<sup>410</sup> These definitions apply to different tax exemptions applicable to small businesses.</p> <p>Workplace relations in Canada is largely covered by provincial laws, each with individual regulations on workplace relations.<sup>411</sup></p>
<b>European Union</b>	<p>A small enterprise is defined as:</p> <ul style="list-style-type: none"> <li>&lt;50 employees <b>and</b> either <ul style="list-style-type: none"> <li>an annual turnover of ≤€10 million <b>or</b></li> <li>a balance sheet total of ≤€10 million.<sup>412</sup></li> </ul> </li> </ul> <p>The EU also has separate definitions for micro and medium sized businesses.</p> <p>The European Commission monitors the implementation of the small and medium-sized enterprises (SMEs) definitions. The definitions are mainly relevant for:</p> <ol style="list-style-type: none"> <li>eligibility for support to programmes targeted specifically at SMEs</li> <li>access to certain concessions such as fewer requirements or reduced fees for EU administrative compliance.<sup>413</sup></li> </ol>
<b>International Labour Organisation</b>	<ul style="list-style-type: none"> <li>Between 10 – 49 employees<sup>414</sup></li> </ul>

<sup>409</sup> Dept of Innovation, Science and Economic Development Canada, 2024, *Key Small Business Statistics*, p. 5, [ksbs-2024-v1-en.pdf](https://www150.commerce.gc.ca/ksbs-2024-v1-en.pdf).

<sup>410</sup> Canada Revenue Agency, 2022, *Evaluation – Canada Revenue Agency (CRA) Management of Small Business Nudge*, <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/internal-audit-program-evaluation/internal-audit-program-evaluation-reports-2022/evaluation-canada-revenue-agency-cra-management-small-business-nudge.html>.

<sup>411</sup> CIPD HR-inform, ‘Employment law in Canada’, <https://www.hr-inform.co.uk/employment-law/employment-law-in-canada#:~:text=If%20an%20employee%20is%20not,they%20live%20and%20work%20in.>

<sup>412</sup> European Commission, 2005, *The new SME definition: user guide and model declaration*, p. 14, <https://www.eusmecentre.org.cn/wp-content/uploads/2022/12/SME-Definition.pdf>.

<sup>413</sup> European Commission, ‘SME definition’, [https://single-market-economy.ec.europa.eu/smes/sme-fundamentals/sme-definition\\_en](https://single-market-economy.ec.europa.eu/smes/sme-fundamentals/sme-definition_en).

<sup>414</sup> International Labour Organisation, 2024, *Industrial relations in micro and small enterprises: patterns, trends and prospects*, pp. 13–14, <https://www.ilo.org/sites/default/files/2024-11/wp129.pdf>.

International definitions of small business	
Country/ international organisation	Small business definitions and relevant frameworks
	This definition is broadly used to guide ILO's program and policy development in relation to SMEs. <sup>415</sup>
<b>New Zealand</b>	<ul style="list-style-type: none"> <li>Usually defined as &lt;20 employees for the purpose of employment law<sup>416</sup></li> </ul> <p>Small businesses do not receive different treatment under New Zealand's <i>Employment Relations Act 2000</i>. While small businesses previously received concessions relating to the use of a 90-day trial period for new employees,<sup>417</sup> this was recently changed to be made available to all employers.<sup>418</sup></p>
<b>United Kingdom</b>	<p>The UK government broadly defines a small business as one with at least 2 of the below features:<sup>419</sup></p> <ul style="list-style-type: none"> <li>a headcount of 50 or less</li> <li>an annual turnover of not more than £10.2 million,</li> <li>a balance sheet total of no more than £5.1 million.</li> </ul> <p>The definition is mainly relevant for access to concessions (e.g. tax) and for reducing administrative burden.<sup>420</sup></p> <p>There is no definition or distinction made for small businesses in the UK's <i>Employment Rights Act 1996</i>.</p>
<b>United States</b>	<p>Small business definitions vary substantially depending on industry, with thresholds based on either revenue (ranging from \$1 million to over \$40 million) or number of employees (from 100 – 1,500 employees).<sup>421</sup></p> <p>These definitions come from the US Small Business Administration, a federal government organisation that provides support and advocates for small business.<sup>422</sup></p>

<sup>415</sup> International Labour Organisation, 2019, 'Small matters: Global evidence on the contribution to employment by the self-employed, micro-enterprises and SMES', [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/document\\_s/publication/wcms\\_723282.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/document_s/publication/wcms_723282.pdf).

<sup>416</sup> Ministry of Business, Innovation and Employment, Small Business Council, *Defining Small Business*, p. 3, <https://www.mbie.govt.nz/assets/defining-small-business.pdf>.

<sup>417</sup> Ibid.

<sup>418</sup> Employment New Zealand, '90-day trial periods extended to include all employers', <https://www.employment.govt.nz/news-and-updates/90-day-trial-periods-extended-to-include-all-employers>.

<sup>419</sup> Government of the United Kingdom, 'Prepare annual accounts for a private limited company: Micro-entities, small and dormant companies', <https://www.gov.uk/annual-accounts/microentities-small-and-dormant-companies>.

<sup>420</sup> Government of the United Kingdom, 'Prepare annual accounts for a private limited company: Overview', <https://www.gov.uk/annual-accounts>.

<sup>421</sup> U.S Small Business Administration, *Table of Small Business Size Standards*, [https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards Effective%20March%2017%2C%202023%20%282%29.pdf](https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards%20Effective%20March%2017%2C%202023%20%282%29.pdf).

<sup>422</sup> U.S Small Business Administration, 'About SBA', <https://www.sba.gov/about-sba>.

International definitions of small business	
Country/ international organisation	Small business definitions and relevant frameworks
	Federal labour laws are largely legislated by the Fair Labor Standards Act (FLSA). <sup>423</sup> It does not have a specific definition for small business, although generally the FLSA applies to businesses with >\$500,000 annual gross volume of sales. Employers can also claim exemptions from FLSA requirements for certain employees whose job meet certain criteria, such as certain threshold salary amounts. <sup>424</sup>

<sup>423</sup> U.S Department of Labor, 'Wages and the Fair Labor Standards Act', <https://www.dol.gov/agencies/whd/flsa>.

<sup>424</sup> U.S Department of Labor, *Small Entity Compliance Guide to the Fair Labor Standards Act's – Exemptions, overtime complianceguide.pdf*.



## Attachment C – Stakeholder views on different sized businesses under the Fair Work Act

A number of employer stakeholder submissions discussed the need for other size businesses to be acknowledged i.e. micro and/or medium sized businesses. This was considered beyond the terms of reference. However, given that a number of stakeholders raised this in their submissions and that it is an intersecting issue in terms of the demarcation between a small business and a non-small business under the Fair Work Act, a summary of stakeholder views are provided below for any future consideration.

Some stakeholders suggested that the current section 23 definition of small business employer is more reflective of microbusinesses, including ACCI, MTO and NECA, with MTO calling the current definition ‘unreasonably narrow’<sup>425</sup> and NECA calling it ‘outdated’.<sup>426</sup>

ACCI recommended that the existing exemptions for small businesses be extended in a graduated way, and in certain circumstances, to medium-sized businesses.<sup>427</sup> ACCI further suggested that subject to further consultation between government and industry, consideration might be given to an appropriate graduated approach where small businesses would be defined as fewer than 25 employees, and that medium businesses could include those with 25 to fewer than 75 employees.<sup>428</sup> This proposal was supported by a number of stakeholders including the ARA, Clubs Australia, HIA, NECA and Surveyors Australia.

HIA acknowledged and supported ACCI’s proposed graduated approach in regards to medium businesses, including the suggestion to provide additional relief for medium businesses (those employing fewer than 75 employees).<sup>429</sup> NECA, too, backed a graduated approach that would extend ‘regulatory reliefs’ to businesses with up to 75 employees, suggesting that such relief could come in the form of lower penalties for breaches, extended compliance timeframes, or modified procedural requirements.<sup>430</sup> In its submission, Surveyors Australia said broadening the definition to include medium sized businesses with ‘transition arrangements’ would be helpful (although they did not specify a size), allowing businesses that suddenly go over the initial threshold time to adjust to any new obligations.<sup>431</sup>

Clubs Australia submitted that introducing a ‘medium-sized business’ category of 25-75 employees ‘would ensure smaller clubs, which lack dedicated HR resources, are not burdened by industrial relation laws they ultimately are not equipped to manage’.<sup>432</sup> Clubs Australia proposed that some, not all, of the accommodations for small businesses be extended to these medium-sized businesses including from the lower civil penalty provisions, exemption from paid workplace delegates’ training, the application of the Voluntary Small Business Wage Compliance Code and the delay for casuals to seek permanent employment.

The ARA noted that while the Fair Work Act objective includes acknowledging the ‘special circumstances’ of medium sized businesses in addition to small businesses there was a no definition of medium sized business.<sup>433</sup> The ARA also recommended there be a medium business classification

---

<sup>425</sup> MTO submission, p. 1 [4].

<sup>426</sup> NECA submission, p. 3.

<sup>427</sup> ACCI submission, p. 3 [13].

<sup>428</sup> Ibid p. 3 [14].

<sup>429</sup> HIA submission, p. 6.

<sup>430</sup> NECA submission, p. 4.

<sup>431</sup> Surveyors Australia submission, p. 2.

<sup>432</sup> Clubs Australia submission, p. 2.

<sup>433</sup> ARA submission, p. 2.

that would operate to extend regulatory relief to more businesses but did not specify a size based on employee headcount.<sup>434</sup> This approach, the ARA contends, would better align with the objects of the Fair Work Act and provide ‘better growth opportunities’, ‘foster growth, encourage job creation and provide a more accurate reflection of the diverse business landscape in Australia’.<sup>435</sup>

---

<sup>434</sup> Ibid p. 4.

<sup>435</sup> Ibid p. 2, 4.