



Working Better For Small Business



Report from the
Connect & Engage
small business
consultation program

Prepared for the
Fair Work Commission by
Bruce Billson of Agile Advisory

Agile Advisory

Agile Advisory is an SME-aligned strategic advisory service focusing on strategic planning, business growth strategies, new market development, public policy and advocacy, regulatory navigation and enterprise and community engagement. Agile Advisory's Founder and principal is the Hon Bruce Billson.

Contact:

Agile Advisory
PO Box 3373,
Mornington, VIC 3931, or
bruce@agileadvisory.com.au

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Executive Summary

With more than 9 out of every 10 employers in Australia being a small business, it is important the Fair Work Commission (the Commission) understands the needs and expectations of this stakeholder group and optimise the way it discharges its functions to 'work better for small business' through the Connect & Engage consultation program.

The Connect & Engage consultation program recognised that small business people want to do the right thing, especially by their staff - the team that can contribute so much to business success. Yet it can be challenging to understand their employment obligations and to navigate employment laws and how the Commission deals with disputes that may be brought against the business.

This report documents the key issues raised and discussed in Connect & Engage consultation meetings held with smaller employers and their representatives between 23 March 2017 and 2 June 2017. The findings also draw on data and insights from user-design

research conducted in June 2017 with smaller employers who had experience of responding to an unfair dismissal application.¹ The scope of the project was contained to identifying possible and practical measures that would make the Fair Work regime 'work better for small business'. As such, suggestions arising from the consultation process that would require legislative change or were policy-related reforms have not been included in this report.

The report features recommendations presented as a package of positive initiatives – not framed in a rigid and inflexible manner, but rather as a starting point to encourage the Commission to think creatively about how to improve and enhance its services to 'work better for small business'. A consolidated list of recommendations is at **Appendix A**.

Key recommendations that emerged from the consultation program that should be the priority areas for action include:

- Introducing early triage/filtering of unfair dismissal and general protections (adverse action) applications and active case management practices similar to the approach adopted for the anti-bullying jurisdiction (see section 3.2 of this report);
- Formation of a dedicated Small Business Division to ensure a 'right-sizing' of procedures and operating protocols, relevant Member and staff experience, empathy and disposition to smaller employers (see section 2.0)
- Establishing ongoing consultation channels with small business; and
- Reviewing information resources with an aim to consolidate materials and limit duplication, encourage greater consistency and predictability in the way Commission Members exercise discretion, improve accessibility for time-poor and inexperienced audiences and present information in plainer terms.

¹The user-design research comprised 4 workshops with smaller employers who had responded to an unfair dismissal application. The research was led by Cube Group, who are producing the report from this research, and supported by Agile Advisory through co-facilitation of 3 of the 4 workshops conducted.

Introduction

The genesis for the Connect & Engage consultation program is the commitment of the Fair Work Commission (Commission) to engage with the community to receive ongoing feedback and ideas.

There has been focus on the needs of the great many parties who do not have significant experience in the range of matters which may be brought to the Commission. In terms of employer parties at the Commission, those with the least experience tend to be small businesses.

The Commission engaged Agile Advisory to seek feedback and canvass ideas from small business employers and their representatives to get a better appreciation of what can be done, within the limits of its powers conferred under the *Fair Work Act 2009*, to make the Commission's activities better suited to the needs of small businesses.

This project was designed to identify ways in which the Commission's guides, resources and services could be improved to meet the needs of the small business community, within the scope of the current legislative framework.

Consultation Process

A total of 17 consultation meetings were held between 23 March 2017 and 2 June 2017 as part of the Connect & Engage program in:

- Melbourne (5 meetings);
- Sydney (3 meetings);
- Brisbane (2 meetings);
- Perth (2 meetings);
- Adelaide (3 meetings);
- Canberra (1 meeting); and
- Albury (1 meeting).

The meetings were jointly convened with employer representative host organisations to canvass issues identified in a previously available [catalyst paper](#), together with other issues raised by participants.

The intended outcome from the meetings was to:

- collect and analyse feedback to brief the Commission on:
 - what information/service (improvements) small business wants/needs;
 - how best to present information and deliver services for small business; and
 - the best dissemination methods.
- identify industry-specific challenges with modern awards to support plain language re-drafting and other activities.

> *Consultation Process (Cont.)*

Agile Advisory's task was to:

- build specific, actionable proposals for change, by:
 - consulting with small business employers and their representatives, and
 - testing insights with workplace relations practitioners;
- prepare a short report (to be reviewed in consultation with Commission staff) that sets out proposals and recommendations to improve the Commission's future performance in meeting the needs of small business employers;
- seek feedback on proposals and recommendations from participants and refine as necessary;
- present the proposals and recommendations to the President of the Commission and senior Commission staff; and
- identify agreed follow-up action/advocacy (with the President) to support implementation of proposals.

The report also draws on data and insights from user-design research conducted in June 2017, comprising 4 workshops with smaller employers who had responded to an unfair dismissal application in the past 6 months, Agile Advisory was engaged to co-facilitate 3 of the 4 workshops conducted for this research. These workshops were conducted in Melbourne and Sydney. Further information about the conduct of the Connect & Engage consultation program and the user-design research is on the Commission's website: <https://www.fwc.gov.au/about-us/consultation/small-business-consultation>.

How to use this report

This report presents thematic analysis of issues raised and discussed in consultation meetings with smaller employers and their representatives held between 23 March 2017 and 2 June 2017 as well as the user-design research. It features recommendations that are intended to prompt consideration by the Commission and a response in the near term about feasibility and implementation plans.

The broad themes covered in the report include:

1. Acknowledgement and recognition of small business
2. A structure that supports small business
3. Making processes work better for small business
4. Making information resources work better for small business
5. Making modern awards work better for small business

The scope of the project was contained to identifying possible and practical measures that would make the Fair Work regime 'work better for smaller employers'. As such, suggestions arising from the consultation process that would require legislative change or policy-related reforms have not been included in this report.

1.0 Acknowledgement and recognition of small business

1.1 Small business engagement initiative

Smaller employers and their representatives were very positive about the Commission's 'Connect & Engage' initiative. Participants appreciated the opportunity to provide direct input to the Commission—which they considered the domain of 'the I.R. club' of larger, well-resourced employers, industry associations and the union movement. All consultation participants recognised the importance of the Commission's work and proper safeguards for employees, noting that no smaller employer wants to lose a good employee and they want to 'do the right thing'.

The consultative process revealed many positive interactions with the Commission, its Members and staff. A number of recommendations aim to support more consistent and predictable practices to make these positive experiences the accepted norm.

1.1 > Recommendations

- (a) There is an expectation and strong interest for the Commission to continue to engage with small business. This could be achieved through similar consultation meetings organised by employer organisations in various states and territories. Smaller employers would be particularly keen to be part of a reference group that meets directly with the President of the Commission or other senior representatives of the Commission to discuss topical and emerging issues.

1.2 Recognition

Smaller employers viewed 'Fair Work' (i.e. the Commission) as having a very significant impact on their workplaces yet it is uninformed of the day-to-day challenges and operational pressures experienced by small business.

There is a strong belief in the small business community that maintaining and demonstrating a contemporary working understanding of the relevant industry and enterprise environments will build greater confidence in the Commission's deliberative processes.

The perceived disposition, determinations and procedures of the Commission and experiences with the Commission's processes, can have a direct impact on smaller employer's preparedness to recruit, invest and expand their operations in Australia. Participants that had directly responded to matters before the Commission shared how this experience had significant implications for future business operations and decision making.

1.2 > Recommendations

- (a) The Commission should introduce and expand initiatives that are designed to ensure it maintains a high degree of awareness and knowledge about the dynamics of a modern economy and the need particularly for smaller employers to be agile and adaptive, and the changing nature of work. Regular engagement with the small business community (as noted in section 1.1) and 'familiarisation' activities such as workplace visits should be encouraged, if not required, of Commission Members.
- (b) Clear steps should be taken to demonstrate the Commission's appreciation that smaller workplaces are inherently different from large corporations in terms of resourcing, in-house specialist expertise, ability to accommodate some directives and the generally more localised nature of operations. Practical measures should give tangible effect to the legislative provisions that acknowledge the specific nature of small business, and to address the generally intimidating and highly legalistic and technical nature of the Commission's engagement with smaller employers. These steps would be borne out in procedural changes that provide greater support for smaller employers.
- (c) Clear actions should be taken to demonstrate the Commission's appreciation that it is not just legislation that affects business decisions. These actions should also reflect the importance of delivering predictable and just decisions in exercising its considerable discretion within the parameters of that legislation. Decisions that can be readily translated into guidance for employers who are trying to 'do the right thing' by their employees and mitigate a claim, would help to shape perceptions of predictability and surefootedness for smaller employers. This would give them the confidence to make positive employment decisions.
- (d) In evaluating itself against the objective of predictable and just decisions, the Commission should take account of the barriers that smaller employers face in pursuing an appeal of a decision. The time and the cost of such actions and the emotional toll they can take would make it beyond the capacity of smaller employers. Such considerations also weigh heavily in decisions to settle rather than proceed to determination of a claim. Alternative models for evaluation that do not rely on a smaller employer to pursue an appeal, such as peer review either prior to or after issuing a decision, could provide a better reflection of how well the Commission is meeting these objectives.

1.3 Working with the Fair Work Ombudsman

The consultation program revealed many instances where smaller employers mistakenly attributed their feedback to the Commission when they were more likely talking about the Fair Work Ombudsman (FWO).

There seemed to be limited understanding of the precise remit of the Commission and the FWO, where they cross over and, where they diverge, and equally not much concern about understanding the difference. For example, many participants thought or assumed that the Commission had some role in enforcing awards and providing information and advice about how to apply awards in the workplace. It was assumed that the Commission had ready access to information about enquiries, complaints and investigations (because 'Fair Work' is responsible), but if this information is not informing the work of the Commission then it ought to be.

Absent of a change of name for the Commission and/or the FWO to clearly distinguish the two separate organisations (which would need to be legislated), the successes and failings of the FWO will be attributed to the Commission, and vice versa. Given this, it would be desirable for the two organisations to work together, particularly in relation to making modern awards easier for smaller employers to apply in the workplace.

1.3 > Recommendations

- (a) The Commission should collaborate with, and support, the FWO in its provision of education and advice to small business. Collaborative initiatives would give greatest benefit to smaller employers if they were to focus on:
 - application of modern award provisions in the workplace, particularly helping smaller employers select the correct award to use (coverage) and classification of employees; and
 - support with procedural elements of ending employment to help mitigate unfair dismissal and general protections (adverse action) claims for smaller employers.

2.0 A ‘structure’ that supports small business

Procedures and operational protocols should be designed to treat all parties fairly, equally and respectfully; however smaller employers reported often feeling that existing practices seemed designed as a counter-weight to an assumption of an inherent balance of power in favour of employers. The frequent experience of smaller employers involved in the consultations is actually a power imbalance in favour of employees when they are represented by plaintiff lawyers and unions. This can sometimes be amplified by perceptions that the Commission’s procedures and resources provide greater support to employee applicants rather than respondent smaller employers. Examples provided by consultation participants included beliefs that adjournments for conciliations and hearings/ conferences would more likely be granted to suit the needs of an applicant rather than a respondent and that there is more information on the website to support an applicant making a claim than for a smaller employer responding or objecting to one.

2.0 > Recommendations

- (a) The Commission’s procedures and operational protocols should recognise that, unlike larger employers, smaller employers do not have in-house expertise, considerable resources and time to defend claims. These procedures and protocols should recognise that smaller employers need just as much support to navigate the system as applicants.
- (b) A dedicated **Small Business Division** should be formed within the Commission as a matter of priority. The Small Business Division would issue decisions on matters involving smaller employers and ensure a ‘right-sizing’ of procedures and operational protocols as well as relevant Member and staff experience, empathy and disposition to the experiences of smaller employers.
 - The Small Business Division would be able to establish its own identity and ethos within the corporate entity of the Commission, in a manner similar to the dedicated small business units/operations within the FWO, Australian Taxation Office (ATO) Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) and for state-based small claims jurisdictions.
 - In so far as is possible within the legislative requirements and constraints, the Small Business Division would seek to operate with a facilitative posture, support earlier resolution, low-cost and less-legalistic approaches.
 - The Small Business Division should be led by a Commission Member who is widely recognised as understanding the needs of small business and empowered by a clear mandate to optimise procedures and operational protocols to better suit the circumstances and capacities of smaller employers and smaller workplaces.

2.0 > Recommendations (Cont.)

- The Small Business Division should aim to be more of a 'tribunal' than a 'court' in character focusing on fairness from a reasonable person's view rather than strict technical and procedural compliance and legal manoeuvrings. For example, for cases involving a small business workplace, the Commission should endeavour to hold a determinative conference and hear from witnesses directly wherever possible, with representatives able to assist parties in preparation for the interaction with Members at the conference.
 - First time smaller employer respondents should be afforded an 'induction' before an unfair dismissal hearing/conference and encouraged to observe a public hearing ahead of their scheduled event so that they have a reasonable understanding of what is going to occur.
 - Members should closely monitor the conduct of parties, their representatives and individuals in the public gallery of hearings to ensure professional and courteous behaviour at all times. Individuals who engage in conduct that is discourteous, bullying, harassing or seeking to intimidate should be ejected.
 - Decisions by the Small Business Division should demonstrate how they have taken account of s.387 (f) and (g) in considering the other criteria for determining whether a dismissal is unfair. For example, smaller employers should not need to describe in a policy that unlawful conduct is the basis for dismissal.
 - The Small Business Division should reflect the characteristics, resources and capacities of smaller employers recognising the distress, anxiety and vulnerability felt by smaller employers responding to an application before the Commission is exacerbated by having to wait months for an outcome; the Small Business Division should endeavour to issue decisions well within the benchmarks set by the President. It should aim to issue reserved decisions for unfair dismissal merits cases within 4 weeks (one month) of a Hearing/conference concluding.
- (c) The Commission should continue to encourage greater take-up of the recently-established and well-regarded pro-bono representation scheme by smaller employers in the unfair dismissal jurisdiction, and the subsequent expansion of the scheme to a broader range of jurisdictional matters and merits cases. A prioritisation of merits cases, where the decision may provide a clear precedent or clarification around recurring themes, may optimise the value from limited pro-bono resources.

3.0 Making processes work better for small business

3.1 Process purpose and problem solving

The Commission should highlight and reiterate the purpose of key processes to ensure alignment with their stated public policy motivation and key imperatives around fairness in the workplace.

Smaller employers view the Commission's determinative processes as legalistic, procedural fault-finding expeditions that unfairly disadvantage smaller employers who do not have dedicated HR areas. For example, complying with a very strict interpretation of 'fair' dismissal procedures with a focus on highly formalised performance management processes is at odds with the prospect of managing a poorly performing employee back into the business through informal means that are often preferred by smaller employers. The need to continually warn an employee of an impending dismissal can effectively make the outcomes of performance management processes a foregone conclusion. The focus on dismissal procedure also doesn't recognise that smaller employers often need to act quickly to protect the viability of their business and sometimes cannot afford to follow a protracted process.

It was widely observed that the Small Business Fair Dismissal Code (the Code) is serving no constructive purpose for small business and in the way it is being applied, it fails to fulfil the stated rationale and public policy purpose that accompanied its introduction. While a full re-examination or at least a refinement for micro-enterprises (less than 5 employees) was preferred, procedural changes were identified that would see the Code restored to something approaching its original intention and for it to recognise the particular nature and circumstances of smaller workplaces.

3.1 > Recommendations

- (a) The proposed Small Business Division should encourage a commitment to decisions that smaller employers can easily understand and learn from through transparency and explanations of how employers had erred in cases where applications are granted. Decisions should be easily adapted into guidance materials for smaller employers, particularly for novel sets of circumstances and where the Member finds there was a valid reason, but based on other criteria, finds the dismissal is unfair. This approach will build confidence among smaller employers in the way the Commission pursues its lawful objects and deals with parties new to, or rarely in, its direct reach.

3.1 > Recommendations (Cont.)

- (b) Mechanisms such as an on-line ‘grievance’ resolution portal like that deployed in Canada could be developed as a means to quickly resolve a dispute between an employee and employer. Such mechanisms could allow for matters to be quickly ‘fixed’ as a dispute at relatively low cost and stress to the parties, rather than through a quasi-judicial process that can be very burdensome for smaller employers.
- (c) Case management processes should allow for smaller employers objecting to an unfair dismissal application to elect that a ‘jurisdictional’ objection be dealt with separately to merits. This approach would reduce the burden on smaller employers who would otherwise incur the expense of preparing for the substantive merits case when there may be no jurisdiction for determining the matter.
- (d) The Commission should make it clear to smaller employers in correspondence following its determinations and in the event an applicant discontinues their claim whether the conclusion of an unfair dismissal application is the end of the specific matters in dispute or whether a further claim (e.g. general protections (adverse action) is possible.

3.2 Triage the traffic and soften the blow

Smaller employers felt that the Commission's procedures do not recognise that being served an application can be a very distressing experience. Its procedures also don't recognise that service of an application automatically creates significant costs for smaller employers, distracts scarce management capacity away from the welfare of the business and livelihoods that depend on it and amounts to a 'summons' from the Commission.

Smaller employers felt it was important for the Commission to caution applicants of the potential consequences of pursuing unmeritorious claims, particularly where applications provide limited detail about the claim.

Smaller employers were very concerned about experiences involving employees that confidently and forcefully pursued applications they believed to be of dubious merit, only to subsequently find their workplace was one of many that had been subject to a similar application from the same individual. They felt that 'frequent flyer' form should be a consideration in terms of how these cases are managed.

A number of smaller employees involved in the consultations expressed concern about the emergence of a new 'formula': an employer engaging an employee in a performance management process is confronted by claims that urging improved

performance amounts to bullying; the bullying claim feeds time-off and a workers compensation claim for stress and gaps/delays in the performance management process; where a lack of performance improvement and termination occurs, an unfair dismissal application is lodged; and a general protections (adverse action) claim for pursuing the performance concerns and dismissal while the employee was unwell. All of which is overwhelming and all-consuming for a smaller employer.

3.2 > Recommendations

- (a) A 'triage' function should be established for unfair dismissal and general protections (adverse action) claims, similar to that operating in the Commission's anti-bullying jurisdiction. The triage process should establish a minimum threshold of information to collect from applicants either in the application form or through follow-up activities on receipt of an application, before it is served on an employer. The information should be collected for the purpose of guiding matters to the most direct avenue for low-cost resolution and to enable employers to respond to the application in a meaningful way. A key objective of the proposed triage process should be to establish if engagement of an employer is warranted based on the material provided by the applicant. Ideas for how the triage function could operate are as follows:
 - Applicants seeking intervention or a remedy from the Commission should pay the filing fee (currently \$70.60) and be required to satisfy a minimum threshold of information about the claim to establish the basis of the application proceeding to service on a respondent/business. The nature of the claim/s, some supporting evidence and what remedy is being sought by the applicant should be established before the application is served on an employer.
 - Triage processes through which Commission Members can dismiss an application before a respondent is required to respond to it, such as instances where an applicant does not cooperate with directions to provide information in a timely manner that satisfies the threshold jurisdiction issues would be a valuable feature for limiting burden on smaller employers.

3.2 > Recommendations (Cont.)

- If an application appears to have not met threshold jurisdiction issues (e.g. the minimum employment period not met), wherever practicable the triage process should establish if the Commission has jurisdiction to determine the matter before the application is served on the employer. This could be achieved 'on the papers' or via more formal mechanisms to hear from the applicant as is the Commission's obligation where facts are contested. A plain English, informative letter about the application could be provided to the respondent/employer at this stage rather than a 'summons' to respond to the application.
- Applications would progress to the 'second pass – reviewable' stage and be served on the respondent/employer following a brief, but reassuring call from a dedicated case manager from the Commission to advise that an application has been lodged and explain the steps in the process. The size of the business could be established during this phone call and matters that involve a small business employer will be allocated to the Small Business Division. Alternatively, the response form would be used to determine whether the matter should be referred to the Small Business Division as it involves a smaller employer.
- On receipt of the response form, the Small Business Division would select the best avenue to hear the matter to support the objective of early resolution and provide helpful resources to facilitate and support effective and 'right sized' handling of matters. Members of the Small Business Division would adopt relatively informal mechanisms (such as a telephone conciliation or determinative conference), particularly where parties are self-represented. These processes should be refined through user-experience co-design and process improvement projects initiated by the Commission.
- The triage process should check whether any recent or active applications have been made by an employee (i.e. not just rely on an applicant to declare this), an employee's history of applications and a smaller employer's history of applications in determining what the most appropriate case management model is for the matter. For example, it may not be suitable to conciliate a matter where either or both parties could be considered 'frequent flyers' in a jurisdiction and management by a Member may be more appropriate.
- Where a smaller employer has raised a jurisdictional objection and can point to reasonable compliance with the Code, present evidence of 'abandonment of employment' in the ordinary meaning of the term, or other relevant objections, the next steps should focus on considering and testing that evidence rather than channelling smaller employers through a process that is focused on reaching a settlement (unless this is the path that both parties want to take).

3.3 Unfair dismissal conciliation

A common theme throughout the consultations was that some conciliators are skilled at encouraging ‘*a search for facts not just a figure*’ such that they may call out a vexatious or unmeritorious claim. However, many others felt that some conciliators focus their efforts on undermining the confidence of respondents in the strength of their case and encouraging them to offer a settlement payment known widely as ‘go away’ money.

Senior conciliators seem to know the ‘mind of the Commission’. However smaller employers felt that all conciliators should be capable and empowered to articulate likely prospects of success to both parties and a ballpark figure (best and worst-case scenario) for remedies if the matter was determined by the Commission.

3.1 > Recommendations

- (a) The conciliation process should be recalibrated to align with expectations of smaller employers that it focus on the merits of the claim and be less concerned with a settlement amount that would see the matter resolved.
- (b) Conciliators should be able to articulate the ‘mind of the Commission’. They should be empowered to recommend a resolution to the parties, taking account of what had been raised in materials submitted and discussed at the private session with reference to precedents and common settlement terms from similar scenarios. This kind of guidance would be valuable in terms of setting and managing expectations.
- (c) Participants should be strongly discouraged or penalised for making false and misleading claims (e.g. sexual harassment, underpayments and unsafe work practices) at conciliation. Participants should not be permitted to introduce new claims or deviate from what has been raised in materials lodged prior to the session. If necessary to achieve these objectives, discussions at conciliation should not be ‘confidential’.
- (d) If the matter is not resolved at conciliation, and involves a smaller employer, the conciliator should provide a report to the Small Business Division on the session(s), including his/her recommended proposal to resolve the matter that could be taken into account in scheduling the matter for the next steps before a Commission Member. If the current conciliation model is to continue, it should be made clearer to smaller employers that the process does not involve any test of evidence and the outcome of the vast majority of conciliations is settlement, typically involving payment. Clearer, more explicit information about the purpose and objective of conciliation and most common outcomes would enable smaller employers to make informed choices about their participation and how to prepare for it. The Commission should communicate much more explicitly what the purpose of the conciliation is so that smaller employers who attend these sessions are aware they will be having a conversation about “how much?” rather than engaging in a search for facts.

3.4 General protections (adverse action)

The uncapped and broader basis for financial remedies from General Protections (Adverse Action) applications were widely discussed in consultations. It was perceived to be a growing jurisdiction and of growing concern for smaller employers.

Although these claims are almost exclusively determined by the Courts and the Commission has a limited role in dealing with them (i.e. limited to conciliation and arbitration where both parties consent), the uncapped remedies and reverse onus of proof features of this jurisdiction mean that the level of anxiety experienced by smaller employers and the amount of time and money invested in responding to an application can be far greater than for an unfair dismissal or anti-bullying claim.

Smaller employers want the proposed triage process (see section 3.2) to apply substantial information requirements on applicants to enable smaller employers to respond with some focus and accuracy given the reverse onus of proof in this jurisdiction.

Ideally, the triage process would ensure that smaller employers are not being called to respond to multiple applications in relation to the same claim and might assist applicants in determining the most appropriate jurisdiction given the circumstances.

3.5 Anti-bullying jurisdiction

Smaller employer feedback about case management experiences with the anti-bullying jurisdiction were overwhelmingly positive giving rise to suggestions that features and procedures for this jurisdiction (e.g. triage) be carried over into the unfair dismissal and general protections (adverse action) jurisdictions.

4.0 Making information resources work better for small business

4.1 Helpful resources

The Commission provides a range of resources about applicable legislation, case law and its procedures/processes for parties to use in their preparation for matters before the Commission. Many consultation participants were aware of the guidance materials, although few were able to recall what resources were available or what they had used.

Notwithstanding that resources are available and intended for use by smaller employers, the perception exists that these resources are there only or predominantly to assist self-represented applicants, not respondents.

As noted earlier, smaller employers typically could not or did not distinguish between resources provided by the Commission and the FWO, particularly in relation to modern award interpretation. Further analysis and recommendations about modern award resources is contained in section 5 of this report.

4.1 > Recommendations

- (a) The Commission should perform a stocktake of its information resources in terms of format and content to examine whether they meet the needs of smaller employers. Improvements to content, format and dissemination of information resources should diminish the risk of process friction and delays that arise from a self-represented smaller employer not knowing or understanding the process they are involved in.
- (b) Transforming the suite of 'Benchbooks' from a resource for Members and practitioners into a 'Handbook' of broader application would assist to manage expectations within key processes, progressively educate workplaces about better practices and enhance the surefootedness and confidence with which smaller employers engage with the Commission.

Expanding the audience of the Benchbooks may also improve the perception of consistency and predictability of Members in exercising the considerable discretion available to them in determining matters; or a greater appreciation of the range of criteria the Commission must consider, the use of various forms of evidence, the complexity of matters and the role/influence of precedents.

- (c) Difficulty in using the Commission's website, particularly its search facilities in relation to both modern awards and dispute resolution functions needs to be addressed with urgency to support better workplace compliance.
- (d) Steps should be taken to reduce the current risk of 'web' ambushing and calculated site-identity confusion by private workplace relations service providers who strategically use terms 'Fair Work' and 'unfair dismissal' to attract people seeking information or to make inquiries with the Commission or the FWO about unfair dismissal.

4.2 Decisions

As noted in section 1, smaller employers want decisions of the Commission to be delivered in a form that could easily be translated into guidance for employers who are trying to 'do the right thing'. The more explicit decisions of the Commission can be about where an employer has erred and unique or novel sets of circumstances that lead to an outcome that may not be expected based on precedent, the more helpful they will be to employers.

4.3 Learnings

As noted above, smaller employers want decisions of the Commission to be delivered in plain language and in a form that could easily be translated into guidance for employers who are faced with decisions about performance management and ending employment.

4.2 > Recommendations

- (a) For educative, transparency and consistency purposes, decisions that deviate from what may have been anticipated from precedent based on a layperson's reading of the Benchbook (renamed to Handbook), should include an account of the basis upon which the precedent was not able to be relied upon. This would provide 'guidance' on nuanced interpretations and the weighing of evidence written in plain language.
- (b) Decisions handed down by the Commission should be accompanied by a succinct account of the determination and what (if any) further processes, obligations or action arise due to the decision as a way of overcoming the confusion expressed by smaller employers.

4.3 > Recommendations

- (a) In conjunction with the FWO, the Commission should distil decisions into widely accessible 'what have we learned' bulletins (or similar) that characterise key decisions and the reason for them and what steps smaller employers should take in terms of 'better workplace practices'.
- (b) More useful reporting of Commission decisions and other outcomes such as monetary settlements would: assist in managing expectations of parties considering pursuing applications; provide ballast to the Commission's work when decision 'outliers' arise and attract public attention; and potentially provide greater insight and clarity to assist parties with decision making.
- (c) Decisions involving payment of some description should be reported regularly in a format that shows both dollar bands and equivalent payment weeks, highlighting the component that reflected any unpaid entitlements distinguished from amounts awarded for other purposes.

4.4 Information and research about jurisdictions

Consultation participants observed that despite a number of years of experience with the current regime that might have informed an anticipated reduction in unfair dismissal applications and an increased use of flexibility mechanisms such as agreement making, this has not been the case.

Possible explanations should be canvassed via research to identify why dispute-related applications are not decreasing in number and the use of flexibility mechanisms is not increasing despite significant smaller employer investment in improved workplace advice and systems.

4.4 > Recommendations

- (a) The Commission should conduct or commission research on trends in unfair dismissal applications and other key functions such as agreement making.

4.5 Services to help mitigate unfair dismissal applications

Many consultation participants described workplace dynamics and scenarios where they wanted to part ways with an employee who was no longer a good fit for the business, but were unsure how to achieve this lawfully and in a manner that was respectful and fair to the employee. Of course, the legislation currently allows for such arrangements to be entered into by agreement. However, facilitating these arrangements could have the effect of reducing the volume of applications the Commission receives. It could also avoid stress and burden for smaller employers and employees having to navigate the unfair dismissal system to resolve the matter through a settlement that could have been reached before the employment relationship ended.

4.5 > Recommendations

- (a) The Commission, Small Business and Family Enterprise Ombudsman and the FWO should consider providing a service to assist employers and employees reach a 'no-fault' dignified end to employment, whether arising from business operational reasons or workplace incompatibility, but not where the employment is being discontinued for an unlawful reason.
 - The Commission could publish template settlement terms and deed of release, information about typical settlement terms and monetary settlement amounts by a range of relevant factors such as tenure, occupation and industry. These materials would be published as guidance for employers and employees. These materials could be linked to tools provided by the FWO to assist smaller employers to correctly calculate entitlements.
 - Provision of conciliation services by the Commission and/or the FWO would be particularly valuable for assisting parties to reach agreement if this was feasible.

5.0 Making modern awards work better for small business

5.1 Modern award formation and review

The consultation meetings canvassed views on use of awards as well as the process and likely outcomes of the ongoing 4 yearly review of modern awards (the Review). Some employer representatives and small business employers shared views about decisions that have been handed down, provisional views expressed by Full Benches of the Commission and initiatives of the Commission throughout the Review.

In a dynamic economy and rapidly changing market, smaller employers value stability and predictability which is reflected in the modern award objective of a 'stable and sustainable modern award system'. The mandatory Review that follows on from significant transformative changes to the award system is concerning to small business employers who have not been directly involved in, or been able to keep up to date with, the range of issues and amendments that will eventually affect them at the end of the process. Some smaller employers and representatives

questioned the benefits of so many years of review and change which has been unsettling and a distraction from pressing business needs.

Despite this, smaller employers were supportive of the Commission continuing to reform the award system under its 'own motion' – following consultation with award users and their representatives. The objective of award changes should be to improve their operation and the user experience so that awards can be applied in the workplace with confidence and without needing the assistance of intermediaries. Changes should be pursued based on evidence and evaluation that changes will result in clear improvement to existing provisions for employers and employees.

The simplification and 'plain language' initiatives were welcomed by smaller employers despite some scepticism that replacing settled concepts, well-understood by practitioners with more familiar language could in turn require further interpretation. Smaller employers were very

keen for the initiative to address the drafting of inherently complex ideas and requirements in order for it to be of significant value to them.

Specific feedback and concern about outcomes of the Review were shared in consultation meetings. Modern award disaggregation and changing coverage were generally viewed negatively by participants who pointed to the desire for stability and the importance of sound rationale and clear benefit to award users from changes. Participants shared expectations for the Review to further reduce the number of modern awards or at least streamline the number of modern awards that are applicable in individual workplaces.

5.2 A small business synopsis

Most smaller employers view modern awards as a 'practitioner's tool'. Despite employment matters being a core business strategic and operational consideration, many smaller employers will not engage with an award (legal instrument or the online version published by the Commission) in its current form due to the complexity of the content and the severe consequences for any error or non-compliance with awards. Smaller employers instead rely on intermediaries to navigate, distil, interpret and explain their award obligations for the benefit of saving time and mitigating their risk of misapplying award provisions.

Smaller employers expressed a strong preference for awards to be shorter and simpler with fewer obligations and fewer employee entitlements to comply with. Some participants noted that within the Western Australian industrial relations system some employer associations could provide working examples of how operational awards can be distilled into less than 15 pages.

Smaller employers recognised the superficial appeal of a separate small business award but could not see it working in practice due to the diversity of our economy. Likewise, many consultation participants were attracted to the prospect of a small business schedule in modern awards and

were aware of the application for a small (micro) business schedule jointly made by Australian Business Industrial (ABI) and the NSW Business Chamber as part of the Review (that was withdrawn in October 2016). There were mixed views about why the application was not pursued further, but the concept of a reduced number and range of provisions applying to smaller employers had broad appeal among consultation participants as a way to reduce the regulatory burden on them. However, it was also recognised that this kind of significant change to modern awards could only be achieved through a determinative process with input from both employer and employee representative bodies and not an outcome

that could be delivered by the Commission of its own motion.

In the absence of a dramatic change to the extent and range of award provisions, initiatives to help smaller employers understand the key provisions in awards had some support. Key provisions provided in a Synopsis could be those that would be most costly for an employer to misapply (and have to back pay), provisions that are most commonly misunderstood/misapplied, or it could be a summary of what the components of the award instrument are and examples of provisions in each part of the award and in what circumstances they would be relevant to a workplace.

5.2 > Recommendations

- (a) A Synopsis designed for the smaller employer audience could be inserted at the start of modern awards as a way to make the instrument more accessible and help readers identify and understand key obligations for employers and/or the employee entitlements.
 - The Synopsis content would need to be decided on an award-by-award basis, but could be based on considerations such as provisions that would be most costly if calculated and applied incorrectly or those that employers most commonly misapply.
 - The selection or prioritisation of awards for the preparation of a Synopsis could be made on the basis of awards most commonly used by smaller employers.
 - An important consideration would be whether smaller employers covered by the award actually engage with the instrument, or would do so with the assistance of the Synopsis and would directly benefit from such an initiative. Research with smaller employers and/or representatives and advisors to smaller employers would be of benefit for this purpose.

5.3 Award interpretation

As noted above, smaller employers were cautiously optimistic about the simplification and 'plain language' initiatives of the Commission. The consultation also sought feedback on the benefits and limitations of award annotations which had been suggested by a Full Bench of the Commission during the Review as a way to help consolidate employment obligations and conditions from a range of sources and assist with interpretation of award provisions.

Annotations were recognised as a potentially useful 'aid' but are unlikely to encourage a smaller employer to engage with the award (instrument) if they were not already doing so. It would be of secondary priority behind more meaningful action to simplify provisions that could lead to increased use and compliant application by smaller employers without the need for an intermediary.

In the absence of greatly simplified provisions, smaller employers expressed a strong preference for access to intuitive tools and calculators and reliable advice. Although education and advice is not the remit of the Commission, smaller employers

believed that 'Fair Work' should provide them with accurate and timely answers to their questions (either verbally or in writing) that they can rely on to 'do the right thing'. Given that the Commission is not funded and resourced to provide education and advice, it is unlikely to be feasible or necessary for it to provide these services directly to smaller employers. However, its knowledge of the award system should be assisting and supporting the FWO's education and advice services with a view to overcoming inconsistent responses from the FWO.

There would be great benefit in the Commission collaborating with the FWO to address the difficulties which confront smaller employers when seeking advice from 'Fair Work' (the FWO and the Commission). Fundamental and common challenges for smaller employers of award selection and employee classification should be a priority for this kind of initiative.

5.3 > Recommendations

- (a) The Commission should assist the FWO in exploring the deployment of technology to create an 'award-wiki' that would navigate the system based on responses to determinative questions and produce a response that could be reliably applied in the workplace.
- (b) The Commission should assist the FWO in improving the accuracy and reliability of information and advice provided by the FWO helpline and its tools. Award selection and employee classification should be a priority for such an initiative.

5.4 Flexibility mechanisms

The consultation meetings revealed the tension between the desire for 'flexibility' in the way that obligations and entitlements are applied in the workplace with the need for certainty of what an employer's obligations are and that they are "doing the right thing". A common example of the desire for flexibility was the challenge of rostering for casual and part-time employees who want to swap shifts with each other at short notice to suit their needs and availability, which cannot be accommodated under many awards due to overtime entitlements. Employers explained how they could not accommodate the needs and preferences of their workforce when weighing their imperative to control their wage bill. Smaller employers want to be exempt from overtime obligations when they have not 'directed' an employee to work overtime, but they are unclear whether this is permitted and what evidence would be required of these arrangements if 'Fair Work' (the FWO) was to investigate their rostering practices and overtime payments.

Smaller employers explained how they felt that award flexibility mechanisms, such as enterprise agreements and even individual flexibility arrangements were out of reach to them as individual workplaces, unless they were party to a broader industry association-led initiative.

Smaller employers and their representatives were disillusioned by recent Court interpretations of the Better Off Overall Test (the BOOT) and the Commission's

increased scrutiny of agreements to ensure that every employee/ category of employee is better off. These developments put bargaining mechanisms further beyond the reach of most smaller employers and making strict award compliance (with the assistance of an intermediary) the safest option for employment decisions and practices.

Smaller employers were attracted to the concept of 'loaded rates' in modern awards. However, the mechanism foreshadowed by the penalty rates case Full Bench did not have broad appeal. The Commission would need to devise a simpler application for

smaller employers because the proposed model was not viewed as practical. The calculations were seen as no less complex than those for penalty rates; work pattern changes required revised calculations each time rostering changed and the 'loading' represented an additional cost with no upside in terms of workplace flexibility and business operations. Ultimately, if a more practical application could not be achieved under the requirements of the *Fair Work Act 2009*, then loaded rates could create more complexity for smaller employers - not less.

5.4 > Recommendations

- (a) The Commission should consider developing a more streamlined and 'ready to apply' mechanism for smaller employers seeking to establish an enterprise agreement in their workplace and undertake research to examine what steps may reactivate smaller employer interest in this mechanism. Options should include:
 - Highlighting approved agreements (and any associated undertakings) that may be of interest and use to smaller employers relevant to their sector and size.
 - ▶ These approved agreements should be allowed to operate for a reasonable period that recognises the investment made in navigating the bargaining process before being used to assist other smaller workplaces.
 - Considering an initiative to take approved agreements (a full agreement or selection of clauses from various agreements) and translate the key features into published template agreements for a range of industries.
 - Examining whether template agreements (with standard undertakings) could be deemed to satisfy pre-approval procedures and be able to be approved simply by providing evidence that the parties willingly enter into the agreement.
 - Providing appropriate support and guidance to employers and employees of smaller workplaces to navigate the procedural requirements for agreement approval through the proposed Small Business Division (as recommended in section 2).

Consolidated list of recommendations

1.0 Acknowledgement and recognition of small business

1.1 Small business engagement initiative

- (a) There is an expectation and strong interest for the Commission to continue to engage with small business. This could be achieved through similar consultation meetings organised by employer organisations in various states and territories. Smaller employers would be particularly keen to be part of a reference group that meets directly with the President of the Commission or other senior representatives of the Commission to discuss topical and emerging issues.

1.2 Recognition

- (a) The Commission should introduce and expand initiatives that are designed to ensure it maintains a high degree of awareness and knowledge about the dynamics of a modern economy and the need particularly for smaller employers to be agile and adaptive, and the changing nature of work. Regular engagement with the small business community (as noted in section 1.1) and ‘familiarisation’ activities such as workplace visits should be encouraged, if not required, of Commission Members.
- (b) Clear steps should be taken to demonstrate the Commission’s appreciation that smaller workplaces are inherently different from large corporations in terms of resourcing, in-house specialist expertise, ability to accommodate some directives and the generally more localised nature of operations. Practical measures should give tangible effect to the legislative provisions that acknowledge the specific nature of small business, and to address the generally intimidating and highly legalistic and technical nature of the Commission’s engagement with smaller employers. These steps would be borne out in procedural changes that provide greater support for smaller employers.
- (c) Clear actions should be taken to demonstrate the Commission’s appreciation that it is not just legislation that affects business decisions. These actions should also reflect the importance of delivering predictable and just decisions in exercising its considerable discretion within the parameters of that legislation. Decisions that can be readily translated into guidance for employers who are trying to ‘do the right thing’ by their employees and mitigate a claim, would help to shape perceptions of predictability and surefootedness for smaller employers. This would give them the confidence to make positive employment decisions.
- (d) In evaluating itself against the objective of predictable and just decisions, the Commission should take account of the barriers that smaller employers face in pursuing an appeal of a decision. The time and the cost of such actions and the emotional toll they can take would make it beyond the capacity of smaller employers. Such considerations also weigh heavily in decisions to settle rather than proceed to determination of a claim. Alternative models for evaluation that do not rely on a smaller employer to pursue an appeal, such as peer review either prior to or after issuing a decision, could provide a better reflection of how well the Commission is meeting these objectives.

1.3 Working with the Fair Work Ombudsman

- (a) The Commission should collaborate with, and support, the FWO in its provision of education and advice to small business.

2.0 A ‘structure’ that supports small business

- (a) The Commission’s procedures and operational protocols should recognise that, unlike larger employers, smaller employers do not have in-house expertise, considerable resources and time to defend claims. These procedures and protocols should recognise that smaller employers need just as much support to navigate the system as applicants.
- (b) A dedicated **Small Business Division** should be formed within the Commission as a matter of priority. The Small Business Division would issue decisions on matters involving smaller employers and ensure a ‘right-sizing’ of procedures and operational protocols as well as relevant Member and staff experience, empathy and disposition to the experiences of smaller employers.
- (c) The Commission should continue to encourage greater take-up of the recently-established and well-regarded pro-bono representation scheme by smaller employers in the unfair dismissal jurisdiction, and the subsequent expansion of the scheme to a broader range of jurisdictional matters and merits cases. A prioritisation of merits cases, where the decision may provide a clear precedent or clarification around recurring themes, may optimise the value from limited pro-bono resources.

3.0 Making processes work better for small business

3.1 Process purpose and problem solving

- (a) The proposed Small Business Division should encourage a commitment to decisions that smaller employers can easily understand and learn from through transparency and explanations of how employers had erred in cases where applications are granted. Decisions should be easily adapted into guidance materials for smaller employers, particularly for novel sets of circumstances and where the Member finds there was a valid reason, but based on other criteria, finds the dismissal is unfair. This approach will build confidence among smaller employers in the way the Commission pursues its lawful objects and deals with parties new to, or rarely in, its direct reach.
- (b) Mechanisms such as an on-line ‘grievance’ resolution portal like that deployed in Canada could be developed as a means to quickly resolve a dispute between an employee and employer. Such mechanisms could allow for matters to be quickly ‘fixed’ as a dispute at relatively low cost and stress to the parties, rather than through a quasi-judicial process that can be very burdensome for smaller employers.
- (c) Case management processes should allow for smaller employers objecting to an unfair dismissal application to elect that a ‘jurisdictional’ objection be dealt with separately to merits. This approach would reduce the burden on smaller employers who would otherwise incur the expense of preparing for the substantive merits case when there may be no jurisdiction for determining the matter.
- (d) The Commission should make it clear to smaller employers in correspondence following its determinations and in the event an applicant discontinues their claim whether the conclusion of an unfair dismissal application is the end of the specific matters in dispute or whether a further claim (e.g. general protections (adverse action)) is possible.

3.2 Triage the traffic and soften the blow

- (a) A 'triage' function should be established for unfair dismissal and general protections (adverse action) claims, similar to that operating in the Commission's anti-bullying jurisdiction. The triage process should establish a minimum threshold of information to collect from applicants either in the application form or through follow-up activities on receipt of an application, before it is served on an employer. The information should be collected for the purpose of guiding matters to the most direct avenue for low-cost resolution and to enable employers to respond to the application in a meaningful way. A key objective of the proposed triage process should be to establish if engagement of an employer is warranted based on the material provided by the applicant.

3.3 Unfair dismissal conciliation

- (a) The conciliation process should be recalibrated to align with expectations of smaller employers that it focus on the merits of the claim and be less concerned with a settlement amount that would see the matter resolved.
- (b) Conciliators should be able to articulate the 'mind of the Commission'. They should be empowered to recommend a resolution to the parties, taking account of what had been raised in materials submitted and discussed at the private session with reference to precedents and common settlement terms from similar scenarios. This kind of guidance would be valuable in terms of setting and managing expectations.
- (c) Participants should be strongly discouraged or penalised for making false and misleading claims (e.g. sexual harassment, underpayments and unsafe work practices) at conciliation. Participants should not be permitted to introduce new claims or deviate from what has been raised in materials lodged prior to the session. If necessary to achieve these objectives, discussions at conciliation should not be 'confidential'.
- (d) If the matter is not resolved at conciliation, and involves a smaller employer, the conciliator should provide a report to the Small Business Division on the session(s), including his/her recommended proposal to resolve the matter that could be taken into account in scheduling the matter for the next steps before a Commission Member. If the current conciliation model is to continue, it should be made clearer to smaller employers that the process does not involve any test of evidence and the outcome of the vast majority of conciliations is settlement, typically involving payment. Clearer, more explicit information about the purpose and objective of conciliation and most common outcomes would enable smaller employers to make informed choices about their participation and how to prepare for it. The Commission should communicate much more explicitly what the purpose of the conciliation is so that smaller employers who attend these sessions are aware they will be having a conversation about "how much?" rather than engaging in a search for facts.

4.0 Making information resources work better for small business

4.1 Helpful resources

- (a) The Commission should perform a stocktake of its information resources in terms of format and content to examine whether they meet the needs of smaller employers. Improvements to content, format and dissemination of information resources should diminish the risk of process friction and delays that arise from a self-represented smaller employer not knowing or understanding the process they are involved in.
- (b) Transforming the suite of 'Benchbooks' from a resource for Members and practitioners into a 'Handbook' of broader application would assist to manage expectations within key processes, progressively educate workplaces about better practices and enhance the surefootedness and confidence within which smaller employers engage with the Commission.
- (c) Difficulty in using the Commission's website, particularly its search facilities in relation to both modern awards and dispute resolution functions needs to be addressed with urgency to support better workplace compliance.
- (d) Steps should be taken to reduce the current risk of 'web' ambushing and calculated site-identity confusion by private workplace relations service providers who strategically use terms 'Fair Work' and 'unfair dismissal' to attract people seeking information or to make inquiries with the Commission or the FWO about unfair dismissal.

4.2 Decisions

- (a) For educative, transparency and consistency purposes, decisions that deviate from what may have been anticipated from precedent based on a layperson's reading of the Benchbook (renamed to Handbook), should include an account of the basis upon which the precedent was not able to be relied upon. This would provide 'guidance' on nuanced interpretations and the weighing of evidence written in plain language.
- (b) Decisions handed down by the Commission should be accompanied by a succinct account of the determination and what (if any) further processes, obligations or action arise due to the decision as a way of overcoming the confusion expressed by smaller employers.

4.3 Learnings

- (a) In conjunction with the FWO, the Commission should distil decisions into widely accessible 'what have we learned' bulletins (or similar) that characterise key decisions and the reason for them and what steps smaller employers should take in terms of 'better workplace practices'.
- (b) More useful reporting of Commission decisions and other outcomes such as monetary settlements would: assist in managing expectations of parties considering pursuing applications; provide ballast to the Commission's work when decision 'outliers' arise and attract public attention; and potentially provide greater insight and clarity to assist parties with decision making.
- (c) Decisions involving payment of some description should be reported regularly in a format that shows both dollar bands and equivalent payment weeks, highlighting the component that reflected any unpaid entitlements distinguished from amounts awarded for other purposes.

4.4 Information and research about jurisdictions

- (a) The Commission should conduct or commission research on trends in unfair dismissal applications and other key functions such as agreement making.

4.5 Services to help mitigate unfair dismissal applications

- (a) The Commission, Small Business and Family Enterprise Ombudsman and the FWO should consider providing a service to assist employers and employees reach a 'no-fault' dignified end to employment, whether arising from business operational reasons or workplace incompatibility, but not where the employment is being discontinued for an unlawful reason.

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5.2 A small business synopsis

- (a) A Synopsis designed for the smaller employer audience could be inserted at the start of modern awards as a way to make the instrument more accessible and help readers identify and understand key obligations for employers and/or the employee entitlements.

5.3 Award interpretation

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- (b) The Commission should assist the FWO in improving the accuracy and reliability of information and advice provided by the FWO helpline and its tools. Award selection and employee classification should be a priority for such an initiative.

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