

AUSTRALIAN GOVERNMENT
PRODUCTIVITY COMMISSION

REGULATOR ENGAGEMENT
WITH SMALL BUSINESS

Submission from Master Electricians Australia

INTRODUCTION

Master Electricians Australia is grateful for the opportunity to respond to the Issues Paper released by the Australian Government Productivity Commission, *Regulator Engagement with Small Business*.

Master Electricians Australia Ltd (MEA) is a not-for-profit organisation that provides a national accreditation program to electrical contractors seeking to differentiate themselves from other contractors. MEA is part of the ECA Group of Companies and operates nationally. The organisation's website is: <http://www.masterelectricians.com.au>.

The **Electrical Contractors Association (ECA)** is the leading voice of the electrical industry and is committed to improving and advancing this sector. ECA is registered as an industrial organisation under Queensland legislation with its operation in Queensland. The association's website is: <http://www.masterelectricians.com.au/page/ECA/>

MEA's core membership base comprises small and medium sized businesses with 57% of members employing less than three staff and 95% with fewer than 20 employees. This places MEA in an ideal position to comment on the unique circumstances of small business and provide recommendations as to ways in which regulators can better engage and support this invaluable sector of the economy.

References to MEA and opinions expressed by the MEA, within this submission, should be read as both Master Electricians Australia and the Electrical Contractors Association.

SMALL BUSINESSES AND THEIR SIGNIFICANCE

Definition of small business

MEA would argue against adopting a uniform definition of small business for use by all regulators. With the growth in internet commerce, businesses can now comprise any number of forms that no single definition could capture for every regulatory purpose. As an example, if the number of employees was the determining factor used to identify a small business, a sole trader running an online shopping business would be classified as a small enterprise, despite achieving an annual turnover of more than \$10 million. This may be appropriate for the application of workplace laws, but less so for taxation purposes where, despite their high turnover, the business may receive certain exemptions or concessions by virtue of their categorisation as a small business. On this basis, we believe it is necessary for each regulator to apply a definition of small business that is geared towards their specific regulatory purpose to ensure all businesses are treated fairly by individual regulators. We certainly acknowledge the compliance challenges that arise from the absence of a consistent definition of small business. However, this confusion could be overcome through a dedicated effort from government to communicate with small business about regulatory responsibilities. This communication would require an approach that focused on clear and targeted information being provided to business owners in plain English. Industry Associations, including employer and employee bodies, could play an important role in this communication process by acting as a conduit to deliver information from regulators directly to specific industries. We would urge government to connect with such bodies to ensure accurate and relevant information is being received by small business on their responsibilities.



REGULATOR PRACTICES WHICH AFFECT ENGAGEMENT WITH SMALL BUSINESS

A fair and impartial workplace regulator

Small businesses face many obstacles in the regulatory environment they operate in. Some of the most significant regulatory challenges centre around the administration and enforcement of workplace laws.

We acknowledge that the unique circumstances of small employers have been recognised in parts of the *Fair Work Act 2009*. Examples include the current exemption for employers with 15 employees or less in relation to a severance payment following a redundancy and the 12 month minimum employment period in order to make an unfair dismissal claim. While this eases some of the regulatory burden for small business, the specific recognition of small business within other areas of the *Fair Work Act* is sorely needed in order to reflect their unique circumstances. Potential areas for reform in relation to the administration and enforcement of the *Fair Work Act* include:

- *Adverse action provisions*

An exemption from the application of the Adverse Action provisions of the *Fair Work Act* for small business, similar to that which applies in relation to unfair dismissal laws.

- *Notice of termination*

Currently the minimum notice period that a business must give an employee to terminate their employment is one week if that employee has up to one year of continuous service. We believe that this requirement could be relaxed to better reflect the needs of small business. As an alternative, employees with less than six calendar months of service for a small business would receive a 48 hour notice period and those with more than six months but less than one year of service be entitled to the one week notice of termination.

- *Transfer to a safe job*

MEA would also recommend a relaxation of the current requirements in the *Fair Work Act* in relation to transfer to a safe job. Currently, under section 81 of the *Fair Work Act* if a pregnant employee provides evidence that she is fit for work but is unable to continue in her present position, the employer must transfer that employee to a "safe job" with no changes to the terms and conditions of employment. This may not be problematic for businesses with large and diverse organisational structures from which to find a "safe job" for a pregnant employee to perform. However, a small business may find it exceedingly difficult to find or even create an alternative role for a pregnant employee to undertake. If no safe job can be found the employee is entitled to take paid "no safe job leave" for the risk period. These provisions can place a substantial burden on small business.

Admittedly, these issues may, to some extent, be outside the scope of this study as they cross over between the development, administration and enforcement of regulation. However, it is important to raise these points as they indicate the obstacles facing regulators as they attempt to better engage with small business. If the unique circumstances of small businesses were better recognised in the requirements laid down by regulators, the administration and enforcement components of the process would be less problematic for both regulators and small business.

A further obstacle affecting regulator engagement with small business is the negative perception of the workplace regulator held by small business as a result of media reports concerning matters before Fair Work Australia. The renaming of the tribunal to the Fair Work Commission is likely to

change this negative view, however this may take some time. In the interim, effective engagement by the workplace regulator with small business could present some challenges and will need to account for this perception.

Genuine and comprehensive consultation

All government legislation and regulation which imposes costs on business and the community must be subject to rigorous regulatory cost and impact assessments including comprehensive consultation with business, industry and the general public. However, it is also important for such a process to be a genuine stakeholder consultation with the ultimate intention of developing regulations that serve the purpose for which they were created and achieve an effective balance between the needs of industry, the economy and the general public.

We have noted in the past that some consultations about regulatory changes have provided very tight response timeframes. While larger businesses may have dedicated staff to monitor and respond to the release of consultation papers in a short period of time, small business would in most cases not have such capacity. Again, this is an opportunity for regulators to improve linkages with industry groups who can engage directly with small business and obtain their views on the proposed changes to regulation. However, it is essential that sufficient time be provided to allow industry groups to liaise with members in order to compile a comprehensive response reflecting small business views.

Of particular concern to MEA and the electrical industry is the consultation process adopted by the National Occupational Licensing Authority (NOLA) in developing a national licensing regime. MEA, along with many other industry bodies, has been actively involved in this consultation process from the outset. On appearances, the process has been comprehensive and included numerous industry briefings and roundtables, a lengthy Regulatory Impact Statement process and the formation of interim and soon to be permanent, Occupational Licensing Advisory Committees. However, over the course of our involvement it has become evident that the views of industry are not being reflected in the final recommendations of the NOLA. MEA, along with many other industry bodies and trade unions, has expressed our concern at the lowest common denominator approach being taken towards the creation of a national licensing system for electrical occupations. Despite strong calls from industry to keep high licensing standards for electrical occupations, NOLA is progressively watering down licensing requirements to a level below what is warranted for such a high risk occupational group. As a result, the electrical industry is slowly withdrawing support for the national licensing system proposed by NOLA which does not bode well for the future implementation of a national licensing regime. It is imperative that in introducing something as important as national licensing that the advice of the industries most affected be heeded by regulators. In the absence of genuine industry consultation and input, the system is unlikely to meet the intended objectives and the consultation process itself will be perceived as nothing more than a procedural exercise rather than an attempt to introduce the best system possible.

Connecting with industry

The introduction of new regulation is undoubtedly the most challenging element to the regulatory process for small business. The majority of small business owners do not have permanent human resources, finance, legal or administrative staff to dedicate to implementing these changes. Consequently, these tasks are more often than not left to the business owner themselves to both understand and implement in order to ensure they are compliant. We firmly believe that the key to ensuring small businesses are put in the best position to handle the introduction of new requirements is for regulators to actively link with industry and professional bodies to distribute the information to those who will be affected most by the changes. Two examples of effective engagement concern the education processes that predated the Work Choices reforms and the Goods and Services Tax.

- *Work Choices*

While we do not wish to make any comment on the content of the now defunct Work Choices laws, the education process that preceded the reforms is a model for how regulators can engage with small business. This process was effective because Fair Work Australia (FWA) actively connected with industry bodies, including employer associations and unions, who were then able to pass on the information directly to their members in a form best suited to their particular industry. While internet resources are of value, the fact remains that the people on the ground are more likely to trust and learn from someone they can relate to in their own industry. Industry bodies can also provide a valuable and much needed contact point for members when seeking further information or clarification on their responsibilities. The approach adopted by FWA ensured small business understood the new regulatory environment and were able to prepare for the changes that would need to be implemented.

- *Goods and Services Tax*

The implementation of the Goods and Services Tax (GST) by the Federal Government in 2000 is another example of effective regulator engagement with small business. Given the wide reaching impact of the introduction of the GST it was imperative that small business in particular be provided with enough information and support to ensure a smooth transition to the new tax system. The Federal Government recognised this by connecting with accounting firms and financial advisors to distribute the relevant information on the GST to small businesses. As the information was coming from impartial third parties who were specialists in the finance field, small business owners were better able to comprehend and trust the information being provided to them. It also enabled these accounting firms to provide targeted information to the relevant industries to ensure employers understood their new responsibilities.

- *Personal Property Securities reforms*

Not all regulatory changes have been predicated by the same level of active industry engagement, to the detriment of small business. An example of poor engagement surrounds the Personal Property Securities (PPS) reforms in 2012. The changes to the *Personal Property Securities Act 2009* and the introduction of the PPS register represented a significant regulatory change, with far reaching implications for small business if they did not understand their new obligations. A key change introduced by the reforms required contractors working on a project to register their security interest in any goods or equipment they leave on a job site to ensure they are given secured creditor status in the event of a debtor's bankruptcy. Despite the significance and complexity of the legislation for small businesses there was very little effort made by government to connect with industry and employer associations in order to ensure the information was reaching those who would be most affected. It appeared that the primary strategy employed to educate small business about the changes was the PPS website. While comprehensive, the website did little to ease confusion amongst small business owners. The internet resources available contained an abundance of complex information, presented in legalistic language with limited guidance to the average small business owner on how the changes would affect them in their everyday business activities and the steps they needed to take to protect themselves. In speaking to members, it was clear to MEA that the PPS reforms were, and are still, causing uncertainty and panic amongst small business owners. This confusion could have been abated had regulators consulted with industry prior to implementation in order to develop a strategy to deliver information about the reforms directly to small business. Unfortunately, it is small business owners who will ultimately pay the price for the government's failure to effectively engage with industry about these reforms.

A focus on the big picture

There is a perception amongst small business owners that regulators choose to focus their enforcement actions on minor matters, such as administrative errors made by contractors, as opposed to concentrating on the bigger picture. In the context of the electrical industry, electrical safety should be the ultimate intention behind any form of regulation. In this respect, issues such as unlicensed electrical work, poor quality electrical products and the need for established workplace health and safety systems need to be the primary focus of compliance action for regulators. While administrative omissions made by contractors in the course of their work need to be addressed, they are rarely critical issues in terms of electrical safety. Such administrative omissions are more likely a result of small businesses not having the time or resources to dedicate to understanding what their obligations are, rather than a blatant disregard for the law. Such oversights would be better remedied through closer engagement with industry to ensure a better understanding of regulatory requirements. Again, we would urge regulators to recognise the importance of linking with industry associations. These organisations are better placed to provide targeted information about regulatory responsibilities directly to small businesses in a manner they can easily comprehend and apply to their everyday operations.

Consistent information and advice

In order for small business to confidently rely on the advice of regulators it is essential that the information provided be accurate and consistent. Unfortunately, this is not always the case. As an example, MEA members in Queensland have reported problems when seeking information from the Queensland Building Services Authority (QBSA). A common complaint from our members is that the officers responding to enquiries at the QBSA are not electrically trained and so do not have the level of occupational knowledge needed to respond to electrical questions involving building work. Given the highly technical nature of electrical work it is essential that electrically trained officers be available to answer enquiries to ensure consistent and accurate information is provided to industry. A small business owner who inadvertently relies on this inaccurate advice could face substantial fines for non-compliance. These financial penalties can be crippling and could threaten the very survival of a small business. In light of this, the importance of accurate and consistent information being made readily available to small business about regulatory requirements cannot be underestimated.

A similar problem encountered by our members is the reluctance of regulators to provide advice and assistance in response to specific questions about technical and safety issues. While generalised industry advice is made available, regulators appear cautious about providing guidance that relates to a contractor's particular scenario. This is more than likely a reflection of regulators attempting to guard against any legal consequences should their advice be flawed. However, this does not change the fact that small businesses rely on such assistance to be confident they are meeting all of the varied and complex requirements set down by the multitude of regulators they must liaise with in order to keep their business running. If small businesses believe they cannot rely on the information available they may be reluctant to approach regulators for advice in the future, choosing instead to find a solution themselves. For resource and time poor employers this adds a further burden and heightens the risks of non-compliance.

A suggested strategy to address these problems is for regulators to improve their linkages with industry groups and associations who engage directly with small businesses on a regular basis. Industry groups, such as MEA, are eager to provide any assistance they can to small businesses in order to ensure they remain both lawful and profitable. If regulators are limited in the specific advice they can provide, industry groups are well placed to assist, provided regulators are willing to facilitate dedicated and readily accessible contact with these industry groups. There will of course always be a need for regulators to provide a final adjudication on any contentious technical matters, however, it may alleviate some pressure on regulators and make it easier for small businesses if industry groups are able to play a greater role.

Fair and consistent enforcement action

Similarly, it is vital to effective engagement with small business that the rules set out by regulators be interpreted uniformly by those undertaking the enforcement. Small businesses need to know what to expect and there must be a degree of quality assurance to ensure the enforcement measures taken are done so consistently. Any quality assurance measures must include appeal mechanisms that small businesses can readily access in order to challenge the decisions made by regulators. It is also important that such appeal mechanisms be undertaken impartially to avoid the perception that a regulator only wishes to defend their own actions as opposed to ensuring that the rules have been interpreted accurately, applied fairly and that the correct decision has been made.

Addressing the regulatory burden

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

- *Workplace Bullying*

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

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

- *Licensing*

The multijurisdictional approach to regulation is particularly problematic for electrical occupations in the regulation of occupational licensing.

To remain competitive in the marketplace an electrical contractor needs to be more than just a company that provides power points and light switches. Most electrical contractors now provide data cables, smoke alarms, TV antennas, solar PV and solar hot water, and in some cases security systems. To achieve this, the average contractor needs no fewer than six worker licenses and two business licenses.

There are substantial amounts of duplication in the criteria for these licenses, and the processes for applying and maintaining each and every license has become extreme. Many contractors fail to keep up with all the license renewals for all staff and the company in addition to managing cash flow, tax and other legislative requirements. Obtaining and renewing each license requires undertaking training, meeting certain criteria, often obtaining insurance and extensive administrative time.

A business operating in only a single state must still engage on average with at least six different state and federal, private and government bodies to monitor and achieve a fully licensed outcome. Moving from state to state or living near a border almost doubles the time, cost and inconvenience to the business. While national licensing may make it easier for businesses to operate interstate, the process of moving to this new system has stalled and faces many obstacles and refinements before small businesses can realise the benefits.

- *The Tax System*

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

The introduction and development of Fringe Benefits Tax (FBT), Capital Gains Tax (CGT), Goods and Services Tax (GST), paid parental scheme and compulsory superannuation has left small businesses needing to invest a significant amount of time to meeting the administrative requirements of regulators. The IPA further commented that the practice of building special concessions into the tax law to ameliorate the taxation burden on small business is largely ineffective due to the complexity involved in order to claim these concessions. The proposed increase to the Superannuation Guarantee rate from 9% to 12 % will place further administrative and financial pressure on small business. Added to this, the impact of the carbon tax on small businesses who will need to dedicate substantial administrative resources to accurately determining whether their own charges to customers must increase and by how much. The recent warnings issued by government about the penalties businesses could face for incorrectly attributing price increases to the carbon tax have only added to the anxiety experienced by small business owners surrounding their compliance with regulatory requirements.

The above examples are just some of the obstacles facing small business on an everyday basis. The weight of this regulatory burden calls out for change in the culture of government from one that promotes red tape to one that actively works to reduce it, with a focus on the cumulative effect of regulation. This is particularly the case for small business who have far less capacity to absorb the additional cost of administration and price increases.

Addressing the specific needs of small business

It is critically important that the specific needs of small business be reflected in the administration and enforcement of regulations. A regulatory approach that does not account for the specific circumstances of small business is not able to provide the level of support that these businesses rely on in order to remain profitable. An example of an area of regulation that could better reflect the needs of small business in the electrotechnology industry concerns the training of electrical apprentices.

It is an ever increasing problem that electrical apprentices are not receiving the level of training through Registered Training Providers (RTOs) that is required in order for them to become fully

¹ <http://www.publicaccountants.org.au/library/media-releases/preferentialtreatment>



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

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

RECOMMENDATIONS

Overall, MEA would recommend the following actions be taken to improve regulator engagement with small business:

1. Regulators to link with industry bodies, including employer and employee groups, in order to distribute information to small business and to support implementation of new reforms.
2. Recognise the unique circumstances of small business and reflect this in regulatory approaches.
3. Consistency in the enforcement of regulations.
4. Genuine and comprehensive consultation with small business prior to any regulatory changes.
5. A change in the culture of government from one that promotes red tape to one that actively works to reduce it, with a focus on the cumulative effect of regulation.

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

Yours sincerely,

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