

Productivity Commission Regulator Engagement with Small Business

**SUBMISSION by the OFFICE OF THE AUSTRALIAN SMALL BUSINESS
COMMISSIONER**

MARCH 2013

Introduction

This is a submission by the Office of the Australian Small Business Commissioner (the 'ASBC') to the Study being undertaken by the Productivity Commission for the Australian Government to benchmark regulator approaches to engagement with small business (the 'Study').

The Issues Paper produced by the Productivity Commission (the 'Issues Paper') in relation to the Study addresses key regulatory behaviours that have significance for small business.

The office of the ASBC commenced operation on 2 January 2013. Having regard to the very short period of its existence, the ASBC has not had any direct experiences with specific regulatory environments sufficient for it to contribute to the Study from an evidence based platform.

Further, the ASBC has not been invested with any regulatory functions of its own.

However, the ASBC is able to make observations which may assist the Study. These observations are formulated through the experiences of the Commissioner, Mark Brennan, who for a substantial period held the office of the Victorian Small Business Commissioner and served as regulator of gambling and liquor licensing in Victoria.

The creation of the ASBC is an innovative Government intervention designed to have substantial benefits for small business by, in effect, influencing improvements in the Australian business environment. The establishment of the ASBC was made, in part, in recognition of the fact that the strength of the Australian economy relies heavily on the profitability and efficiency of small business.

According to the Australian Bureau of Statistics (ABS), there are over **2 million** small businesses in Australia, comprising **95.9 per cent** of all businesses. Small businesses in Australia employed approximately **4.8 million** people representing **45.7 per cent** of the private sector work force.

The ASBC's Submission is constructed to be responsive, to the extent possible, to the Chapter headings of the Issues Paper.

What has the Commission been asked to do?

The Productivity Commission has been asked to undertake a study to benchmark regulator approaches to engagement with small business. The Terms of Reference acknowledge that:

‘(A)pproaches to the regulation of small business can be wide ranging, with some regulators adopting a facilitative role, assisting small businesses to meet their compliance responsibilities, recognising that regulatory compliance activities impose a disproportionate cost on smaller firms. Other regulators adopt a more traditional compliance based regulatory posture’.

The Issues Paper attaches considerable importance on ‘Regulator behaviour.’ This importance is well placed.

The behaviour of regulators of business can substantially influence:

- **the quality of the business environment; and**
- **the reduction of red tape.**

It is the opinion of the ASBC that a facilitative approach by regulators regulating business, is well received by those regulated and significantly contributes to the quality of the business environment and the reduction of red tape.

In considering the task asked of the Commission, it may be helpful to reflect on some of the rationales for governments’ regulating business. In this regard, the ASBC Submission sets out below its observations on government intervention to regulate business and some of the policy considerations likely to be taken into account in justifying intervention.

Observations on Government and Regulation

Observations on Government intervention to regulate business generally reveal two enduring core responsibilities for government, namely education and justice.

Education

The facilitation of access to or the provision of information to the business sector is a core responsibility of government. It is appropriate for Government to commit resources to information services, especially where the behaviour of businesses participating in a particular sector is regulated.

The concept of a Small Business Commissioner is a popular modern mechanism for advocating government intervention, encouraging education and resolving disputes, particularly through mediation.

Key educative themes for a Small Business Commissioner are to:

- encourage governments to facilitate access to information (*'no small business should fail through lack of access to information'*);
- encourage businesses to improve their professional and commercial behaviour (*'you get the customers you deserve'*); and
- promote improvement in their business to business conduct in the business relationship (*'resolve disputes early and pragmatically'*).

Accordingly, the Study undertaken by the Commission will complement the role of the ASBC, especially in advocating small business interests to government and encouraging business education.

Justice

The second enduring core responsibility of government when intervening to regulate business is to provide an appropriate system of justice.

In ancient times, provision of justice focussed on placing wrongdoers in prisons. Refinements and sophistications over time have developed various means of providing systems of justice, which are not confined to punishment of offences against the Crown but extend to finding justice for those in private conflicts. In particular, alternative dispute resolution has emerged as an appropriate measure of according justice in business dealings.

Speedy, inexpensive resolution of disputes and fair dealings are crucial to business efficacy. Regulators with decision making functions can find it helpful to their administration by utilising alternative dispute resolution techniques, particularly where the regulatory function involves consideration of objections to an application to a regulator to grant a licence or the like.

In these cases, a contribution to justice for a Regulator is to consider an alternative dispute resolution mechanism, such as mediation, to effect a speedy and inexpensive resolution of objections.

Government Intervention: Policy Considerations

In the sense of the commercial community, there appears to be a basis on which government intervention can improve public welfare. For example, information balance and fair competition appear pertinent to small business policy considerations. In turn, these considerations assist identification of a

number of policy principles supporting government intervention on behalf of small business. These may be stated as follows:

1. *Government regulation of small business should focus on addressing information balance and fair competition.*
2. *While small business legislation should protect small and medium sized businesses, the net outcome should be an enhanced competitive and fair operating environment for all business.*
3. *Government involvement in small business matters should aim at ensuring that both prospective and ongoing small businesses have sufficient knowledge to make informed business decisions.*
4. *While any business has a fundamental right of control over positioning and maximising its business opportunities, this right does not extend to engaging in unfair business practices.*
5. *Small business should be able to access a low cost informal dispute resolution forum prior to any grievances proceeding to formal litigation.*

The existence of these policy principles in the development of a regulatory scheme should enhance the prospect of the regulated environment's operating in an appropriately small business friendly fashion.

Small Business and their Significance

What is a 'small business'?

Small business has been defined by various Acts of various Parliaments, although there is no one uniform definition. These different definitions probably reflect points of emphasis or influence of particular regulatory schemes.

The standard ABS definition of a small business is a business which employs less than 20 employees. This definition applies generally except in agriculture, where classification of a small business is made by reference to a monetary value.

According to ABS studies, small businesses can be considered to have the following characteristics:

- independently owned and operated;
- closely controlled by owners/managers;
- decision-making is principally done by the owners/managers;
- the owners/managers contribute most if not all of the operating capital.

Further to this, in respect of its own responsibilities, the ASBC has found it practicable and more beneficial when looking at the types of business that could be assisted by the office, to consider small (and medium) business as anything that would not be considered 'big business'. This also reflects the approach of the ASBC that it is not concerned with the technicalities of a definition but is interested in the substance of matters.

To date, this has been an effective means for running the office's activities. Indeed, in its internal administration, the office has adopted the expression 'we say no to nobody' as an effective mantra.

From the perspective of the ASBC, a specific definition of 'small business' is not crucial. The ASBC approach is to seek to influence improvements in the business environment by, among other things, encouraging all participants to 'lift their game.' Improvements in the business environment will be beneficial for small business whether occurring as a downstream benefit resulting from improved business behaviour by larger businesses, or as a result of the direct benefit of improved business behaviour by small businesses.

However, if pressed to adopt a particular definition, the ASBC would favour adoption of the ABS definition. The ABS definition has the advantage of popularity. If adopting the ABS definition, the ASBC would like to see some clarity around the definition on how the relevant employee numbers are calculated. For example, are casual or part time employees included? What is the timing of the calculation? Is it a snapshot of a particular day or a longer period of weeks?

Characteristics, Practices and Impact of Regulators

The Issues Paper contains three substantial chapters addressing the following three questions:

What Key Characteristics of Regulators Influence Their Posture Toward Small Business? Which Regulator Practices Affect Engagement with Small Business? How Does Regulator Engagement Impact on Small Business Costs?

The ASBC submission responds to these by reference to the behaviour of regulators.

Behaviour of Regulators

Concerns expressed by business about regulation are often focused on the quality of the design of legislation and its ease of compliance, rather than an in-principle objection to the regulation.

Regulators should be concerned not to be characterised as ‘umpires who have never played the game’. If perceived this way, business will be less co-operative and responsive to a regulator. It is the players of the game (ie. those being regulated) who can often make the most constructive suggestions to improve the way in which regulators engage with small business and how improvements can be made to regulator practices.

A constructive measure for Regulators to demonstrate a desire to better understand the business environment they regulate is to convene ‘user groups’. That is, to conduct periodical meetings with businesses which have a high incidence of contact with the regulator, together with representatives from key industry and professional associations. An initiative of this kind is a positive engagement that can improve regulator practices.

‘User groups’ as well as being a forum for seeking views that will improve the administration by the regulator, and compliance by the regulated, can also be useful consultative bodies from a broader policy perspective. In this regard, consultation is not calling a meeting to tell small business what the regulator is going to do. Consultation is more than imparting information. It is receiving views, considering them and rationalising why, or why not, a particular view is adopted.

Enforcement of Regulation and the Quality of the Business Environment

Compliance suggests two words, education and enforcement.

In many instances the easy option for a regulator is to concentrate effort on enforcement, particularly enforcement in the sense of ‘cracking down’ on business and being uncompromising. The more challenging approach is to be educative about compliance. This can require more effort from the regulator in identifying education needs and developing or approving education tools. Educating to comply entails a facilitative approach to administration of regulation.

Putting aside the content of what is to be enforced under specific regulatory schemes, the ASBC considers, as a general proposition, that a facilitative approach to regulation is most appropriate in regulation of business.

By and large, businesses want to comply with the laws that regulate their activity. Non-compliance, especially in the case of small business is frequently associated with unawareness or poor management practices. A crackdown on non-compliance by pecuniary or disciplinary measures may be effective in certain circumstances. However, where the business environment is one where business efficacy is served by certainty of rights and obligations and unfettered by prescriptive compliance, non-compliance incidents may better be addressed by a facilitative approach tending to educate to comply rather than punishing non-compliance.

In this regard consideration may well be given to providing for, at least in the case of first time non-compliance, a requirement to undergo, at the offenders expense, a course of training in compliance with the regulatory scheme. In this way, rather than solely being punished for non-compliance, the offender learns about compliance and the likelihood of a repeat incidence of non-compliance is reduced.

An emphasis on educating to comply has the potential to positively benefit the quality of the business environment. If educating leads to better business operations, this can only enhance the standards of the conduct of business in the particular regulated business sector.

Licensing Schemes and Red Tape

Regulators of licensing schemes have particular opportunities to contribute to red tape reduction.

It is characteristic of small business that, whilst accepting requirements to comply with regulation, they wish to have as little as possible contact with the regulator. Regulators should look for opportunities to reduce the amount of contact that those being regulated have with their office.

For example, where the licensing scheme is one of annual renewal of licences, regulators could advocate (or, if permitted, implement) a longer period of licence, such as five or ten year licences.

Another initiative in the licensing field is for regulators to consolidate core licences so that licencees do not have to seek regular additional variation to their licence. For example, if a holder of a liquor licence seeks a temporary extension of trading hours for operating on St Patrick's Day, or other annual recurring occasion, it would be reasonable for the regulator to have such a variation placed permanently on the core licence, thus obviating the need for the licensee to be making application every year. Initiatives by the Regulator

of this nature impact both on administrative efficiency of the regulator and costs on small business.

A further characteristic of business licensing schemes is that they are particularly apt for educative or facilitative approaches, more so than, say, public safety regulation.

Another initiative worth exploring by regulators is the extent to which alternative compliance mechanisms may be available. If the objective of the regulation can be met by businesses complying in different ways, ask why can't this be accommodated.

In business regulation, it is not necessarily essential that regulations be made on the basis that one size fits all. Nor should it be assumed that compliance must be identical for all sizes of business in a particular regulatory scheme. There is considerable scope for flexibility, both in making regulations and in regulators' administration of regulations.