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Presiding Commissioner
Regulator Engagement with Small Business
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

19 August 2013

By email: small.business@pc.gov.au

Dear Dr Mundy,

Regulator Engagement with Small Business – Appco Group Australia Submission

Thank you for the opportunity to provide a submission on the Productivity Commission's *Draft Report on Regulator Engagement with Small Business* (Draft Report).

Appco Group Australia is a leading sales and marketing company that assists a wide range of organisations realise growth and development in their business activities. Appco Group Australia engages independent marketing companies which separately engage independent contractors to deliver face-to-face sales across the country.

While Appco Group Australia recognises the need for regulation, we observe that in many situations small businesses are subject to costly and onerous compliance measures. These are typically imposed by regulators who do not understand the many challenges faced by small business in meeting regulatory requirements. In many cases this leads to unsatisfactory engagement with regulators, with small business incurring substantial direct and indirect costs.

This submission constitutes our formal response to the Productivity Commission's Draft Report and seeks to engage with its draft recommendations. Where relevant, we have also sought to provide additional information about the experiences of the small businesses we contract in engaging with a number of regulatory authorities in Australia.

Please find enclosed our submission.

Yours sincerely,

Regina de Wolf-Ngarimu
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Appco Group Australia

Submission to the Productivity Commission
Regulator Engagement with Small Business

August 2013

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Executive Summary

Appco Group Australia (Appco Australia) welcomes the opportunity to provide a submission to the Productivity Commission in relation to its *Draft Report on Regulator Engagement with Small Business* (the Draft Report). Appco Australia supports the Productivity Commission’s finding that for business, good engagement with a regulator is generally associated with an educative and facilitative regulatory posture, rather than a combative approach.

Appco Australia and the small business marketing companies it engages (see Background, p.4) are committed to being fully compliant with the regulatory requirements that apply to them. In the majority of cases, regulatory compliance is achieved without unreasonable difficulty and without extensive engagement with the relevant regulator/s. In other cases, however, Appco Australia and the small business marketing companies it contracts have experienced unsatisfactory engagement with regulators, resulting in both direct and indirect costs to business.

This submission constitutes a formal response to the Productivity Commission’s Draft Report. In it, Appco Australia seeks to engage with the Productivity Commission’s draft recommendations and provide additional context and background about its engagement experience with regulators. Appco Australia has identified five key attributes of regulators that are conducive to productive and satisfying engagement. The table below details these attributes in both their favourable and unfavourable manifestations:

<i>Favourable regulator attributes</i>	<i>Unfavourable regulator attributes</i>
1. Helpful, professional and supportive of small business	1. Unhelpful, combative and aggressive , i.e. ‘out to get’ small business – this includes behaviours such as bullying and intimidation
2. Clear and accessible in their communication of compliance obligations	2. Ambiguous and inaccessible communication of compliance obligations, i.e. difficult to understand or deliberately uncommunicative
3. Consistent in their approach to compliance management and enforcement	3. Inconsistent in their approach to compliance management and enforcement, i.e. regulator personnel taking different approaches
4. Flexible and proportionate in their enforcement, with a consistent focus on outcomes	4. Inflexible and non-proportional in their enforcement, with an inconsistent focus on outcomes, i.e. extremist and narrow-minded, often not taking into account the ‘big picture’
5. Understanding of the unique characteristics of small business, including its specific needs and constraints	5. Misunderstanding or intolerant of the unique characteristics of small business, i.e. overt ‘one size fits all’ mentality

While Appco recognises that regulation is necessary, it observes that small business owners are regularly subject to regulators’ combative behaviours, inconsistent or inaccurate advice and inaccessibility. These factors combine to result in time consuming and costly litigation and/or regulatory disputes through the judicial system. They also impose a great deal of stress on small business owners who, in some cases, resign from their industry because of the wellbeing and financial implications of managing these regulatory burdens.

Background

Appco Australia is a leading sales and marketing company in Australia and has helped a range of companies across many industries to achieve significant business growth. Appco Australia is a member of the international Appco Group – one of the world’s foremost sales and marketing organisations. Appco Group operates in over 800 locations in more than 25 countries, and engages independent marketing companies which separately engage independent contractors to deliver more than one million Human Commercials™ every day. Australia was the founding country of Appco Group in 1987, then known as the Cobra Group.

Appco Australia has approximately 36 clients across charities, sports, marketing, telecommunications and energy, including Surf Life Saving Australia, Mater Health Services, CanTeen, the Australian Paralympics Committee and Australian Power and Gas. Appco Australia operates through a network of 70 locally owned marketing companies in metropolitan and regional areas. The marketing companies that are engaged by Appco work with approximately 1,000 independent contractors.

Noting the widespread engagement of independent contractors, the marketing companies are subject to the provisions of the *Independent Contractors Act 2006* and *Fair Work Act 2009*. The independent contractors engaged by the marketing companies operate in the capacity as small business owners and have a unique opportunity to build their own marketing business. Because of the large-scale engagement of independent contractors and sensitivities about the distinction between contractors and employees, the marketing companies are frequently subject to regulatory investigations, including by the Australian Taxation Office (ATO), Fair Work Ombudsman (FWO) and regulatory compliance personnel in a variety of state and territory departments (e.g. state Departments of Finance).

Generally, investigations are incorrectly predicated on the basis that the nature of the marketing companies’ engagement with their independent contractors is that of an employer. In other cases, regulatory barriers include difficulty of independent contractors in obtaining an Australian Business Number (ABN) through the Australian Business Register. Regulators also regularly initiate disputes pertaining to payroll taxation matters.

While Appco recognises that regulation is necessary, it observes that small business owners are regularly subject to regulators’ combative behaviours, inconsistent or inaccurate advice and inaccessibility. These factors combine to result in time-consuming and costly litigation and/or regulatory disputes through the judicial system. They also impose a great deal of stress on small business owners who, in some cases, resign from the contracting industry because of the wellbeing and financial implications of managing these regulatory burdens.

1 Regulatory compliance, costs and alternatives

Appco Australia submits that due to their unique characteristics, small businesses find compliance with onerous regulatory requirements particularly challenging. Contributing factors include the size of small and micro business, and constraints upon their time and resources. This section of the submission details:

1. why compliance is a challenge for the small business marketing companies engaged by Appco Australia;
2. compliance costs incurred by small business when engaging with regulators;
3. possible containment of these regulatory compliance costs; and
4. when differential regulatory treatment for small business may be appropriate.

In Appco Australia's case, regulatory compliance is also taken to include actions arising from allegations of non-compliance. For example, this may include responding to information requests in the course of regulator-led investigations and costs incurred as a result of seeking legal advice.

1.1 *Why compliance is a challenge for small business*

Appco Australia and the small business marketing companies it engages are committed to full regulatory compliance and invest heavily in their education to this end. Furthermore, Appco Australia does not believe that small business should be exempt from reasonable regulation solely because they are small businesses. However, regulatory compliance is a challenge for small businesses due to a variety of factors. Specifically, the marketing companies engaged by Appco Group will demonstrate one or more of the following characteristics:

- they are generally staffed by one to three personnel (an owner/manager and relevant administrative/support staff) or non-employing¹;
- they are likely to be heavily affected by direct and indirect regulatory compliance costs;
- due to time and resourcing constraints, they may need additional support and assistance in understanding their compliance obligations because they have less capacity to comply with regulatory requirements; and
- they have minimal capacity to interpret complex legislation, identify effective ways to manage risks and document their regulatory compliance.

¹ Australian government figures show, of new business entries in the 2010–11 financial year, 94.6 per cent were mostly in the non-employing and employing micro business population, which comprises businesses employing between 0–4 employees. "Australian Small Business – Key Statistics and Analysis" Department of Industry, Innovation, Science, Research and Tertiary Education, Canberra, 2012.

Regulators need to recognise the unique characteristics of small business. Most notably, regulators must realise that regulatory compliance requirements readily accommodated by large organisations (who have the resourcing capacity), impose onerous burdens on small business owners.

“I run my own business and have one employee, who assists with administration and book keeping. Regulatory compliance is important to me, but I literally do not have the manpower to jump through too many hoops. It is work I have to do myself, often after hours, and takes away from time spent growing my business”.

- marketing company owner, July 2013

In the case of some of the marketing companies, compliance is also a challenge due to conflicting legislative requirements. Regulators regularly incorrectly interpret requirements under other legislative regimes and cite these as indicators of regulatory non-compliance. One specific example pertains to regulator-led investigations as to whether or not the independent contractors engaged by the marketing companies are in fact independent contractors. In such cases, regulators attempt to determine independent contractor or employee status by considering factors such as absence of control over work or other employee indicia.² For example, many independent contractors are engaged by the marketing companies to raise charitable funds on behalf of not-for-profit sector clients. In NSW, s. 11(1) of the *Charitable Fundraising Regulation 2008* provides:

While participating in a fundraising appeal, a face-to-face collector must prominently display any identification card or badge that has been issued to the person in compliance with a condition of the authority to conduct the appeal.

It would be in breach of this legislation for an independent contractor engaged in fundraising activities to not wear an identification card or badge. However, investigators from the FWO and the ATO's Australian Business Register have previously cited the wearing of identification as an indicator of an employer-employee relationship. The regulatory compliance burden on a small business involved in such an investigation is large, as it requires not only the time of the small business owner and manager to manage such an investigation, but the cost of seeking independent legal advice and the emotional and psychological impact of the anxiety such an investigation may cause.

Appco submits that marketing companies are also negatively impacted by the duplication of effort required when engaging with regulators. For example, marketing companies are regularly required to defend that the contractors they engage are not employees under a common law legal definition. While this is an onerous undertaking for a small business in any case, it is exacerbated when they are required to make the same representations to different regulators. For example, one marketing company received a determination from the ATO that they engaged contractors not employees under the common law, but then needed to respond to a conflicting assessment by the FWO in the course of

² A variety of indicia are outlined in the ATO's Employee or Contractor table at http://www.ato.gov.au/businesses/PrintFriendly.aspx?doc=/content/00232435.htm&page=2#P39_2763.

an investigation. Improving inter-regulator communication would considerably reduce the burden on small business as well as avoid duplication of effort among regulators and their investigators.

1.2 **Compliance costs associated with regulator engagement**

Regulators engage with businesses for a variety of purposes and it is through this engagement that businesses primarily 'experience' regulation and much of the associated compliance costs. As noted above, the compliance costs associated with regulator engagement are varied, ranging from direct costs (for example, financial costs) to indirect costs (for example, the ill effects of anxiety on health and wellbeing). The indirect costs are particularly extensive and difficult to quantify as they include the time spent on compliance and associated losses to business productivity.

"For a new small business with modest turnover, spending close to \$8,000 on legal advice to help me manage a Fair Work investigation was a huge set back. It was an expense I feel like I shouldn't have incurred if Fair Work had been more supportive and open to working together to resolve the matter".

- marketing company owner, April 2013

The Australian Chamber of Commerce and Industry's (ACCI) 2012 *National Red Tape Survey* found that "almost one-half (42.2 per cent) of businesses reported that they spent more than \$10,000 to comply with government regulatory requirements, with 26.1 per cent of respondents indicating that they spent up to \$50,000 on compliance, which is almost equivalent to the cost of employing a full-time worker"³. Between 2011 and 2013, the marketing companies have spent over \$8,000 on regulatory compliance relating to FWO investigations or audits alone. In 2011, one marketing company spent over \$47,000 on an investigation for which no outcome has yet been determined.

It is in the area of indirect costs, however, that the marketing companies experience particular detriment. For example, due to the complex legislative environment governing independent contractor status, the marketing companies are regularly subject to FWO investigations. These investigations induce significant stress and anxiety among small business owners, sometimes resulting in owners closing their business and/or independent contractors pursuing alternative professions.

"I cannot afford to keep fighting – financially or emotionally. It is so hard to get the regulator to understand the complex legislative environment in which my business operates, and they continue to bark up the wrong tree. I've never been more stressed in my life. My wife and I are talking about closing the business".

- marketing company owner, May 2013

³ ACCI, National Red Tape Survey, October 2012, p.7, < <http://www.acci.asn.au/getattachment/caea26ac-b3a5-4eb6-9d45-8488e882d6a2/ACCI-National-Red-Tape-Survey.aspx>>, accessed 5 August 2013.

Such indirect costs can significantly affect the motivation of small business owners, including influencing their decision to shut down their business. In particular, given the encroachment on their personal time (or reduction in their implicit hourly wage) to become familiar with new regulatory requirements or engage with regulators in relation to a dispute or investigation, small business owners may be discouraged from expanding their business. This conclusion is supported by the ACCI's 2012 *National Red Tape Survey*, which found that complying with regulatory requirements hampered the growth of over 50 per cent of small business members⁴. Similarly, indirect costs can be important in influencing the rate of new business formation, which typically requires a period of 'unpaid' preparatory effort to identify, understand and implement regulatory requirements.

Appco Australia submits there is potential for business compliance costs to be compounded by a regulator's approach to engagement (i.e. the manner in which a regulator engages small business). The marketing companies have experienced several sources of additional or unnecessary compliance costs, including:

- lack of effective communication about proposed regulatory changes and/or lack of guidance or inconsistent advice about what constitutes adequate compliance;
- unnecessarily extensive reporting requirements, the supply of similar/same information to a number of government organisations or excessive delays in processing applications;
- engaging with regulator personnel who have received little or no training on the interplay of other areas of relevant legislation (for example, the *Fair Work Act 2009* and *Commonwealth Authorities and Companies Act 1997*) and therefore are compromised in their ability to provide holistic and comprehensive advice;
- an adversarial attitude to business owners demonstrated by an excessive number of inspections or audits or behavioural aggression; and
- excessive prescription in interpreting regulations, resulting in rigid enforcement actions, poor communication on why a breach was considered to have occurred and what must be done to be compliant.

The adversarial attitude of some regulators is the most-cited complaint of the marketing companies. Poor behaviour, including demonstrated aggression contributes to the anxiety of business owners who feel unsupported and unfairly treated.

"My business is regularly but spontaneously visited by Fair Work inspectors who assert they are "watching us" and that my sector was a target for investigations. This "them" against "me" attitude is extremely stressful. I feel anxious because while I am committed to regulatory compliance, it's like they want to catch me out. This anxiety is affecting my business. I dread going to work in the morning".

– marketing company owner, August 2013

⁴ ACCI, National Red Tape Survey, October 2012, p.9, < <http://www.acci.asn.au/getattachment/caea26ac-b3a5-4eb6-9d45-8488e882d6a2/ACCI-National-Red-Tape-Survey.aspx>>, accessed 5 August 2013.

1.3 Suggestions to contain regulatory compliance costs

Appco Australia regards positive small business engagement with regulators as being associated with an educative and facilitative regulatory posture. Such a posture would help to minimise regulatory compliance costs, as small businesses would not need to navigate inconsistent regulatory positions or a lack of coordination across regulators for the sharing of information.

By simplifying regulatory requirements and providing clear and sufficient guidance, small businesses would spend less time on self-education to understand requirements. Regulators would also be less likely to pursue onerous investigations. In addition, small businesses would be less likely to pursue high-cost compliance pathways, for example, by meeting a higher standard of compliance than is necessary.

In respect of regulatory compliance and its associated costs, Appco Australia recommends regulators:

- demonstrate brevity, clarity and accessibility in the communication of compliance obligations;
- demonstrate a capacity and willingness to be flexible and proportionate in their enforcement strategies, with a consistent focus on outcomes;
- ensure regulatory activities are undertaken in a timely manner, so as to minimise the compliance costs for business associated with delays;
- minimise unnecessary compliance and reporting costs imposed on small business, including the cumulative burden derived from engagement with multiple regulators; and
- understand the needs and constraints of small business generally and those specific to their business or industry.

In addition, Appco Australia endorses the Productivity Commission's draft recommendation 3.1, which notes that regulators should remove any unnecessary complexity in regulatory requirements and associated guidance material and set outcome-based regulatory requirements. Appco Australia also agrees that regulators should offer detailed guidance about acceptable solutions including, where feasible, offering a compliance pathway, which if fully implemented, would deem businesses compliant with requirements.

1.4 When differential regulatory treatment is appropriate

Appco Australia submits that regulators should provide differential treatment for small business wherever this is appropriate, noting the unique characteristics of small business (see section 3.1). Appco Australia supports the Productivity Commission's draft recommendation 3.2 which recommends that regulators should provide differential treatment for small business wherever this would maximise net benefits to the community. This includes support for the undertaking of formal regulatory impact analysis, including consultation with small business and the community.

Specifically, Appco Australia agrees that governments and regulators should consider:

- the potential to reduce unnecessary compliance costs for small business, including transitional costs that might affect the appropriate pace of implementation of regulatory requirements;
- the administrative cost, complexity and potential for distorted business behaviour from altering the content of regulation for small businesses; and
- the likely change in compliance outcomes and any risk to regulatory objectives.

While small business should be not exempt from necessary regulation by virtue of its size, it is important for differential treatment to be applied where this is appropriate.

2 Compliance and enforcement

Appco Australia submits that a well designed approach to regulatory compliance and enforcement can lower costs for both small business and regulators. To facilitate such an approach, regulators will be required to assess the risk posed by individual business activities, and how best to mitigate these risks. This section of the submission provides Appco Australia's suggestions to assist governments and regulators:

1. deliver a compliance and enforcement approach commensurate with risks;
2. ensure requirements on small business are the minimum necessary; and
3. ensure enforcement responses are effective and proportionate.

2.1 A compliance and enforcement approach commensurate with risks

Appco Australia submits that good engagement between regulators and small business necessitates that the benefits of improving regulatory outcomes (mitigating risks to communities) more than match the costs of achieving further reductions in risk (both business compliance costs and regulator costs).

Appco Australia agrees with the Productivity Commission that the priorities for governments and regulators should therefore be directed at achieving outcomes at minimum necessary cost (avoiding the inappropriate transfer of costs to regulated small businesses). In delivering a compliance and enforcement approach commensurate with risks, Appco Australia suggests that regulators:

- adopt a formal risk-based framework or at least consider risk as a factor when ascertaining how to target regulatory resources;
- assess both the likelihood and impacts of non-compliance across the sectors of the individual businesses they regulate and allocate their compliance and enforcement resources accordingly;
- develop and devote proportionally more resources (e.g. surveillance and investigation) to the compliance of activities and business that have the greatest potential to impose the highest costs on the community if they are not compliant with regulations.

The culture of regulators and their approach toward business engagement is crucial to deliver a risk-based compliance and enforcement approach. It is important to note that even the most formal and comprehensive risk-based framework will not result in full compliance. However, this is not a reason for regulators to engage aggressively with businesses they identify in the course of preparing a formal risk-based framework. At all times, regulators should focus on positive and collaborative engagement with small business to facilitate productive outcomes.

2.2 Ensuring regulatory requirements on small business are the minimum necessary

Appco Australia supports the Productivity Commission's draft recommendation 3.2 that governments should undertake formal consultation with industry to consider the potential to reduce unnecessary compliance costs for small business when designing regulations. By considering the possible consequences of regulatory requirements before they are imposed is the most effective way to ensure requirements are the minimum necessary.

"It would be helpful if someone thought about the likely impacts of regulatory compliance on small business before new regulations are introduced. I don't think regulators understand how hard it is when the requirements are so onerous".

– marketing company owner, August 2013

Consideration of prospective regulations and their likely impacts on small business should also include 'big picture' thinking to situate the new regulation/s in the context of existing and/or complementary regulations. The marketing companies note that the regulations to which they are subject are not only comprehensive, but interrelated. For this reason, factors to be taken into account when developing regulations should include:

- identification of linkages with other regulations where applicable to ensure transparency where regulations share regulatory responsibilities and to avoid duplication;
- the extent of regulatory coverage in order to mitigate against ambiguity about businesses subject to the regulation;
- the specific regulatory objectives, to avoid uncertainty among regulations when exercising their regulatory functions;
- the degree of prescription, to allow for regulator discretion as appropriate; and
- options for assessing and reconsidering the appropriateness of the regulation over time so that regulators can more flexibly engage with small business if required.

"The regulators I deal with don't seem to fully understand the interrelatedness of many of the regulations to which I am subject. It would be easier if somewhere in the regulations these linkages were identified so investigators understood my position".

- marketing company owner, July 2013

Minimising the regulatory burden on small business should not be regarded as an attempt of small business to avoid compliance. Rather, it should be an objective of governments and regulators to note the unique characteristics of small business which may prevent compliance with excessive or particularly onerous regulatory requirements. For further information about why regulatory compliance is a challenge for small business, see section 1.1 (p.5).

2.3 Ensuring enforcement responses are effective and proportionate

The marketing companies regularly raise concerns that the enforcement response they receive from regulators is often out of proportion with the nature of the alleged breach and its consequences. Furthermore, many marketing companies cite examples where inefficient regulator processes and inadequate engagement opportunities have resulted in enforcement responses that are inappropriate, due to inaccuracy. An example of an ineffective engagement process resulting in a non-proportional enforcement response is included in the case study below.

Ensuring enforcement responses are effective and proportionate - case study

In May 2012 a FWO investigator contacted the marketing company engaged by Appco Group Australia to advise that an investigation has commenced. The investigator did not explain the purpose of the investigation. The Dispute Resolution Officer at Appco Australia contacted FWO on behalf of the marketing company to advise the company was happy to engage to resolve the dispute but would first need to ascertain the nature of the complaint. No response was received from FWO until August 2012 which advised they had been unable to contact the complainant.

In November 2012, FWO wrote to the marketing company requesting a formal recorded interview. The company declined this via letter as it was still awaiting the details of the complaint and sought to obtain this information prior to committing to an interview. The FWO responded and advised that *"the complainant is alleging that the nature of his engagement is that of an employee and not an independent contractor"*.

The marketing company sought legal advice and based on this, declined a further request to attend at interview as they had not received detailed information about the nature of the complaint. The investigator advised that she would be going on holiday and her boss would be looking after the case in her absence and be in contact. No contact was made by FWO during this time. In February 2013 the marketing company received a Determination of Contravention letter finding that the independent contractor was an employee and a sum over \$2500 should be paid to the complainant.

Following receipt of this determination, the marketing company business invested in additional legal advice and responded with further information. FWO did not amend the determination but elected not to pursue it as it was not in the public interest to do so. The marketing company incurred substantial legal costs, feels the determination was made unfairly and is concerned that the matter was not resolved.

Noting the irregular and ambiguous communication and the lack of opportunity for the marketing company to engage directly with Fair Work, this enforcement response was ineffective. Assigning a financial penalty to the marketing company without appropriate engagement is also considered by Appco Australia as a non-proportional response.

Appco Australia submits that in addition to taking into account the level of risk or detriment associated with non-compliance (see section 2.1 at p.11), regulators should be willing to take into account a number of other considerations before determining an optimal enforcement response. These factors may include the compliance history of the business in question, the size of the business and its capacity to comply, public attitudes to risk and the ease of detecting breaches or proving non-compliance.

3 Communication, information and consultation strategies

The marketing companies note that communication with regulators is, in their opinion, the single most important factor in determining a favourable engagement experience.

“As a new business owner, I didn’t speak to one person who could confidently answer what I thought were fairly straightforward compliance questions. I was frustrated that my questions were unanswered by the body regulating my business activity, and I felt confused about what to do”.

- marketing company owner, July 2013

A regulator’s sensitivity to the fundamentally unique characteristics of small business are nowhere more apparent than in the regulators’ communication style, the information it makes available and the consultation processes it facilitates. With effective communication as its central focus, this section of the submission details:

1. some ways in which better communication between regulators and small business can be achieved;
2. strengthening consultation and feedback; and
3. better handling of complaints and appeals.

3.1 ***Achieving better communication***

In achieving better communication with small business, Appco Australia submits that regulators should place a premium on the simplicity, clarity, brevity and accessibility of the information they provide. By favouring these characteristics of better communication, small business will be better informed about the regulations that affect them. As part of an effective communication strategy, regulators should regularly evaluate their communication methods and welcome feedback from the entities they regulate. This would allow for regulators to modify their engagement approach as needed, or to provide targeted communications support to identified sectors or business groups.

Appco Australia regards the accessibility of information as one of the central tenets of effective communication and supports the Productivity Commission’s draft recommendation 5.1 that regulators should ensure information and advice on regulatory requirements is readily available. Specifically, regulators should ensure information and advice on regulatory requirements is readily available, up-to-date, reliable and provided in brief, clear and user friendly formats, using language that is easy to comprehend. Where the benefits are likely to outweigh the costs, information and advice should also be tailored to consider factors that affect the compliance capacities of small businesses.

Accessibility is also one of the characteristics of better communication that has received the most negative feedback from the marketing companies when they reflect on their engagement with regulators. An example of poor regulator communication with small business is included in the case study below.

Accessibility of information - case study

In April 2011, a small business owner engaged by Appco Australia received a letter from the FWO regarding a sham contracting audit. The business owner completed the audit documentation as directed and all requests for further information. The FWO requested an interview which was conducted in May 2011. The business owner sought information about the audit process and next steps, to which they received no further communication until August 2011.

At this time, the FWO did not answer the questions asked by the small business owner, but communicated that a voice-recorded interview with the business owner was required. Unable to cope with additional workload and stress, the business owner engaged legal counsel on employment law. A number of independent contractors engaged by the business were contacted and asked to come in for voluntary interviews. They expressed their concern and confusion to the business owner as the FWO did not inform them of the process or the objective of the investigation.

In September 2011, correspondence was sent on behalf of the business urging finalisation of their investigation and expressing concern that the FWO had indicated that they may use a different test than that applied by the ATO to determine the status of independent contractors and employees. A response to this letter was never received and the matter was never formally closed.

Poor communication practices, including inaccessibility of information, as detailed in the case study above, contribute to negative outcomes for small business. For example, Appco Australia has experienced the detrimental effects of terminated service agreements by business owners that take extended leave for health reasons when they struggle with the stress and anxiety of a poor regulator engagement experience. It is the sustained stress, expense, disruption to business and uncertainty caused by ineffective communication that contributes to small business owners leaving the contracting industry.

While the accessibility of information is paramount, the usefulness of various communication approaches to small business is also worth the consideration of regulators. For example, while the Productivity Commission notes that regulators consider their websites to be one of the most effective means of communicating with small business, this is not the perception of small business owners accessing such websites. Regulator websites are often regarded as unclear, confusing and unnecessarily complex.

“Before applying for my ABN [Australian Business Number], I tried to find out what information I could from the ABR’s [Australian Business Registrar] website. Several tools and checklists were available to determine my eligibility for an ABN but I found them to be contradictory as some of them gave me different indicative outcomes. There was a lot of information which seemed randomly located on the website and I found it very confusing. When I contacted the ABR directly, they said everything I needed to know was published on their website”.

– independent contractor, May 2013

In addition to poor accessibility of information, the marketing companies have expressed other concerns about their experiences of regulator communication, including:

- regulators failing to communicate their requirements simply and clearly;
- poor quality advice that is inconsistent, erroneous or lacking in specificity, with regulators unwilling or unable to advise what constitutes adequate compliance;
- difficulty locating and understanding requirements on websites; and
- too much written material leading to information overload and lack of clarity on priorities.

Inconsistent advice is a common complaint fielded by Appco Australia when dealing with small business owners who are confused and frustrated as a result of their engagement with regulators. For example, in the context of FWO audits and investigations, small business owners will discuss which investigator has been assigned their case. The perception is that the success of the engagement with FWO will depend on the individual investigator and their personal style and interpretation of the regulatory matter.

“To be honest, many of the marketing companies we engage lack confidence that they will be treated fairly by regulators, and also have no idea what process the officer will take or what mood they will be in. We now offer dispute resolution as a service to small business owners to help them in this area as regulators offer very little in the way of consistency or support”.

– dispute resolution officer, Appco Group Australia, July 2013

Small business owners acknowledge that outcomes are inconsistent across regulator personnel, with the quality and consistency of information depending very much on the person within the regulator with whom one deals. This is problematic in the regulatory space when information should be consistent and specific. Regulatory outcomes (for example, in the case of investigations or audits) should not depend on the officer assigned to the matter or to his or her moods.

The Productivity Commission notes that seminars and workshops can also be effective means of providing practical advice and guidance to business on regulatory obligations and how to meet them. Appco Australia submits that while these can be effective where there are concentrated populations of

small businesses that have similar interests and information requirements, the current seminars and workshops on offer are not sufficiently tailored to be of use.

For example, the Office of the Small Business Commissioner has referred Appco Australia and the marketing companies to HomeBiz and its website www.homebizconnect.org.au. HomeBiz is described as a “one stop shop for the home based businesses in understanding and accessing relevant government information, to ensure that they meet compliance requirements and to meet with potential suppliers to help them establish and grow their business”⁵. HomeBiz involves attendance at sessions which are advertised as “short sharp sound bites of information geared towards providing home business start-ups with much needed information on relevant topics”⁶.

The marketing companies would not identify as ‘home-based’ businesses although they are small in size and from the outset feel like attendance at a HomeBiz event is not a good fit. Furthermore, their content is not tailored to meet the specific needs of small business by sector. Thus, their usefulness in helping businesses to “understand and access relevant government information, to ensure that they meet compliance requirements” is limited.

“When I established my business, I wanted to obtain as much information as possible about my regulatory compliance obligations. I heard about HomeBiz but felt it didn’t apply to me, as the information wasn’t specific to my sector, and my business wasn’t a home-based business per se. But I did find the ATO helpline useful in directing me to information I needed. The people I spoke to were very supportive”.

– *marketing company owner, August 2013*

Appco Australia submits that the provision of help desks and information lines can provide small business with simple and low cost ways of accessing regulators and compliance information. Feedback received by Appco Australia from the marketing companies is consistent with the Productivity Commission’s summary that, notwithstanding often long waiting times, in general these services work reasonably well for those businesses that are able to set aside the time to call during business hours.

⁵ HomeBiz Connect “About Us”, <<http://homebizconnect.org.au/about-us/>>, accessed 2 August 2013.

⁶ HomeBiz Connect, “Events”, <http://homebizconnect.org.au/events/>, accessed 2 August 2013.

3.2 *Strengthening consultation and feedback*

Appco Australia submits that regulators should ensure that effective processes for consulting with small business are in place. Appco Australia supports the Productivity Commission's draft recommendation 5.3 that consultation processes are established to allow businesses to provide feedback:

- at low cost;
- on the source and magnitude of compliance burdens;
- on how well the regulation is achieving objectives; and
- any unintentional adverse impacts, including interactions between different regulations and cumulative effects.

While formal consultation and feedback processes may be established, it would also be helpful if regulators would welcome informal feedback from small business as part of an ongoing dialogue. Appco Australia recently approached the FWO to discuss regulatory issues, and received a friendly and supportive response. The representative with whom Appco Australia engaged noted that the FWO so rarely receives direct contact from small business to discuss any issues or problems, and that they welcomed the interaction.

"We are very interested to hear directly from regulated entities if there are any issues or problems on the ground as we genuinely want to help. But we are so rarely approached by businesses that this conversation doesn't happen very often".

– FWO officer, June 2013

While this represents a positive experience of open and facilitative regulator engagement, it raises a question about why more small businesses do not directly approach regulators. The marketing companies consider that this is because engagement with regulators is ordinarily so adversarial, they would be afraid to directly approach a regulator to provide feedback and/or discuss their concerns. In cases where regulators would welcome direct feedback from small business, this is not widely published (if at all), so many small business owners do not realise this is an option available to them.

Appco Australia also supports the greater use by regulators of stakeholder advisory groups, such as those used by the Australian Taxation Office and the Australian Competition and Consumer Commission, as a means to identify better ways to achieve compliance and ensure small businesses are adequately consulted on changes to regulatory requirements.

3.3 **Better handling of complaints and appeals**

Appco Australia submits that regulators should ensure that processes for lodging complaints and seeking review of decisions are readily accessible by small business. Appco Australia supports the Productivity Commission's draft recommendation 5.4 that appropriate mechanisms should have a degree of independence from the day-to-day operation of the regulator, provision for businesses to seek reasons for decisions taken, and processes that allow regulators to learn from complaints.

Currently, Appco Australia perceives there to be limited accessible and effective complaints handling processes among regulators. To address this need, Appco Australia provides an independent mediation and dispute resolution service to the marketing companies, and their independent contractors. While this service is predominantly designed to mediate issues prior to them becoming legal or regulatory disputes, it also provides a mechanism whereby Appco Australia can provide feedback to regulators on behalf of the marketing companies.

"I've had several difficult experiences with the regulator that is currently auditing my business and I would like to be able to provide some feedback to them. But if I was to provide this feedback directly [i.e. not through Appco Australia], I wouldn't know where to start or who to contact".

– marketing company owner, August 2013

Ideally, governments would also ensure that there are independent, low cost mediation services in place to facilitate the resolution of disputes and misunderstandings between small businesses and regulators. As a minimum, regulators must be required by legislation or ministerial direction to cooperate with the mediation agency and provide whatever information the agency reasonably seeks. Appco Australia supports the Productivity Commission's recommendation that this function should be undertaken by Small Business Commissioners (including the Australian Small Business Commissioner with respect to Commonwealth regulators) where currently in place.

When regulators have clearly established processes for lodging or making a complaint, steps should be taken to formally review this feedback to allow for incorporation of lessons learned into administrative practices. In this way, regulators who receive feedback should be actively engaged in considering the content on this feedback, and whether it can be used to improve existing practices.

Appco Australia submits there is an opportunity for Small Business Commissioners to perform an expanded role in the area of regulator engagement with small business. For example, they may participate in the investigation of regulator treatment of small business, and monitor and report on the impacts of legislation and regulation affecting small business. They may also serve as an information portal for small business, for example, to identify and summarise regulatory changes as they arise.

4 Conclusion

Appco Australia is supportive of the Productivity Commission's Draft Report on Regulator Engagement with Small Business, and endorses several of its draft recommendations as detailed in the body of this submission. Overall, Appco Australia believes that beneficial outcomes for small business can be achieved through positive engagement with regulators, including the enhanced performance of this vibrant sector through the minimisation of direct and indirect regulatory compliance costs.

Appco Australia concludes that regulators need clear direction to engage favourably (i.e. helpfully and professionally) with small business. Typically, favourable engagement is characterised by the regulator adopting an educative and facilitative posture rather than taking a combative or adversarial approach. This should include a requirement for communication of compliance obligations to be clear and accessible. In addition, regulators should be consistent in their approach to compliance management and enforcement, ensuring that their enforcement strategies are flexible and proportionate. Furthermore, regulators would do well to further develop their understanding of the unique characteristics of small business, including its specific needs and constraints to allow for appropriate and sensitive engagement with the sector.

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