# Small Business IR System for Queensland

**December 2012**

This paper is a response to the Queensland Government's Issues Paper *"Should Queensland maintain or terminate the referral of industrial relations jurisdiction for the unincorporated private sector to the Commonwealth?"* released on 18 December 2012.

The Issues Paper asks the following question:

> * What do you consider would be the most appropriate arrangements for the on-going regulation of industrial relations for the unincorporated private sector in Queensland, and in particular, should Queensland maintain or terminate its referral of industrial relations jurisdiction for the unincorporated private sector to the Commonwealth?

In response, Independent Contractors Australia (ICA) congratulates the Queensland government on its initiative to review industrial relations for unincorporated businesses. ICA encourages Queensland to 'bring back' the powers that were referred to the Commonwealth in January 2010 and for Queensland to regulate industrial relations for unincorporated businesses.

The reasons for our support are as follows:

- Unincorporated businesses in Queensland are, to a very large extent, micro/small businesses (that is, 0 to 19 employees).
- The Federal *Fair Work Act* (FWA) has proven to be a significant drawback for small businesses because it suppresses the willingness and ability of people to engage in small business. This, in turn, constrains entrepreneurship in Queensland.
- By bringing back its powers for unincorporated businesses, the Queensland government can offer all Queenslanders expanded opportunities to engage in small business, to be entrepreneurial and to create prosperity and jobs.
- By bringing back its powers, the Queensland government has an opportunity (at least in part) to address a fundamental flaw that is entrenched in traditional assumptions about the nature of the employer–employee relationship and how it should be regulated. This is discussed below but, specifically, the nature of the employer–employee power relationships in small business are fundamentally different from those that operate in large businesses and the public sector. As a consequence, the nature of industrial relations regulations requires re-configuration.

Further, we believe that the following should receive serious attention:

- Unincorporated businesses should ***not*** be subject to the same Industrial Relations Act that currently applies to the public sector in Queensland. In other words, that once the powers are brought back, unincorporated businesses should be the subject of a special

and specific Act designed to fit the circumstances of small business. We suggest that this be called the *Small Business (Unincorporated) Industrial Relations Act*.

- That the unique circumstances of incorporated and unincorporated small businesses that do not employ anyone (that is, businesses of one/independent contractors) be reviewed with a view to improving the regulations covering them in Queensland. This would include, as one example, the definition of 'worker' under the Queensland workers' compensation scheme. The reason for this is that the idea and reality of 'business' and 'worker' have changed. There are 268,000 businesses of one (independent contractors) in Queensland. Regulations need to be updated to accommodate this new reality.

## 1. Conceptual re-configuration: What is a worker? What is a business?

For about two decades, regulators around the world have been struggling to understand how to adapt to the huge shift that has occurred (and is still happening) in the way people want to work and do work. The common regulatory approach since WWII has been that work is organized (or must be organized) under the command-and-control structure of the employer–employee relationship.

But this single approach no longer fits the reality of how people are now working. On average, across the developed world, 20 per cent of workers are not employees. They are either businesses of one or businesses where the owner/worker employs a small number of other workers. The concept of 'worker' has broadened beyond that of wage-slave 'employee'. 'Workers' are also the individual people who own/operate businesses. It is within this new reality of work that power relationships must be re-understood.

### 1.1 How many

In Australia:

- 2.1 million people are self-employed workers.
- 1.1 million do not employ anyone. They are workers and businesses all in one.
- 1 million self-employed workers employ, on average, about 6 people.

Put differently, of Australia's 11.5 million workforce, more than 8 million people work in micro/small businesses consisting of business owners who are workers and the people who work with them in the business.

In Queensland:

- 268,000 people/workers are businesses of one (referred to by the ABS as independent contractors).
- An additional 161,400 people/workers are individual business people who employ other people/workers.
- Up to 380,000 work as employees in unincorporated businesses. To this must be added the number of employees (not identified) working in incorporated small businesses. Assuming the national average, well in excess of 900,000 Queenslanders work as employees with those 161,400 individual business people/workers.

That is, in Queensland somewhere in the order of 1.3 million people are workers (self-employed owners, independent contractors and employees) working together in micro/small business (based on data in the Issues Paper). This is the powerhouse of business activity, entrepreneurship, innovation, wealth creation and broad wealth distribution in Queensland.

In releasing the Issues Paper the Queensland government is, in effect, inviting comment, suggestions and ideas on how best to enable this micro/small business powerhouse to achieve its potential. ICA contends that the *Fair Work Act* is flawed, and inhibits and constrains that potential. To address this it is necessary to think about working people outside of the traditional, narrow confines of what is considered the employer–employee relationship.

Queensland, however, only has potential constitutional coverage of a percentage of these people—namely, those people who work in unincorporated businesses. This comprises:

- 195,800 people/workers who are businesses of one.
- 50,700 people/workers who are individual business people who employ other people/workers.
- Up to 380,000 people/workers who work with those 50,700 individual business people/workers.

In other words, in constitutional terms, the Queensland government has the ability to reconfigure the regulation of the working relationships of 626,500 people in Queensland with a view to enabling widespread entrepreneurship and innovation.

The Issues Paper, however, is focused on a narrower target, namely the industrial relations regulation of the 430,700 people in the employer–employee relationship (50,700 individual people who are employers and 380,000 employees). ICA suggests that the regulation of the 195,800 independent contractors should also be reviewed—but as a separate exercise given that this category of worker lies outside industrial relations law.

### *Statistical summary Queensland*

| | Total | Unincorporated | Incorporated |
|---|---|---|---|
| Independent contractors (do not employ) | 268,000 | 195,800 | 72,200 |
| Self-employed people (are employers) | 161,400 | 50,700 | 110,700 |
| Employees (employed by self-employed people) | 900,000 plus (estimate) | 380,000 (up to) | 520,000 (estimate) |
| Total | **1,329,000 plus** (estimate) | **626,500** (up to) | **702,900** (estimate) |
| Caught in *Fair Work Act* | | | 630,700 |
| Available for coverage under QLD IR Small Business Act | | 430,700 | |

*Note*: Independent contractors do not employ anyone, so are not caught in industrial relations legislation.

## 2. Conceptual Re-configuration: A three-tier industrial relations system is needed

The current concepts underpinning industrial relations law contain a fatal flaw in their fundamentals.

The traditional and entrenched assumption of industrial relations systems, including the *Fair Work Act*, is that the employer–employee relationship is one of unequal bargaining power. This assumption underscores every aspect of industrial relations regulation. But this is a theoretical construct that does not play out in reality. In truth the employer–employee power relationship can more accurately be split into three different categories. These differences need to be understood if industrial relations systems are to properly match the needs of individual people, business and society.

The employer–employee power relationships inside organizations should not be thought of as having only one form. The power relationships instead have three distinct and different forms—namely, what happens in:

- Large businesses
- The public sector
- Small/micro businesses

a) *Large firms*: In large firms the business corporate structure is one in which an executive elite runs the firm. This elite most frequently is removed from the risk of loss in the firm, but organises to ensure it can 'cream off' many of the benefits. (The classic agent–principal problem.) Members of the elite are also employees of the firm.

   The owners of the firm (shareholders) are mostly removed from the operations of the firm, although the owner/shareholders are conceptually the 'employers'. In many respects the employer–employee relationship is a legal construct that does not play out in the large firm's structure. It is more accurate to say that the employer–employee relationship is a relationship between one class of employees (workers) and another, higher class of employees (elite executives) operating through a management system. That is, the power imbalance is between the (worker) employees and the (elite executive) employees who control the firm's management system. In this respect, the power imbalance is real and relates to who controls the management system. It can thus be argued that this specific type of power imbalance requires a specific industrial relations regulatory framework.

b) *Public Sector*: Employer–employee relationships in the public sector have strong similarities with those in large firms but with a major difference. As with large firms, the employer–employee relationship is between classes of public service employees. Elite public service (employee) executives manage the managerial system in which other public service employees (workers) work. However, the agent–principal problem is significantly diminished in comparison to large firms.

   The elite public sector executives do not suffer risk of loss but (unlike private-sector elite executives) have a severely limited capacity to 'cream off' profits. This is because the employer (legally, Cabinet/Parliament) dictates the design of the management system, including the wages and conditions of employment. In this instance the power imbalance is real, but it is not between management and workers,

rather it is between individual employees and a management system dictated by a detached Cabinet and Parliament. This again requires an industrial relations management regime accommodating this fact.

c) *Small Firms:* In small firms the situation is markedly different from that operating in large firms and the public sector. In small firms the employer is in fact an individual person and not a management system. The individual owns the firm and personally bears the risk of loss, which means high personal vulnerability. The relationship between employer and employee is entirely personal, one person to another. The outcome is a low level of power imbalance in the relationship.

   For example, the small business employer (individual person) has the ability to fire, which arguably gives the employer a powerful edge. This is also true in large firms. But the employee has the power to under-perform or otherwise exploit the employer (for example, by stealing). In large firms the elite executives do not suffer personal loss when this occurs. But in small business, employee theft or underperformance imposes real harm on another individual person, the small business employer. The employee does not bear the risk of loss (other than loss of job). The small business employer personally bears the risk of loss.

   The result is that any alleged power imbalance is in fact hard to identify because of countervailing power trades-offs between individual people (the employer and the employee, person to person). In this small business environment the regulation of the employer–employee situation needs to be markedly different from that found in large firms and the public sector. In essence, it needs to be 'light touch'. It warrants a workplace relations system entirely different to and separate from those governing large firms and the public sector.

### *Australian workforce composition (approximates)*

| Total Australian workforce 11.3m | % | Small business | Big business & Public service |
|---|---|---|---|
| Self-employed—Independent contractors | 9.7 | 1.1 m | |
| Self-employed—employers | 8.8 | 1.0 m | |
| Employees of self-employed | 53.1 | 6.0 m | |
| *Small Business Totals* | *71* | *8.1 m* | |
| Big business employees | 14 | | 1.6 m |
| Public service employees | 14 | | 1.6 m |
| *Big Business & Public Service Totals* | *29* | | *3.3 m* |

## 3. The current Queensland situation

The central purpose of this discussion is to focus on people working in small business. But some background is helpful.

All private-sector businesses in Queensland are currently regulated under the Federal *Fair Work Act*.

Queensland has, however, chosen to retain control of the regulation of the State's public-sector workforce. This reflects the fact that the State as a sovereign entity has a specific type of employer–employee power relationship with its workforce (as described above). That is, the Queensland government as an employer has decided to retain the way in which the State's public sector employer–employee relationship is regulated and administered. This is done through specific State industrial relations legislation.

The Issues Paper floats the idea of bringing unincorporated private-sector businesses back under Queensland law on the basis that there are significant problems with the Federal *Fair Work Act*.

## 4. The flaws in the *Fair Work Act*

The Issues Paper summarises the business criticisms of the FWA drawn from recent public inquiries. The summary states that the FWA imposes:

- constraints on workplace flexibility
- restrictions on individual agreements
- increasing employment costs that are not offset by productivity gains and which impact on competitiveness and viability of businesses, such as:
  - wage levels and wage increases
  - leave provisions (e.g. parental, personal carers)
  - penalty rates and public holiday entitlements
  - superannuation guarantee
  - shift allowances and
  - minimum shift lengths
- unfair dismissal
- general protections
- union rights of entry
- permitted matters in enterprise bargaining
- increased regulatory burden/compliance and
- a failure to take into account the special circumstances of small and medium sized businesses which are hampered by time constraints and lack of HR/IR resources.

Further, the Australian Industries Group (AIGroup) recently released a scathing analysis of the FWA. This is significant because the AIGroup was the principal business lobby group that supported, encouraged and negotiated the FWA with the federal government and unions. For the AIGroup to now be critical, demonstrates that the FWA has significant failings. The AIGroup's analysis is consistent with the summary included in the government's Issues Paper.

These criticisms of the FWA focus on the commercial impact and outcomes of the FWA. However, the criticisms do not cut to the core of the reasons for the FWA's failings in relation to small business people.

Like all industrial relations laws designed since at least WWII, the FWA's underpinning (as discussed above) is the assumed inequality of bargaining power between employer and employee. This assumed inequality can arguably be demonstrated in large businesses and the public sector but cannot be demonstrated in small business situations.

The FWA has been designed, as with all industrial relations law, to balance the assumed inequality of bargaining power by the imposition of countervailing powers by the state. This is done under the FWA by:

- Delivering power to the Fair Work Authority (IR Tribunal) to hear, settle and determine disputes through a quasi-legal process.
- Delivering power to unions to act for employees within this quasi-legal process.

As it currently stands, the industrial relations debate in Australia primarily relates to whether the FWA is better or worse than prior industrial relations legislation under, for example, the Howard, Hawke or earlier regimes and whether amendments can be made to the FWA to improve it. But that debate still resides within the framework of the assumed inequality of bargaining power.

The essential problem for people working in small business is that the starting point for designing industrial relations laws is wrong. Big business, big government, big unions and big lawyers get together and argue and decide over issues relating to 'big'. In other words, that in the employer–employee relationship in large organizations, a power imbalance does exist and needs to be rectified. The big players design industrial relations laws to create countervailing power relationships favouring employees or, more specifically, employee representatives (unions). This is then applied to people in small business. This is what the FWA does. For people in small business this creates huge distorting outcomes in the way small businesses are able to operate.

The distortions happen because the delivery of countervailing power to unions/employees, when applied to small business actually *creates a power imbalance* rather than addressing a power imbalance. This time the power imbalance is against the individual worker who owns the business (the employer). This individual (small business) person is subject to exploitation through the rules of FWA.

In other words, the industrial relations laws (the FWA in this case) become the source of a power imbalance rather than a correction of it. And it is a power imbalance against the worker who is the small business owner. This is unjust and unfair. It is this injustice that the Queensland government has an opportunity to correct and rectify (in part) by bringing back its industrial relations powers relating to unincorporated businesses. As shown in the statistics above, this proposal offers an opportunity to 430,000 people in Queensland working in small business to do better business.

## 5. What a small business industrial relations system could/should look like

As discussed above, the bringing back of powers by the Queensland government should result in unincorporated businesses being subjected to a special and specific Act designed to fit the circumstances of small business. For the purposes of this argument, we suggest that it be called the *Small Business (Unincorporated) Industrial Relations Act.*

Such an Act should have the following broad features.

### 5.1 Overview of the *Small Business (Unincorporated) Industrial Relations Act*

The Act should exist entirely on its own and should not be connected to the industrial relations legislation that applies to large businesses and the public sector. The mechanisms it deploys and any institution/s that administer the Act should likewise be unconnected to legislation that applies to large businesses and the public sector. The Act should be modelled closely along the lines of consumer protection laws rather than industrial relations laws.

Features should include:

- Legislation worded in simple non-legalistic language. The Act should be short.
- A tribunal operating in a similar fashion to consumer affairs tribunals that would have several functions—including educative, enforcement and review functions as described below.
- The tribunal's most important task would be to ensure that employees had been correctly paid and to make orders imposing correct payments.
- Lawyers would not be allowed to be involved in dispute matters. Parties would represent themselves. The tribunal would have staff available to both employees and employers to help them through any dispute-resolution process.
- The Act would prohibit employers from making it a condition of employment that employees work overtime or work on specific days and times. What days and times people worked and the number of hours they worked would be subject only to agreement between the small business parties themselves.
- In cases of dispute, mediation would be a compulsory first step which, if unsuccessful, would be followed by compulsory arbitration which would lead to a final and binding decision.
- Fines could be imposed on employers where evidence existed of repeated under- or non-payment of employees.
- The tribunal would be charged with a legislative requirement that, where an employer or employee requested information on minimum rates to be paid, that the tribunal must respond with information that could be relied upon as factual by both the employer and the employee.
- Unions and employer representative bodies would not have jurisdictional representative rights under the legislation.

### 5.2 Minimum employment conditions

The Act should contain statements of the minimum rights and obligations of employers and employees to one another including:

- The stipulation of one minimum pay rate applying across the entire small business sector which details the amounts for both full-time and casual employees.
- Establishment of loadings for (a) overtime and (b) public holidays. Loadings should be capped under the Act.

- Stipulation of full-time employee entitlements such as holidays, parental leave, and so on.

**5.3 No Awards**
No awards should exist. The Act should replace all awards by establishing the minimum rates and conditions to be applied to all people working in unincorporated small businesses. Existing awards referred to in the Issues Paper would not apply or have relevance.

**5.4 Dealing with business/market reality**
In more than any other sector of business, people working in small business are immediately subject to the whims of consumers. They must service customers when customers want to be serviced. If small business owners do not service customers when and where customers want, the business is damaged along with the owner's personal income. If small businesses do not service customers when and where customers want, the small business's employees will find that they do not have work and that their personal incomes will suffer. Everyone working in small business operates at the cutting edge of this thing called the marketplace. And it's a 24/7 reality.

To accommodate this reality the Act should *not* be structured around a 9 to 5, Monday to Friday concept—a concept that has well and truly died. Such a concept may apply in some big businesses and in the public sector, but it is a non-reality in small business.

To allow small business operations to meet the realities of market (customer) demands, the Act should:

- Enable 'normal' hours to be worked within any seven day 'week' cycle. For example, 'normal' hours could be from Sunday to Thursday, or any other combination.
- Allow small business employees and employers themselves to make work arrangements of any sort they wish with the proviso that all remuneration meet or exceed the minima stipulated under the Act.

Such an arrangement would provide opportunities for employees and employers to adjust their work arrangements according to their personal preferences.

**5.5 Fair Dismissal Code**
The Act should not include unfair dismissal arrangements (such as those that apply under the FWA). The Act should instead establish a Fair Dismissal Code.

Unfair dismissal laws applying under the FWA are a mechanism for the exploitation of individual workers who are small business owners/employers. Unfair dismissal laws may have justification in large businesses and the public sector because, as previously discussed, both of those institutions operate with unbalanced power relationships which are embedded in their management systems. Workers in the public sector and large businesses are entitled to protection from potential unfair treatment by the management system/bureaucracy that stands over them.

But in small business there is no justification for unfair dismissal laws. (Note: this is not the same as preventing discrimination and harassment in the workplace. This should continue to apply to small business but under the specific Acts relevant to those issues.) Under the FWA the evidence is abundant that where an unfair dismissal action is taken against a small business owner, the small business owner personally bears considerable personal cost. The

FWA processes require the involvement of lawyers at great expense. Any payments to an employee directly come out of the pocket of the small business owner. The small business owner is thus subject to institutionalized exploitation created by the FWA. The outcome is that small business owners are reluctant to employ people, thereby limiting small business job creation.

This problem was recognized by the Federal Labor Party in its policy platform for the 2007 federal election. It promised to create a 'Fair Dismissal Code' for small business that largely would resolve the inappropriateness of unfair dismissals laws applying to small business. This has never been implemented under the FWA.

A Queensland *Small Business (Unincorporated) Industrial Relations Act* should include a Fair Dismissal Code. Consideration for the design of this could/should be drawn from the principles outlined in the Federal Labor Party's 2007 election commitment.
Some features would be:

- Termination would be fair where there were breaches of work safety requirements, acts of discrimination or harassment, situations where an individual was drunk or used illegal drugs. That is, situations where the employee exposed the employer to breaches of the law.
- Conversely, an employee should be protected from dismissal where the employer broke the law: for example, for breaches of work safety requirements, committing acts of discrimination or harassment, being drunk or affected by illegal drugs and so on.
- Necessary but simple processes for the issue of warnings and so on.
- The tribunal should be empowered to consider dismissal issues and to make rulings. Cases should be heard without lawyers, conducted in a non-legalistic environment similar to small claims cases covering consumers. Parties should represent themselves.

**5.6 Strikes**
Laws covering strikes are not relevant for small business situations. Strikes are a feature of large businesses and the public sector. The reality is that if a small business employee withdraws his or her labour, the small business owner steps into the breach. The Act does not need to have reference to strike situations.

**5.7 Enterprise bargaining**
Enterprise bargaining has no relevance for small businesses.

Under the FWA, enterprise bargaining is a key feature of the Act. Under its current form of 'good faith bargaining', larger businesses make the observation that this is a form of enforced bargaining. Enterprise bargaining is a long, drawn-out, legalistic and highly expensive process that exists entirely to govern how unions and big business/public sector employers interact. It is a process far too expensive and drawn-out to have any use for people in small business.

The *Small Business (Unincorporated) Industrial Relations Act* should not include provisions for enterprise bargaining.

**5.8 Unions**
Union membership density currently stands at 13 per cent in the Australian private-sector workforce but its membership exists almost entirely in the 14 per cent of the workforce working in large businesses. Under this circumstance there is some justification for allowing

unions to have jurisdictional coverage rights under industrial relations laws (for example, the FWA).

However, union membership in small business is almost non-existent. There is no justification for allowing unions to have automatic jurisdictional rights covering people in small business.

The *Small Business (Unincorporated) Industrial Relations Act* should not include reference to unions or employer associations as having jurisdictional rights. There should not be anything, however, to prevent small business employees or employers from using the services of unions or employer associations to assist them on any matter.

**5.9 Minimum employment conditions reviews**
Employment conditions should be reviewed on a regular basis.

The *Small Business (Unincorporated) Industrial Relations Act* could/should allow for the tribunal to review employment conditions and report to Parliament with recommendations for changes.

## 6. The Australian Federation and the value of competition

The creation of a small business (unincorporated) industrial relations system in Queensland would add great value to the Queensland economy and overall Australian economy. It would set the scene for a broader understanding of workplace relations regulation in Australia.

The Australian federation offers Australia unique opportunities to

- Do things well at the national level for situations where national consistency provides advantages.
- Allow localized solutions to accommodate local needs.

It is not necessary for everything to be the same. In fact, where States come up with local solutions to suit local needs, opportunity exists for good ideas developed in one State to be picked up, replicated (and even improved) in other States. A competitive federation is good for policy development. This is the situation that applies in industrial relations laws.

The *Fair Work Act* has to a large extent become a monopoly industrial relations system. It is not a system subject to competition. The result is an ossified process incapable of responding and adapting to the needs of its market: businesses, people and the economy. This is evidenced and summarized in the Issues Paper.

A federal industrial relations system may suit the needs of big business operating nationally but it does not necessarily suit the needs of people in small business. Small business is always about local needs. By bringing back its powers for unincorporated businesses, Queensland has the opportunity to tailor-make simple, localized and easy-to-use industrial relations regulations for small businesses.

If this were to occur, small businesses would enter an environment where, if they preferred the federal system (FWA), they would incorporate. If they thought the Queensland small business system was better, they would be unincorporated. This is a model of competitive policy. Let the marketplace (the people) decide which system suits them best.

## 7. Some consequential issues

There are several questions and consequences that need to be considered in the event of Queensland bringing back its powers for unincorporated businesses. ICA understands the following to be the case.

### 7. 1 Superannuation

The requirement for employers to pay superannuation on employees would be unaffected by Queensland bringing back its powers. Employers in unincorporated businesses would still be required to pay under the federal superannuation guarantee arrangements.

### 7.2 Federal Paid Parental Leave scheme

It's assumed that the bringing back of powers and the requirements under the *Small Business (Unincorporated) Industrial Relations Act* would include entitlement to parental leave. This being the case, the entitlement of a parent taking leave under the Commonwealth's paid parental leave scheme of 18 weeks would be unaffected.

### 7.3 Work Health and Safety laws

The coverage of Queensland work health and safety laws to all businesses would be unaffected by a bringing back of its powers.

### 7.4 Transition

Consideration of transition issues would need to be considered for people moving from the FWA to a Queensland small business system. This would include consideration of how to manage existing pay arrangements under the FWA to what might apply under a Queensland small business system. Such issues should be subject to detailed research and public debate to ensure a full understanding of what is involved.

### 7.5 Independent Contractors

Independent contractors are not employees or employers of anyone. In Queensland there are 195,800 unincorporated and 72,299 incorporated independent contractors. Industrial relations laws do not apply to them. However, independent contractors are subject to administrative discrimination under workers' compensation and many other state-based regulatory arrangements. This limits the entrepreneurial potential of independent contractors. In considering improvements to the small business environment in Queensland, it is recommended that a review is conducted of regulations affecting or impacting on independent contractors with a view to reform.