

**Restaurant & Catering Australia Submission to the Senate Education,
Employment and Workplace Relations Committee
Inquiry into the Provisions of the Fair Work (Transitional Provisions and
Consequential Amendments) Bill 2009**

Background

1. Restaurant & Catering Australia (R&CA) is the peak national organisation representing the interests of restaurateurs and caterers.
2. The Association is a federation of State Associations that work together on matters of national importance. The State Associations had a combined membership of over 7,000 in the 2008 calendar year. There is an R&CA member restaurant and catering association in every State and Territory.
3. The Business Register records 68,022 businesses in the total accommodation, cafes and restaurant sector (including hotels, pubs and clubs). Restaurants, cafes and catering businesses account for 55.4% of the hospitality industry by numbers of businesses.
4. The overall numbers of businesses in the accommodation, café and restaurant sector have grown by 2.1%, 1.8% and 1.8% each financial year from 2004/05 to 2006/07. It is estimated that there were 40,000 restaurants, cafes and caterers in Australia in 2009.
5. Turnover in the restaurant, café and catering industry was below 2008 levels in February 2009 but slightly higher in January 2009 (on the back of strong Domestic tourism and events stimulated demand). Turnover began to slide as sentiment slipped in February / March 2008. Turnover for the 2008 year was in the order of \$15 Billion for cafes and restaurants.
6. A report released by the Australian Bureau of Statistics¹ in April 2008 shows a slowing in restaurant profits (as forecast by the R&CA) with over 50% of businesses (the businesses employing less than 0-4 people) generating an average LOSS of .03%.
7. Businesses reported to the ABS that restaurants had an average net profit of 3.8%, down 5% on the previous survey period (2004-05). Labour costs have risen an average of 10% in the survey period whilst in the same period turnover increased by 9.2%. Meals consumed in restaurants income grew by 6.2% with the major increases coming from takeaway and liquor sales. Profitability performance is an ongoing challenge with wage costs continuing to increase (particularly for those businesses in the Federal system) with a significant rise in wage rates effective 1 October.
8. In the period between the December Quarter 2008 and that of 2007 the price of restaurant meals increased by 4.4%². In the same period the price of food inputs to restaurants rose by an estimated 6.4% based on the combination of food inputs to restaurants (Dairy products by 7.9%, Bread and Cereal by 8.9%,

¹ Cafes and Restaurants Industry Survey, ABS 8655.0

² ABS 6401.0 – Consumer Price Index, Dec 08

Lamb and Mutton by 7.1%). In the same period the cost of fast food rose by 7%.

Restaurant Industry Employment

9. The Australian Bureau of Statistics *Cafes and Restaurants Australia* report (released in April 2008), cited industry employment at 195,814 persons. According to ABS Labour Force data³, industry wide employment in May 2004 (for accommodation cafes and restaurants) was 468,400. Data previously purchased from the ABS suggested that there was 223,000 persons employed in cafes and restaurants (48.5% of hospitality employment).
10. In July 2008, in their Job Outlook publication the Department of Education, Employment and Workplace Relations reported (as outlined in Figure 4) 242,200 people employed in the cafés and restaurants.
11. *Cafes and Restaurants Australia* also noted that 53.4% of employees were casual with permanent full time employees making up 25.4% of the labour force. The proportion of casual workers is more than double the all industry average of approximately 26%. As a result there are more employees subject to rates greater than the standard hourly rate than in other industries.
12. The number of casual employees has been steadily growing by an average of 1% per annum. This casualisation of the industry has been evident over the past ten years. The largest proportion of the restaurant, cafe and catering workforce is part-time females.
13. The difference in the nature of employment in the hospitality industry is clearly demonstrated by the ABS Forms of Employment data⁴. The hospitality industry has a roughly 40:60 split of full time to part time workers, whereas the all industry average is 70:30.
14. Other characteristics of the hospitality labour market include a lower than average proportion of working operators (reflecting the high labour intensity of the sector) and a lower than average (6.6%) number of workers on contract. 74% of full time workers in the hospitality industry have leave entitlements compared to 89% across all industries.
15. Despite worsening economic conditions and a bleak outlook for tourism, DEEWR⁵ projects employment growth for the cafes, and restaurants sector will be in the order of 2.2% per annum between 07-08 and 2012-13 (an increase of 27,700 over the five year period).
16. DEEWR Job Outlook reports that 48.1% of jobs in Accommodation, Cafés and Restaurants are part-time (approximately 116,500 in cafes and restaurants).
17. Despite relatively strong job growth projections, the hospitality industry also has the highest rate of job turnover per annum at approximately 24%. High staff turnover produces many 'costs', including those associated with recruitment,

³ ABS 6202.0 – Labour Force Australia

⁴ ABS Forms of Employment 6359.0

⁵ *Ib id*

any firm-specific training and the need for new employees to familiarize themselves with their new occupation and/or workplace. These costs are particularly hard hitting for small to medium tourism/hospitality enterprises, which account for the majority of businesses in the hospitality industry.

The Restaurant Industry & the IR System

18. At the outset of the Award Modernisation process it was estimated by Restaurant & Catering Australia that 25% of the employees in the restaurant and catering industry are covered by NAPSAs, 15% are covered by AWAs / Collective Agreements, 7% are working operators and 25% are covered by State Awards.
19. Restaurant & Catering Australia respects the Government's mandate to reform the Industrial Relations system to the extent that it was detailed in the pre-Election statements in 2007.
20. R&CA supported the concept of Award Modernisation from its inception until it became obvious that modernisation would not be undertaken in a manner consistent with the Minister's Modernisation request or the policy position stated by the Government prior to the 2007 Election.
21. Prior to the 2007 Election Restaurant & Catering Australia was assured that the process of Award Modernisation would be an award making process and not an award variation process. Assurances were provided that modernisation would result in building awards from the 'ground up'.
22. In the Hospitality Industry (General) Award this IS NOT what has happened.
23. The hotels award has been amended very simply to rope in restaurants, cafes and caterers.
24. In addition to assurances provided direct to Restaurant & Catering Australia, there were many references to the creation of modern awards in the enabling legislation and in the Award Modernisation Request.
25. The Modernisation Request makes it very clear that 'the modernisation process will not increase costs for employers'. The current Hospitality Industry (General) Award will increase costs for employers in the restaurant, café and catering sector between \$150 Million and \$250 Million and R&CA estimates are that 8,000 jobs will be lost as a result.

The Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

26. The Deputy Prime Minister has publicly acknowledged that there is a problem with the impact of Award Modernisation on the restaurant industry and has

suggested that this Bill is the means through which this problem will be addressed.

27. Restaurant & Catering Australia contends that this is possible and has made suggestions as to how this could be achieved in the Award Modernisation section below.

Transition to new system

28. The Implementation of the Forward with Fairness policy, through this and other legislative vehicles will mean the most significant change in the workplace relations system in the last decade. This change will come at a very significant cost to employers as knowledge is gained and systems change. Let alone the additional wage costs in complying with the new arrangements.
29. Restaurant & Catering Australia contends, that business, particularly small businesses are unable, in this environment, to adsorb the costs of this change. In order that this change take place without significant disruption in the business community, Government will need to allocate financial resources to the implementation task.
30. To service small business these resources must be targeted toward employer organisations. These are the organisations that these businesses turn to for advice on workforce matters and the natural point of advice for the business community.

Recommendation

That process of negotiation of the Bill give rise to the commitment of significant resources to a education campaign to inform employer of their obligations under the changed system, through employer associations.

Application of the Safety Net

○ National Employment Standards

31. The brunt of any additional costs associated with the NES will again fall on those industries with a large proportion of females 'of child bearing age'.
32. In relation to parental leave, it is suggested in the Explanatory Memorandum, for the Fair Work Bill, that the impact the male parental leave will be low but that the most significant impact will be most likely through unpaid leave for female workers.
33. As noted in the first section of this submission, the restaurant and catering industry has the greatest proportion of female workers, in the younger age range, of any industry. As such, the restaurant, café and catering industry, will bear the brunt of these provisions of the National Employment Standards.
34. Changes to personal / carers leave are to be minimal in their impact other than the extension of unpaid compassionate leave to casuals. This measure too will

also have a disproportionately large impact on the restaurant, café and catering industry.

35. The Explanatory Memorandum refers to 24.7% of employees being casual yet in the restaurant and catering industry this figure is closer to 54%, double the average of all industries.
36. It should be acknowledged that the proposed introduction to the National Employment Standards are not without additional costs to business, in particular those sectors of business that are small businesses, dominated by females of child bearing age that employ large numbers of casuals.
37. The Department of Education, Employment and Workplace Relations stated in the Explanatory Memorandum for the Fair Work Bill 'The Department does not anticipate that the impact of these regulations will be different across industries, occupations and regions'. Restaurant & Catering Australia contends that, in relation to the NES, this is not the case. Employers in the Personal Services Sector (predominantly retail and hospitality) are, whilst 25% of employment and 33% of projected new jobs, the net losers from the changes proposed.
38. Restaurant & Catering Australia acknowledges the significant consultation that has taken place around the National Employment Standards. The Association considers however, that this was undertaken against the backdrop of a different economic environment and a different labour market to that of January 2009.
39. The industries that are the most negatively impacted by the introduction of the NES (and the Award Modernisation process) are the only industries experiencing any sort of commercial growth in the current economic environment.
40. Restaurant & Catering Australia is very concerned about the amendment in the Fair Work Bill process to allow an employer's refusal to accommodate a request for flexible working arrangements or to grant a second year of parental leave to be resolved by Fair Work Australia.
41. In the requests for flexible working arrangements section of the Explanatory Memorandum, for the Fair Work Bill, there was a suggestion that 'some minor administrative cost, primarily the time spent by management and/or human resources staff to consider a request and prepare a written response to such a request'.
42. As detailed in the submission made to the consultation into the NES, and the Fair Work Bill, restaurants and cafes do not have human resources staff and, in many cases, do not have management other than the business owner. As one third of new jobs are being created in sectors dominated by small business (personal services), that are in a similar situation, consideration should be given to this impact in businesses without support staff.
43. Restaurant & Catering Australia is concerned at the cost and time impact of the process of managing flexible working arrangement requests itself. This concern is further magnified by the time and cost of working with Fair Work Australia on

disputes over refusals of requests (particularly in an industry where, on operation grounds, refusals will be more the norm than the exception).

Recommendation

That the Bill provide for a staged introduction of the administrative requirements for application for and response to requests for flexible working arrangements and for the dispute resolution process, through Fair Work Australia, allowing for an exemption for Small Business.

Application of the Safety Net

- *Award Modernisation*
- *The Hospitality Industry (General) Award*

44. In the Explanatory memorandum to the Fair Work Bill it stated that 'The simplicity of modern awards will assist parties in this phase and also in their future involvement in award related processes'. The Hospitality Industry (General) Award is a 47 page document of which 18 pages have no relevance to the restaurant industry. The award contains 68 classifications compared to the 7 proposed by R&CA in its draft modern award. There is nothing simple about the Hospitality Industry (General) Award 2010.
45. Restaurant & Catering Australia questioned the statement in the above Explanatory Memorandum that 'Employer groups broadly support modern awards'⁶. R&CA, at least, believes that the modernisation process is flawed and that the outcome is inconsistent with the Award Modernisation Request and the Workplace Relations Act 1996 (Cth.). It is not broadly supportive of modern awards.
46. The Hospitality Industry General Award 2010 as proposed by the AIRC is totally unacceptable to the restaurant and catering industry. The award is a 'cut and paste' from the federal hotels award. Without reiterating all of the thousands of pages of evidence tendered to the Commission on the unsatisfactory nature of the hospitality modern award, the fact that the commission has sought to impose outdated, hotel specific award conditions on the restaurant industry is totally contrary to the intention of the modernisation process.
47. The imposition of a evening penalty (on all hours worked after 7pm) on an industry in which the majority of hours are worked after 7pm, because it was in the hotels award is an example of the insanity of the modernisation decision. This provision came from the 6 o'clock swill that was eliminated from hotels in 1967.
48. There are several other examples, however, the additional penalty provided for working on Sundays (at 175%) in another that will have a very deep impact on industry practice and cost, should it eventuate. R&CA considers that many restaurants will close on Sunday as trading will cease to be viable.

⁶ EM Fair Work Bill 2000, pxxx

49. Once again this is a hotel-based provision that was brought about in a period when liquor was only able to be sold through hotels on Sundays. In an industry such as the restaurant and catering industry that has a significant proportion of trade on a Sunday and services the needs of domestic and international tourists 7 days a week, this additional penalty comes at significant additional cost and will impact on restaurant opening hours.
50. As stated above, these provisions come at significant additional cost to employers. This is contrary to the terms of the Award Modernisation request which states at 2(d) that award modernisation should not result in 'increase cost for employers'. The additional cost is an additional regulatory burden on business (contrary to 576A(2(a)) of the WR Act), is not economically sustainable or promote flexible modern work practices (contrary to 576A(2(c))), and as it will lead to reduced employment / hours worked by employees in the industry in contrary to 576B(2(b and c)).
51. These are but two examples of many that demonstrate that the award modernisation process has not been acceptable or consistent with the intention in the Workplace Relations Act or the Minister's Award Modernisation request.
52. These provisions are not modern, would apply additional cost, and come from industry specific conditions in an old award, all of which were to be NOT what modern awards were about.

Recommendation

That the Bill provide for a complete deferral of the application of the provisions of a modern award in a circumstance where the award is clearly in conflict with the objectives of the Award Modernisation objectives and the conflict can not be remedied through the transition process.

Conflict of objectives

53. S 2 (c) of the Ministers Award Modernisation Requested states that the creation of modern awards is not intended to disadvantage employees. S 2 (d) of the Ministers Award Modernisation Requested states that the creation of modern awards is not intended to increase costs for employers.
54. There may appear to be a conflict between these two objectives, however, there is a way to reconcile this apparent conflict. That is to measure employee conditions in terms of take home pay, measure employer costs by actual payroll outlay and, through taxation reform, decrease the 'non take home' component of wages.
55. Given the tax cuts promised in July 2009, it is possible for this Fair Work (Transition) Bill to allow for a reduction in the gross rate payable by employers in lieu of increased take home pay for employees.

56. Restaurant & Catering Australia contends, however, that this would be difficult to achieve through an Award as complex as the Hospitality Industry (General) Award.
57. In a more simple award (such as that proposed by R&CA in the Award Modernisation process), this could be achieved through lowering base gross rates of pay to the levels required to preserve take-home-pay levels. This would effectively allow for increased costs to employers, of award modernisation, to be paid for by the tax cuts rather than being absorbed by the business, which is contrary to the objectives of award modernisation and in this environment, would be counter-productive.

ILLUSTRATIVE EXAMPLE

Joe gets paid \$50,000 as a trade cook (under the proposed Hospitality Industry (General) Award a Level 4) because of the overtime, weekend and evening penalties applied to his base rate. At this rate of pay Joe takes home \$777 per week. After July 1 Joe will potentially receive \$798 per week.

It is proposed that as part of the transitional arrangements the base rate in the modern award should be reduced such that Joe continues to receive \$777 per week (i.e. the rate be decreased from \$637.69 to \$612 per week).

This decrease would allow for an offset for increases in the costs incurred through award modernisation in the form of weekend penalties, evening penalties and classification shifts.

With the REDUCTION in base rate Joe would (post award modernisation), if employed in Queensland, earn for the same shift, \$968 per week gross and receive take home pay of \$802.

58. The impact of the Minimum Wage review would also need to be considered in the context of a transition that would provide a take-home-pay guarantee alongside a lowering in gross rates of pay. It is suggested that all rates would need to be adjusted effective 1 January to simplify the transition to the new system.
59. This approach to managing the conflict of objectives in the modernisation process and is consistent with the recently floated Take Home Pay Guarantee. At 197 the Explanatory Memorandum makes it clear that if 'award rates decrease, but an employee's pay does not decline (because pay is maintained by their employer), an order cannot apply'.

Recommendation

That the Bill provide for a reduction in gross rates of pay such that the existing rates of take home pay are preserved once the 2009 tax cuts have taken effect, to be implemented from January 1, 2010, to off-set increases in employer costs borne through award modernisation.

Take Home Pay Guarantee

60. Restaurant & Catering Australia submits that the safety net for take home pay (s45 – 45) of the Bill should have a reciprocal provision for employer costs. The Association believes that, given the direction in Award Modernisation process was to both provide a safety net for employees and ‘not increase costs for employers’ surely both conditions should enjoy legislative protection this Bill.
61. There is a clear and obvious inequity in the proposed process where Fair Work Australia is, on one hand, empowered to make ‘take-home pay orders’ to remedy any reduction in pay and on the other granted scope to make orders to ‘phase in’ minimum wages in modern awards on application by an employer where it is satisfied that such measures are necessary to ensure the ongoing viability of a business.
62. The phasing in of additional costs is not the same a remedy.
63. Restaurant & Catering Australia contends that the process of responding to an application for take-home-pay orders may in itself add a significant administrative burden on businesses. The process of investigating the working hours of employees in terms of ‘for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work’ could be very onerous for employers.
64. Restaurant & Catering Australia believes that the process of the defence of the comparison of rates of pay would be such that it would be beyond the capacity of most small businesses. As such, it will fall to consultants to undertake this task. In businesses without a Human Resource infrastructure, this will be prohibitive and be likely to lead to the payment of the claimed differential rather than equitable defence of the claim.
65. R&CA proposes that a small business exemption be imposed from Take-Home-Pay orders or at the very least the Bill should allow for a penalty for vexatious claims so as to discourage false claims.

Recommendation

That the Bill provides for a guarantee of no increase to employer costs as a reciprocal arrangement to the take-home pay guarantee, providing for no increase in employer costs at any stage of the implementation of modern awards.

That the Bill allow for a small business exemption form Take-Home-Pay orders or provide for a penalty for vexatious claims.

Modern Award Transition

66. The five-year scope for the transition to the modern awards (i.e 2009 – 2014) will represent the most turbulent financial period in Australia's history. In this period it is likely the economy will traverse very deep lows and period of recovery in a fairly erratic fashion.
67. For this reason it is suggested that any increases in rates / conditions, for which there are no off-setting savings for employers are left to the end of the transitional period.
68. Restaurant & Catering Australia has little confidence in the Australian Industrial Relations Commission to respect the wishes of the Government, in allowing for the Five-Year Transition, given the experience of the Governments wishes being disregarded by the Commission in the Award Modernisation process.
69. R&CA therefore requests that the transition period and the arrangements for transition (including the capacity to delay the heaviest cost increases until late in the transition period) be confirmed in this Bill.

Recommendation

That the Bill provide for transition arrangements for modern awards, established by the AIRC or FWA delay any areas of cost increase, that are not be off-set by corresponding decreases in cost, until the end of the transition period.

Modern Awards Review

70. Restaurant & Catering Australia considers it vital that the review of modern awards that is to be conducted after 2 years should consider the extent to which the modern awards have increased employer costs an the extent of compliance with the modern award.
71. R&CA contends that, after this period, despite the fact that many of the areas of significant cost increases are likely to be yet to be implemented (as they will be subject to a five-year implementation), the process of transition and the more minor areas of increase will still have had significant cost impact.

Recommendation

That the Bill provide that the review of modern awards, that is to be conducted after 2 years, consider the extent to which the modern awards have increased employer costs an the extent of compliance with the modern award.

Bargaining, agreement-making and industrial action

○ *Agreement Making*

72. Noting that the WA will cease to exist on 31 January 2010 to allow it to assess collective agreements made before 1 July 2009 using the current no-disadvantage test and ITEAs made until 31 December 2009 under saved provisions of the WR Act, R&CA is concerned that agreement processing will effectively stall until January 2010.
73. The Association submits that administration of the system during this transition process must ensure that parties are not disadvantaged. Timelines for processing agreements must be maintained at a reasonable level to ensure that employers are not potentially subjected to make-up pay claims (as they are now).

Recommendation

That process of negotiation of the Bill give rise to the commitment of resources to ensure the efficient processing of agreements through the transition period.