

RESTAURANT & CATERING AUSTRALIA
SUBMISSION TO THE SENATE
EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS COMMITTEE
ON THE FAIR WORK BILL 2008

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RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the peak national organisation representing the interests of restaurateurs and caterers.

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 6,500 in the 2007 calendar year. There is an R&CA member restaurant and catering association in every State and Territory.

THE RESTAURANT INDUSTRY

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.

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.

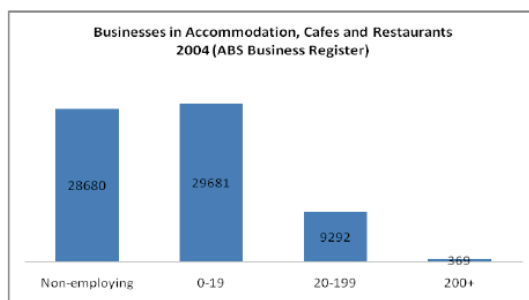


Figure 1 – Hospitality Businesses by Employment Number, 2004

Turnover in the restaurant, café and catering industry has been at or below that of last year for each month of 2007/08. As indicated in the figure 2 turnover began to slide as sentiment slipped in February March for this year. Turnover for the 2007-08 year was \$15.56 Billion for cafes and restaurants compared to \$13.59 Billion in the 2006-07 year.

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%.

Businesses reported to the ABS 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.

In the period between the September Quarter 2008 and that of 2007 the price of restaurant meals increased by 4.5%². In the same period the price of food inputs to restaurants rose by an estimated 5.6% based on the combination of food inputs to restaurants (Dairy products by 11.3%, Bread and Cereal by 9.2%, Meat & Seafood by 4.4% (with some meats by 8.6%)). In the same period the cost of fast food rose by 6.9%.

¹ Cafes and Restaurants Industry Survey, ABS 8655.0

² ABS 6401.0 – Consumer Price Index, Sept 08

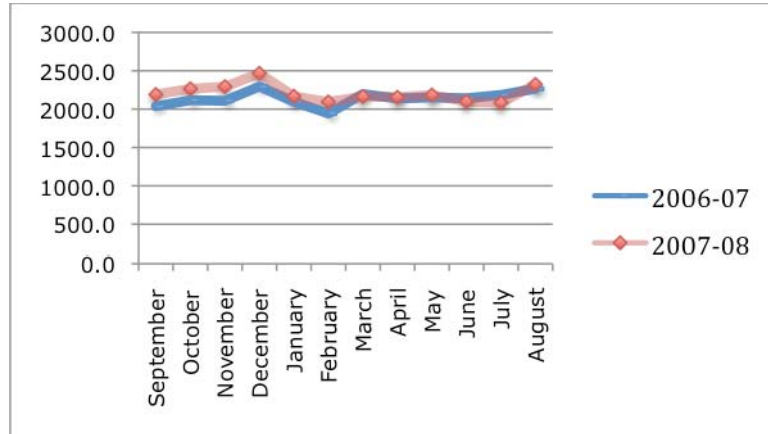


Figure 2 - Café, Restaurant and Take Away Food Turnover (annual \$ Million 06/07-07/08) – ABS 2008

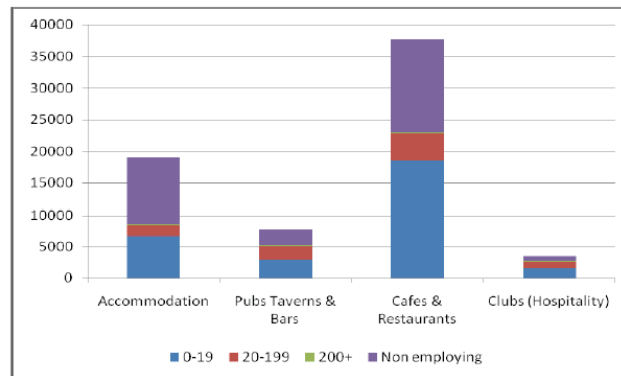


Figure 3 – Proportion of the Hospitality Industry by Sector and number of employees

RESTAURANT INDUSTRY EMPLOYMENT

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 ABS7 (as detailed in the table below) suggested that there was 223,000 persons employed in cafes and restaurants (48.5% of hospitality employment).

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.

³ ABS 6202.0 – Labour Force Australia, June 2006

	Full Time	Less than Full Time	AWOTE
November Quarter 2002	105,000	116,000	\$697.10
February Quarter 2003	104,000	112,000	\$674.30
May Quarter 2003	98,000	125,000	\$683.10
August Quarter 2003	110,000	113,000	\$676.10

Table 1 – Employed persons in cafes and restaurants, 2003-04

Figure 3: Accommodation, Cafés and Restaurants Sectors - Employment Level ('000) – February 2008

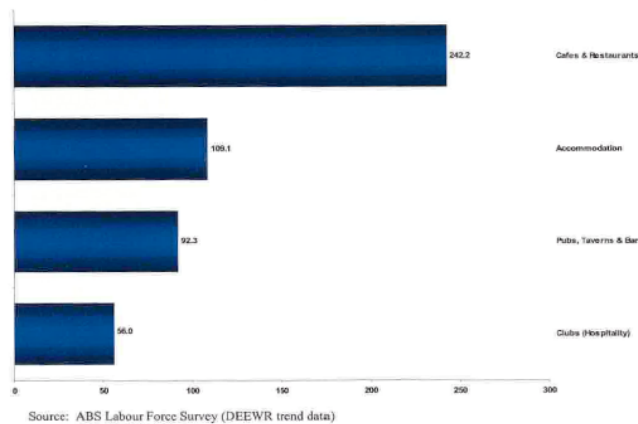


Figure 4 – Cafes and Restaurants, 2008

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.

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.

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.

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.

⁴ ABS Forms of Employment 6359.0

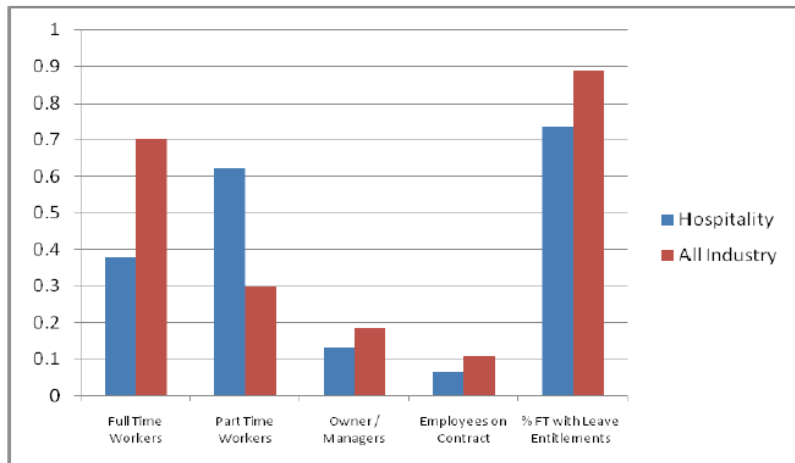


Figure 5 – Forms of Employment, ABS 2006

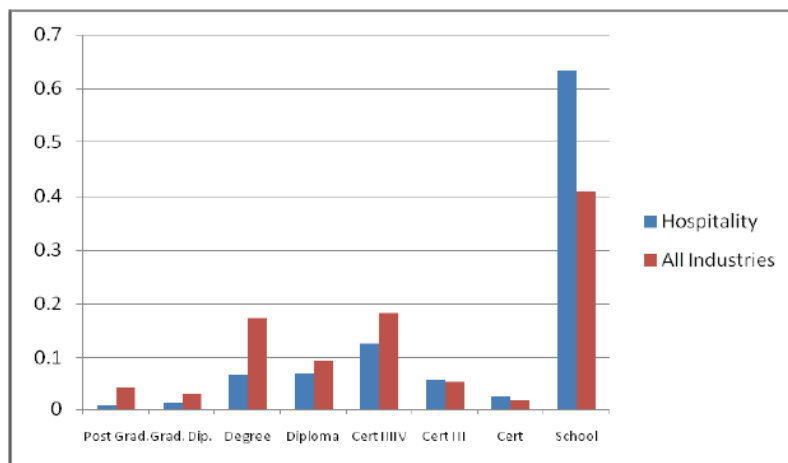


Figure 6 – Educational Attainment, ABS

The hospitality industry has among the lowest level of education attainment of any industry. Approximately 65% of workers have no post school qualifications compared to 40% as an all industry average.

The hospitality industry has the lowest average pay rate of any industry with the average full time rate of pay sitting at \$751 per week and the part time rate of pay a \$232 against an all industry figure of \$388⁵.

Restaurant & Catering Australia contends that, in part at least, this level of remuneration is due to the mix of employees in the hospitality industry in entry level positions compared to other industries. The major occupations in the wider hospitality industry include waiters, kitchenhands and bar attendants. These occupations are all regarded as having good to very good career prospects or are in other words still undergoing significant growth and are in shortage.

⁵ Employee Earnings Benefits and Union Membership, ABS 6310.0

Occupation	% in Accommodation, Cafes and Restaurants	Number Employed
Waiters	89.90%	102,400
Kitchenhands	40.70%	95,200
Bar Attendants	88.60%	55,800
Chefs	82%	55,400
Restaurant & Catering Managers	70.20%	50,800
Cooks	63%	33,800
Hotel and Motel Managers	97%	22,900

Table 2 – Occupation Distribution, Key Occupations, Accommodation Cafes and Restaurants¹⁰

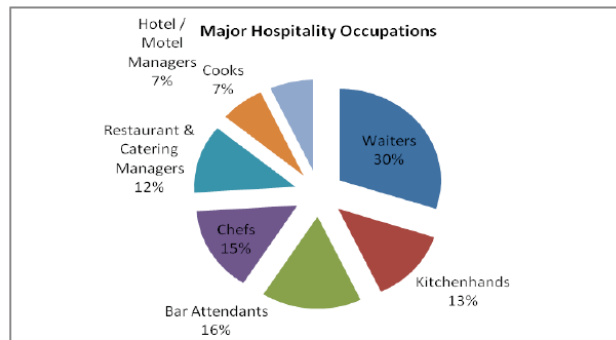


Figure 7 – Proportion of Employment in Major Hospitality Occupations

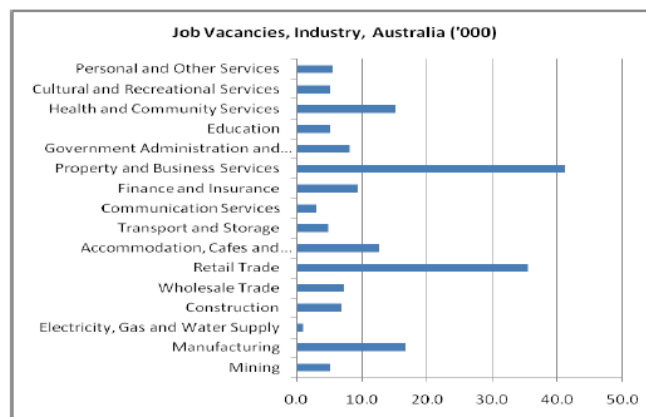


Figure 8 - Job Vacancies, November 2007

In 2007 the hospitality industry had the 5th highest number of job vacancies of any industry with 12,700 vacancies reported⁶. As a proportion of its workforce, the hospitality industry ranks third behind mining and property/business services. There is no doubt that the restaurant, cafe and catering industry is still suffering badly in the wake of the skills and labour shortage.

⁶ ABS Job Vacancies, 6354.0

EMPLOYMENT PROJECTIONS

Despite worsening economic conditions and a bleak outlook for tourism, DEEWR⁷ 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).

DEEWR Job Outlook reports that 48.1% of jobs in Accommodation, Cafés and Restaurants are part-time (approximately 116,500 in cafes and restaurants).

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, 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.

While low skilled jobs traditionally have had the highest rates of staff turnover, reflecting individuals moving along the career path from lower skilled to higher skilled jobs, in the hospitality industry the change in occupation is often unrelated to the area of work. The industry is often used to provide a casual income for students, who then go on to other careers on completion of their study.

It is evident that the predictions of future growth as well as the economic potential of the industry could be jeopardized by the current national skills shortage. In the past the shortage has been most evident for chefs, cooks and pastry cooks but, this has now been surpassed (in sheer numbers) by the shortage in front of house occupations. One of the immediate challenges for the industry is addressing the need for skilled staff in order to realise the full economic potential of the industry.

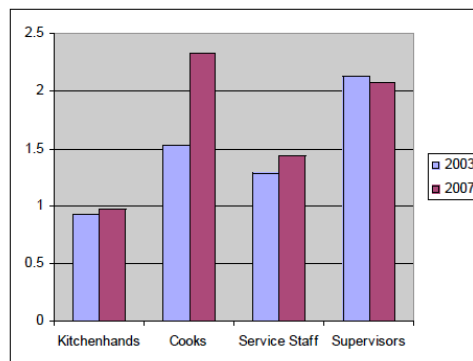


Figure 11 – Occupations in Skills Shortage in the Restaurant Industry, 2007 v 2003

It is unlikely that this situation will improve. In an occasional paper for The Academy of the Social Sciences⁸, published in January 2008, Peter McDonald and Glenn Withers suggest 'In the next 20 years, the only potential sources of increases in the labour supply are increased labour force participation rates and immigration.'

This paper goes on to suggest that net migration would have to rise by 277,000 by 2021 to maintain labour force growth at 1%. As detailed in the figure below the projected growth in the labour force is made up of very high levels of growth in the hospitality industry, modest growth in some sectors and even contraction in other industry areas.

The observation is made in the report that, whilst both increased workforce participation and migration have a role in meeting the needs of labour force growth, those 'who might be induced into

⁷ *Ib id*

⁸ Population and Australia's Future Labour Force, ASSA, McDonald and Withers, 2008

the labour force (through increased participation) will not necessarily provide a good match to the required skills'. In the restaurant and catering sector this is likely to be the case. Disaffected job seekers may not necessarily have the attitudinal profile for customer service roles, leaving immigration as the most appropriate source of employees.

It is clear that in the future very extensive migration will be required to feed substantial growth in the service sectors (including the restaurant and catering industry). In part this is brought about by 'Average Australian living standards rising in line with productivity growth, creating increased demand for service workers in various labour intensive sectors to which higher incomes are devoted¹⁴'.

THE GENDER BALANCE

The data in the hospitality industry⁹ the participation in the workforce of females exceeds that of males by 26%. According to the Australia Bureau of Statistics in May 2008 there were 207,200 males employed compared to 261,200 females.

The mix of working arrangements are such that part-time females are the predominant group in the hospitality workforce, followed by full-time males and then some way to full-time females and lastly part time males.

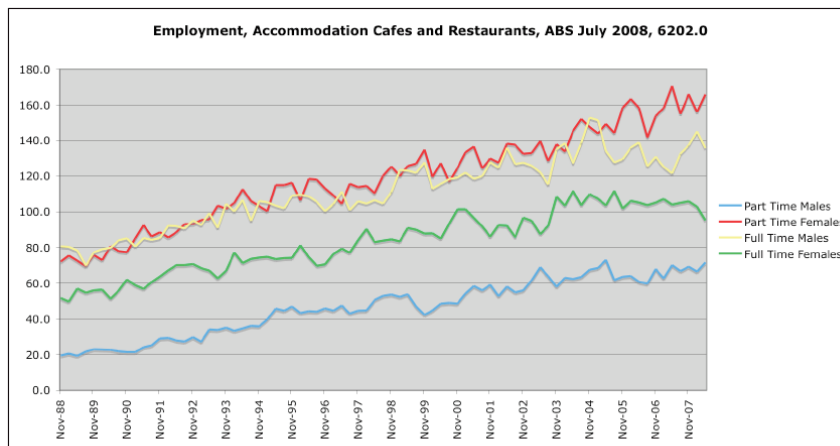


Figure (12)

As can be seen from figure 12, the proportion of part time females in the workforce eclipsed full time males at the end of 2004 and the gap has widened significantly since then. In the period 2004-2008 part-time employment has grown at the expense of full time employment. In this growth the proportion of females employed part time has outstripped males 2.3:1.

The magnitude of the trend is evident in Figure 13. The shift from full-time to part-time employment is a function of increasingly irregular business patterns with more business being undertaken in the traditional peak periods of evenings and weekends.

⁹ ABS Division H, Accommodation, Cafes and Restaurants

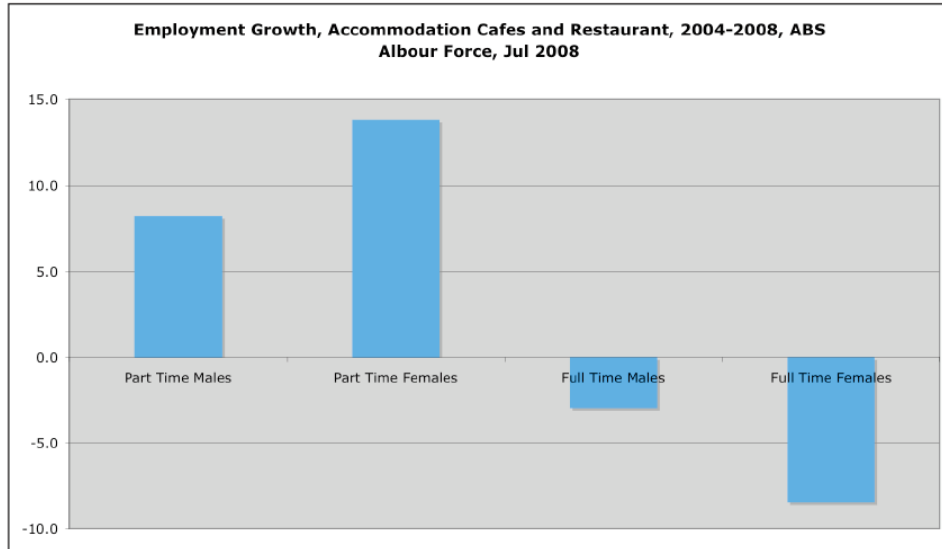


Figure (13)

The growth in employment across the sector has lead to a strict parity of hourly pay for males and females across the board. Whilst this is the case overall, there are variations in the average amounts paid in each of the sectors.

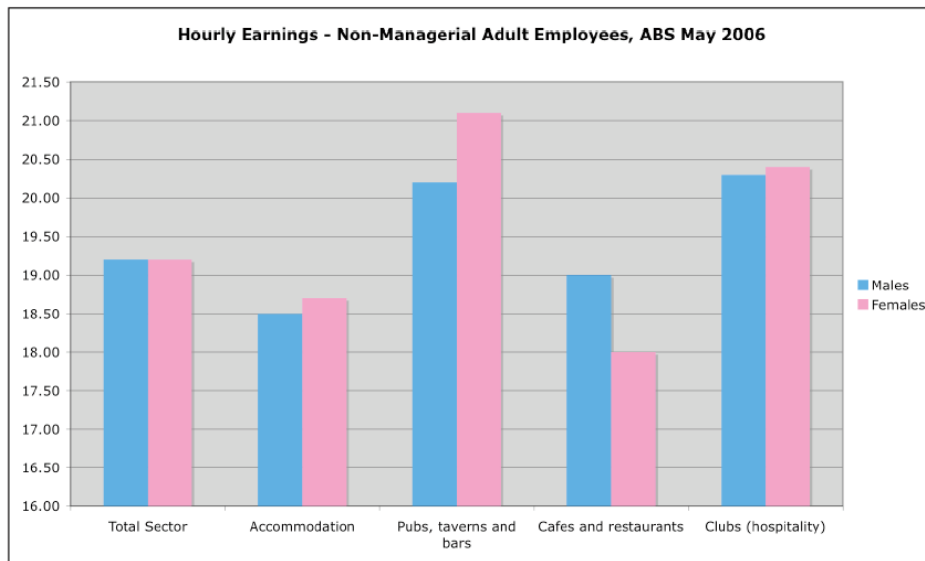


Figure (14)

In light of the Award Modernisation decision by the Australian Industrial Relations Commission, drawing a parity between hotels and restaurants, the discrepancy above between pay rates in these sectors should be noted. Average earnings for females in hotels are 17% higher than they are in restaurants and males approximately 8%. This exemplifies the differences in classifications and employment arrangements in the industries.

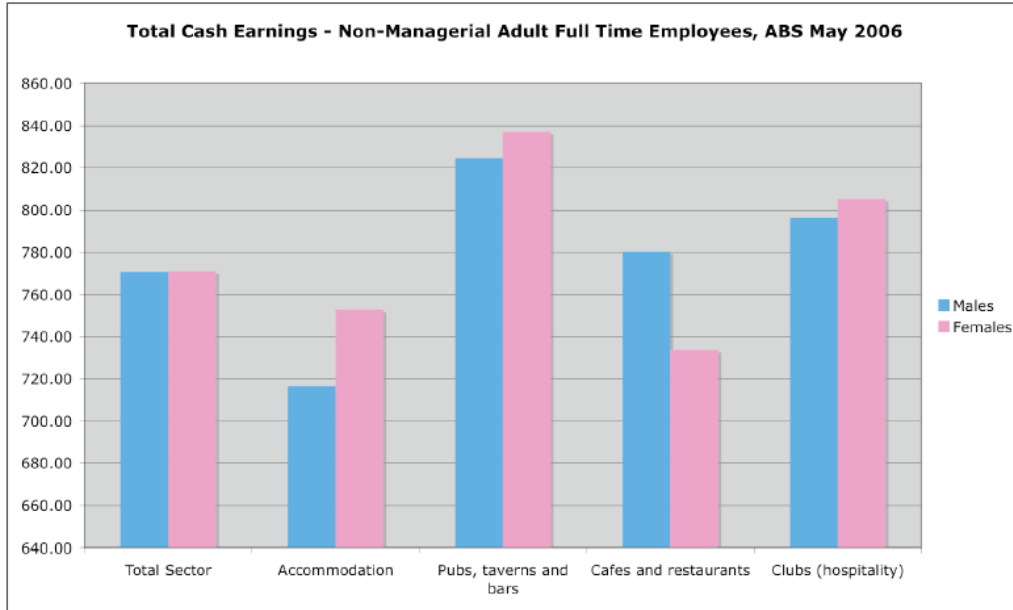


Figure (15)

In addition to a parity of the hourly earnings (at an average of \$19.20 per hour), there is parity of total weekly wages paid (at approximately \$771.00 per week). Once again this parity in subject to substantial variance from sub-sector (industry) to sub-sector. The pay parity by industry sector is further explained by the mix of occupations in the sectors. In hospitality, there are two major non-management occupations. These occupations are reasonably confined to the hospitality industry. They are Food Trades people (cooks and chefs) and hospitality workers (Waiters, Kitchenhands and Bar Attendants).

PART TIME WORK

One facet of the hospitality workforce that is worth exploring in the proliferation of part time work, that is undertaken by females, and the extent to which activity should be directed toward shifting the balance from part to full time work.

Restaurant & Catering Australia contends that the vast majority of part time workers undertake this type of work by choice and are more than satisfied with their working arrangements than their full time equivalents. The Association believes that it is conclusive that part time work in the industry meets very specific employment objectives of employees and therefore would best be protected as an employment arrangement rather than try and effect change away from part time work.

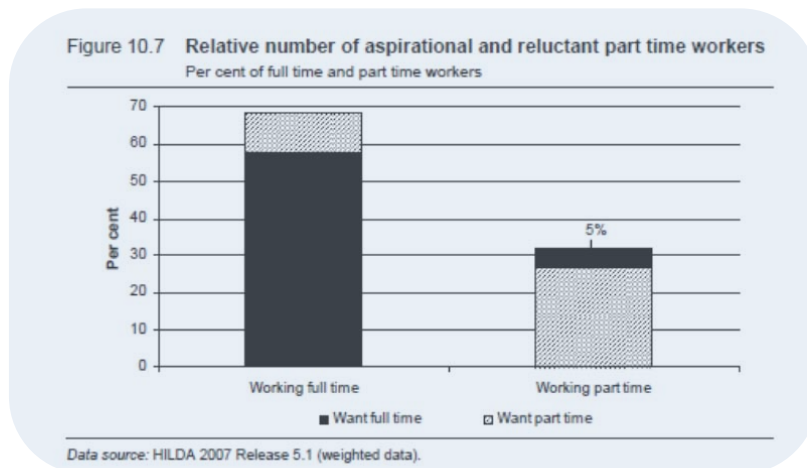


Figure (19)

In a recent study undertaken by the Productivity Commission¹⁰ the issue of pay equity (between full and part time staff) was dealt with extensively. The report notes that *'Research findings indicate that part time workers in Australia are paid at broadly similar or even higher rates per hour compared to their full time counterparts'*.

The Productivity Commission report states clearly that only 5% of part time workers do so because they want full time work. The overwhelming majority of part time workers want part time work.

The report also examines in some depth the extent to which female workers are more desirous of part time work than men. The report notes that *'For women, those aged between 35–64 have the highest rate of full time workers aspiring to work part time.'*

These ages are typically associated with returning to work as children grow and transition to retirement.' This is augmented by women in other life stages (particularly students) having a strong preference for part time work. All in all female workers overwhelmingly work part time because they want to.

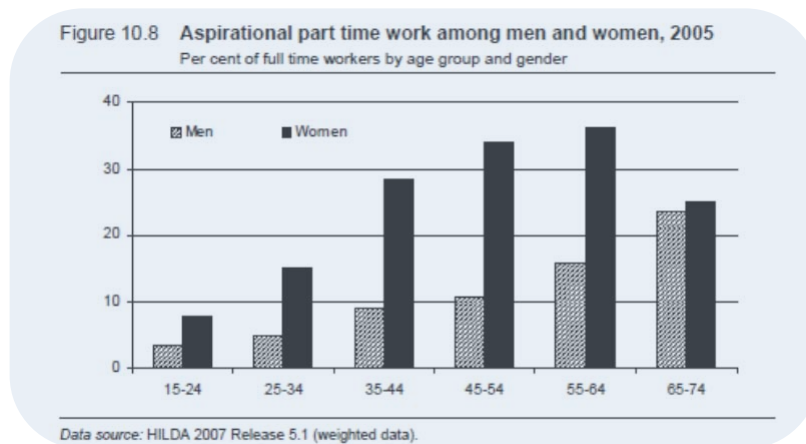


Figure (20)

The report raised several important contributions made by part time work. As the sector of the economy in which part time work is most prevalent, hospitality makes a sizable contribution to these benefits. The report states that *'Income from part time work was found to be an important source of income for households with young children, especially for household with a lone parent'*. A very significant number of female part time workers are in this category.

¹⁰ Part Time Work the Australia Experience, Productivity Commission, July 2008

FORWARD WITH FAIR BILL 2008

The submissions that follow reflect the views of Restaurant & Catering Australia and its constituent State Associations.

OVERALL PROPOSAL

Restaurant & Catering Australia has been publicly very supportive of many aspects of the Forward with Fairness reforms. In particular establishing a truly national industrial relations system and the making of modern awards that reflect contemporary business practice.

The Association makes the comment below in response to the Fair Work Bill 2008.

REGULATORY ANALYSIS

Restaurant & Catering Australia considers that the lack of consideration of the Regulatory Impact of the Fair Work Bill to be contrary to the Government's stated desire to address over regulation. Further, the Association questions the 'exceptional circumstances exemption granted to these proposals at the decision-making stage'¹¹.

In the face of criticism over the productivity impact of these proposals, the significance of the reforms and the likely impact on labour intensive businesses, at least, R&CA contends that the 'exception' should be to completely consider the impact at the decision making stage.

Particularly in relation to the Awards Modernisation aspects of the Bill, the lack of detailed consideration of the regulatory impact is contrary to the objective of modernisation (as defined in the current Workplace Relations Act 1996 (Cth.)) in so far as it is intended to 'reduce the regulatory burden on business'. R&CA questions how this previous statement of the objective of the process can be considered seriously when the first act of the Government, in giving currency to the modern awards, is to introduce a Bill without any regulatory impact statement.

The statement that "this section does not include an impact analysis of award modernisation' is a non-sense when considered alongside the objective stated in s576A of the Workplace Relations Act at 2(a).

Restaurant & Catering Australia commissioned modelling to inform its Award Modernisation submissions that show 8,000 jobs will be lost as a result of the introduction of the Hospitality Industry (General) Award 2010. Impact of this magnitude in one sector alone surely justifies a complete analysis of the regulatory impact of the full suite of reforms prior to consideration of their adoption¹².

Recommendation

Restaurant & Catering Australia considers it vital that a full regulatory impact study should be undertaken into the measures proposed in the Fair Work Bill prior to further consideration by the Senate Committee.

¹¹ EM Fair Work Bill 2008, p iv, par. R2

¹² KPMG Econtech Award Modernisation Analysis

In the current business environment, where consumer sentiment is low and business confidence is even lower, the sensitivity to any additional cost to business is very high. The restaurant and catering business is particularly delicately balanced with some 50% of businesses making a net loss. The decision to fundamentally change the business model for businesses in this predicament should not be taken without all the available information as to its impact.

CONSULTATION

Restaurant & Catering Australia considers that the detail in the Explanatory Memorandum in relation to consultation on the new industrial relations system to be misleading. Whilst R&CA appreciates being involved in the Small Business Working Group, the implication that this group was consulted more widely than the Fair Dismissal Code is misleading.

COVERAGE

It is acknowledged that the Government committed in its Forward with Fairness statement to enter into new arrangements with the State Governments with a view to a uniform national industrial relations system.

Restaurant & Catering Australia regards this as one of the most important aspects of the reform package. For the small business sector R&CA represents, the impact of the dual system is greater than for others with up to one third of businesses left in the State systems. This leads to great confusion over what rates of pay and other conditions should form part of the employment obligations of restaurateurs and caterers.

The Association believes that the single greatest credit on regulatory impact, of the implementation of the Forward with Fairness policy, would be the enabling on consistent IR arrangements nationally.

Recommendation

That the Government prioritise the establishment of a uniform national industrial relations system.

TERMS AND CONDITIONS OF EMPLOYMENT

NATIONAL EMPLOYMENT STANDARDS

Restaurant & Catering Australia acknowledges the significant consultation that has already 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.

In the **requests for flexible working arrangements** section of the Explanatory Memorandum, there is a suggestion that 'some minor administrative cost, primarily the time spend by management and/or human resources staff to consider a request and prepare a written response to such a request'.

As detailed in the submission made to the consultation into the NES, 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.

Recommendation

That the requirement for a written response to the request for flexible working arrangements include an exemption for small businesses, on the basis that they do not have the human resource capacity to bear this load.

Further, given the proposed criteria for access to this flexibility, the brunt of these change will again fall on those industries with a large proportion of females 'of child bearing age'.

In relation to **parental leave**, it is suggested in the Explanatory Memorandum, 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.

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 provision of the National Employment Standards.

Changes to **personal / carers** leave are to be minimal in their impact other that 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.

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.

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.

The Department of Education, Employment and Workplace Relations states in the Explanatory Memorandum '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.

Restaurant & Catering Australia is supportive of the retention of the small business exemption from redundancy arrangements in the NES.

MODERN AWARDS

THE PROCESS

Restaurant & Catering Australia fully understands and appreciates the magnitude of the Award Modernisation task. The Association has engaged very significant resources behind the defence of a modern award for restaurants and caterers throughout the entire modernisation process to date.

Restaurant & Catering Australia contends that the modernisation process is in itself flawed. The process provides no avenue to question the merits of a decision of the Australian Industrial Relations Commission and no onus on the Commission to justify its decision or abide by the wishes of the parties to each modernisation matter.

The Bill spells out a four-yearly review cycle and 'limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews'¹³, however, even after the initial period of development, the *modern* awards will remain virtually unchallenged beyond the four year review.

R&CA to some extent understands the balance to be achieved in the review process post 2010. The Association is concerned that there is a potential to use the award making powers to pursue widespread improvements in existing minimum standards, given the ability for modern awards to "build on" and contain "industry relevant detail".

This risk must be able to be mitigated through the legislation, as does the risk that an Awards may exist for a 4-year period that is far from a compromise between the interests of the parties.

The Government has created, through the modernisation request, a process that uses the traditional adversarial commission process without any of the checks and balances that this process was intended to have. The establishment of a dispute, the tendering of argument from parties and the conciliation and arbitration activities of the Commission of old at least ensured that the argument from the parties were considered. In the modernisation process the Commission has been able to impose their will without due consideration.

To then enshrine this decision in a legislative fortress beyond any form of appeal or review is simply unjust.

THE HOSPITALITY INDUSTRY (GENERAL) AWARD

In the Explanatory memorandum to the Bill it states 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.

Restaurant & Catering Australia questions the statement in the Explanatory Memorandum that 'Employer groups broadly support modern awards'¹⁴. R&CA, at least, believes, as noted above, 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.

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.

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.

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.

¹³ EM Fair Work Bill 2000, p98

¹⁴ EM Fair Work Bill 2000, pxxx

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.

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)).

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.

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.

THE SOLUTION

In the content of the consideration of the enabling legislation, Restaurant & Catering Australia believes that there should be a Government review process for making Modern Awards.

Restaurant & Catering Australia suggests that the Government review the actions of the Australian Industrial Relations Commission in establishing modern awards, where there is significant dissatisfaction with the decision and/or where the decision is inconsistent with the Act and the Award Modernisation Request.

Recommendation

That the Government review the actions of the Australian Industrial Relations Commission in establishing modern awards, where the decision is inconsistent with the Act and the Award Modernisation Request.

TRANSITIONAL PROVISIONS

Restaurant & Catering Australia is concerned that The Fair Work Bill does not provide for any transitional provisions. As a result it unclear how employers and employees are to move from the current system to Forward with Fairness system.

As noted below, R&CA contends that, given the huge impact Forward with Fairness will have on enterprise in Australia, the transition from one system to another should be a focus of discussion for the Senate Committee in its deliberations over the Bill.

ENTERPRISE AGREEMENTS

The restaurant and catering industry, through the leadership of Restaurant & Catering Australia and its constituent associations, has extensively used agreement making to manage workplace relations. In one nine month period, prior to WorkChoices, the industry signed 10% of its workforce onto agreements.

The industry used both Australia Workplace Agreements and Non-Union Enterprise Agreements. The key focus of this activity from an enterprise perspective was to simplify the regulation of workplace arrangements in small labour intensive businesses, not to reduce entitlements for employees.

Restaurant & Catering Australia considers that the establishment of a single stream if enterprise agreement (from the Union and non-Union streams) has effectively eliminated non-Union agreements. In an industry such as the restaurant and catering industry where conservatively less than 6% of the workforce is a member of a Union, this is of concern.

Restaurant & Catering Australia have not only been leaders in relation to agreement making, the Association has also lead the way in relation to notification to employees of their rights. Prior to the requirement for the information statement under WorkChoices, R&CA jointly funded the production of '10 Things You Should Know' cards that went to new employees in the industry.

The Association supports the requirement for employers to provide notification of an employees right to be represented, however, would be concerned if this activity promoted Union membership. The Association is also keen that some reciprocal notification be provided by Government to employers of their right to be represented by an industry association.

Restaurant & Catering Australia also believes that there should be reciprocity in relation to automatically appointed bargaining agents. In clause 176 of the Bill an employee who is a member of a Union is automatically represented by that Union as a bargaining agent, however, an employer must appoint an agent in writing. R&CA suggests that the same automatic appointment should apply to employer as employees.

Restaurant & Catering Australia also contends that the establishment of default bargaining agent / representative status should be explicitly ruled out in the legislation other than for Greenfields agreements. Neither employer nor employee organizations should have any involvement in the negotiation of an agreement if they have no stake in it simply on the basis of their interest in a particular type of enterprise. Employee and Employer organizations without members that are parties to an agreement should not be engaged in its negotiation.

Recommendation

That members of employer organisations should automatically have them act as bargaining agents and the default bargaining agents should be explicitly ruled out.

Restaurant & Catering Australia is also concerned at the removal of the notion of 'prohibited content' in agreements. The potential to include matters like childcare, health care and salary sacrificing union dues in agreements is real.

Taken in conjunction with concerns expressed elsewhere in this document above ratchetting up of conditions, R&CA is very concerned about the potential expansion of the breadth of agreement to cover more and more matters that would impose significant additional cost of employers, particularly in labour intensive industries, such as restaurants, cafes and caterers.

It is also of concern that the 'matters pertaining' principle could also include the relationship between the employer and a union. In an industry such as the restaurant and catering industry where there is a low level of Union membership, this is of concern.

AGREEMENT CONTENT AND APPROVAL

Restaurant & Catering Australia is concerned that the proposed arrangements in relation to the application of the Better Off Overall Test (BOOT) may require employers to disclose to Fair Work Australia details about their business that are either commercially sensitive or overly onerous. There is also a further concern that Fair Work Australia may in turn disclose such information to other parties such as employees or their representatives.

The object of the Act of 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining' will be seriously compromised if the process of proving that all employees are better off is made overly onerous with all rosters for all staff, financials for the business etc are required to be provided as justification for an agreement.

Similarly, if commercially sensitive information (such as financials, business plans or projections) are required to be submitted as justification for working patterns etc, agreement making will reduce dramatically.

Restaurant & Catering Australia suggests that the legislation should direct Fair Work Australia to make a determination on the best available data. Further, the legislation should prohibit, and certainly not require, this information to be passed on to any third party (such as a bargaining representative).

Recommendation

That the legislation be amended to direct Fair Work Australia to make a determination on the best available data and prohibit any information provided to support the approval of agreements to be passed on to any third party.

NOTE IN RELATION TO ILLUSTRATIVE EXAMPLE

The illustrative example on page 140 of the Explanatory Memorandum states that 'Min works in the hospitality industry as an assistant in a sandwich shop'. Restaurant & Catering Australia questions the Department's interpretation of the hospitality industry, particularly in light of the Modern Award, that includes sandwich shops?

LOW PAID BARGAINING

Restaurant & Catering Australia is concerned that neither the Fair Work Bill 2008 nor the explanatory Memorandum include an explanation of what 'low-paid employees' are. Whilst reference is made to 'certain employees in the community service sector and the cleaning and child care industries'¹⁵, there is a suggestion by some that sectors of hospitality might be included in this definition.

Restaurant & Catering Australia believes that the employees, sectors and/or industries that may up the 'low-paid' must be defined in the Act / Regulations.

Recommendation

That the Act / Regulations define the low-paid.

If there is a suggestion that part of the restaurant, café and catering industry might be considered low-paid, Restaurant & Catering Australia is very concerned at some of the provisions in relation to low-paid bargaining.

The capacity of Fair Work Australia to 'act on its own initiative to facilitate bargaining' and the capacity for FWA to 'make a low-plaid workplace determination' are areas of significant concern to the Association. Further, the necessity of FWA to, at the behest of a related party (such as a Trade Union) to replicate bargaining arrangements across a series of restaurants, without any employees being members of that Union is a real possibility under the proposed arrangement. This is not in the spirit of the Forward with Fairness Policy and should be prohibited by the legislation that flows from this Bill.

The basis for the low-paid bargaining arrangements under Fair Work Australia is flawed if it intended to be applied to the restaurant, café and catering industry. The suggestion that there is inequity in the bargaining position of an employer and employee simply because one is an employer and the other is an employee in a specific industry sector is flawed.

The suggestion that Fair Work Australia could, at its own initiative, be able to insist on the ratchetting up of conditions over and above the award in a particular industry, is flawed.

Restaurant & Catering Australia believes that an arrangement whereby Fair Work Australia could only intervene in an agreement negotiation at the behest on one of the parties directly would be more consistent with the forward with fairness policy statement.

Recommendation

That the provisions for low-paid bargaining be changed so that Fair Work Australia only be able to intervene in an agreement negotiation at the behest on one of the parties directly.

¹⁵ EM par. 991

RIGHTS AND RESPONSIBILITIES

UNFAIR DISMISSAL

Restaurant & Catering Australia is supportive of the arrangements for unfair dismissal administration for its small business constituency. The Fair Dismissal code is a useful tool for small business that lends itself to customisation for sectors of business. There is some concern, however, at the number of businesses that are fundamentally small businesses than are proposed to be left out of the small business protections in the proposed Bill.

Restaurant & Catering Australia would prefer to see a more generous definition of small business for the purposes of the application of the code and other small business provisions. R&CA would suggest that the 15-employee definition should apply to full time employees only.

RECOMMENDATION

That the 15-employee definition for small business should apply to full time employees (i.e. a small business should be defined as one with 15 full time employees).

The Association also supports the 7-day limit to taking unfair dismissal action and the qualifying periods of 6 and 12 months.

Restaurant & Catering Australia is however concerned that the Fair Work Bill will increase the period in which an application for making an unlawful termination claim to 60 days after the employment is terminated (increased from 21 days under the current Act). Restaurant & Catering Australia is concerned that different statutory periods cause confusion and increase meritless claims for unlawful termination.

ADMINISTRATION

FAIR WORK AUSTRALIA

Restaurant & Catering Australia is concerned at the arrangements for the administration of approval of agreement by Fair Work Australia. R&CA believes that the legislation should include a timeframe for the approval process.

At 768 in the Explanatory Memorandum the Department suggests that the logic for not stating a timeframe for approval is that agreements may sometime not be approved within that time. R&CA suggests that this would be able to overcome with some proportion of agreements to be approved within the timeframe. It is important, however, that the legislation proposes some form of indicative time to ensure that the turn-around of approvals is seen as a priority by FWA.

Recommendation

That the legislation includes an indicative timeframe for the approval for agreements.

REGISTERED ORGANISATIONS

Restaurant & Catering Australia and its constituent organisations are concerned at the lack of mention of the rights and responsibilities of registered organisations currently covered by Schedule 1 of the Workplace Relations Act 1996, with no provisions relating to them in the Fair Work Bill.

The Association believes that this uncertainty, for both federal and state organisations needs to be addressed, particularly so given the Modern Award decision not to make particular organisations a party to Modern Awards.

IMPLEMENTATION ARRANGEMENTS

To date the implementation of Forward with Fairness has been exceptionally costly for Restaurant & Catering Australia and its constituent Associations. The representation of the industry position in the context of the modern award has been a very intense and costly process (in excess of \$1 Million).

Whilst it is acknowledged that the Government went on record to say they would not pay for employer representations in relation to modern awards, there was no such statement in relation to the implementation of the new system. Restaurant & Catering Australia believes that there will be significant resources required to inform employers as to their obligation under the new IR system.

Restaurant & Catering Australia and other industry associations are the most effective way of getting information to business on industrial relations. Australian businesses go to their associations for advice on these matters and the Associations are best placed to communicate with particularly small businesses.

Recommendation

That the Australia Government resource associations to provide advice to businesses in relation to the new industrial relations system.