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Submission to the Senate Inquiry into provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002

RESTAURANT & CATERING AUSTRALIA

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Restaurant & Catering Australia
Level 1, 80 Cooper Street
SURRY HILLS NSW 2010
Ph : (02) 9280 0833
Fax (02) 9280 0855
Restncat@restaurantcter.asn.au

Restaurant & Catering Australia

- Restaurant & Catering Australia is the peak national industry organisation representing the interests of the 28,925[1] restaurants, cafes and catering businesses in Australia. The Association is a federation of State Associations all working together on national issues, on behalf of their members. Whilst, Restaurant & Catering Australia is NOT a registered industrial organisation, many of its constituent State Associations are.

- The State Associations that are members of Restaurant & Catering Australia have 5,000 members that represent some 60 –70% of the industry's $9.3 Billion[2] in turnover.

- The industry employs 217,400 people[3].

The Restaurant, Café and Catering Industry and the Existing Commonwealth Legislation

The current situation

- The ABS details 20.1% of employees in restaurants and cafes[4] (both on average and for part-time employees) are located in Victoria. An additional 2.7% of employees work in the Territories.

- The Office of the Employment Advocate suggests that 15,641 Australian Workplace Agreements have been approved in the accommodation, cafes and restaurants sector of industry[5]. This could account for a further 3.5% of the hospitality workforce.

- Under the existing arrangements some 26.2% of employees in the restaurant and catering industry are covered under federal industrial arrangements.

[1] ABS Business Counts, June 2001
[2] ABS Retail Trade Turnover Data
[3] ABS Labour Force, August 2001
[4] ABS, Employed Persons, Unpublished data, August Quarter 2001
[5] Current Status of AWAs, Office of the Employment Advocate, 01 March 2002, Source: ABS Cat No: 6248 Sept 2001 Quarter, Table 12

The Bill

1. The *Workplace Relations Amendment (Termination of Employment) Bill 2002* was introduced into the House of Representatives by the federal government on 13 November 2002.

2. The Bill addresses the operation of federal termination of employment laws, more colloquially referred to as unfair dismissal laws, as provided for in Part VIA of the *Workplace Relations Act 1996*.

3. The Bill has been referred to the Senate Employment, Workplace Relations and Education Legislation Committee. The Senate Committee will conduct public hearings on the Bill in Melbourne on Monday 24 February 2003.

4. In broad terms, the policy effect of the *Termination of Employment Bill 2002* is three fold:

   a) Jurisdictional Amendments
   The Bill would extend the operation of the federal unfair dismissal system by making greater use of the corporations power in section 51(i) of the Constitution. This would effectively ensure that employees have access to either federal or State unfair dismissal redress, and would expand the area of federal coverage.

   b) Amendments relating to all Businesses under federal laws
   There Bill would amend the operation of unfair dismissal laws more generally, including the following policy and procedural matters:

   - Requiring the AIRC to have regard to conduct by an employee which contributed to dismissal.
   - Refining scope for claims where dismissal is for operational reasons.
   - Requiring the AIRC to have regard to the safety and welfare of fellow employees in assessing whether a dismissal was harsh, unjust or unreasonable.
   - Requiring the AIRC to consider the size of an employers business in determining an appropriate remedy.
   - Requiring the AIRC to take account of any income an employee who is to be reinstated may have earned since their dismissal.
   - Emphasising reinstatement as the primary remedy.

c) Amendments relating to Small Businesses under federal laws

The Bill would amend the operation of the federal unfair dismissal laws as they impact on small business, including the following policy or procedural matters:

- Extending the qualifying period from 3 to 6 months for small business employees.
- Empowering the Australian Industrial Relations Commission to dismiss, without a hearing, applications made against a small business on the ground that the application is beyond jurisdiction or that the application is frivolous, vexatious or lacking in substance.
- Halving the maximum compensation payable to employees of small businesses to 3 months remuneration.
- Refining penalty provisions for lawyers and agents who encourage unmeritorious claims against small business.
- Streamlining the criteria for determining whether a termination by a small business employer was unfair.

Restaurant & Catering Australia's Position

- Restaurant & Catering Australia supports the proposed amendments with respect to the use of the corporations power in the Commonwealth unfair dismissal laws but would like to see an extension of the corporations power such that all business entities were included in the federal coverage in this regard.

- Support for the proposed jurisdictional amendments is contingent on federal procedural arrangements, such as those proposed, being closer to a balanced consideration between employer and employee, than state jurisdictions.

- Restaurant & Catering Australia supports the amendments which vary the operation of the unfair dismissal laws relating to small business (and all businesses) under the federal system.

Jurisdictional Amendments

1. Currently 55.8% of the 28,925 restaurant businesses are corporations[6]. The existing federal legislation already covers those in Victoria, the ACT and NT. In addition AWAs already cover an estimated 3.5% of restaurant employees. 11,448 restaurant businesses would conceivably be covered by an expansion of federal unfair dismissal arrangements. Based on average employment, these business would employ 91,584 people.

2. Restaurant & Catering Australia supports the extension of the federal unfair dismissal jurisdiction to an additional 11.448 restaurant businesses and potential 91,584 restaurant employees (see explanation above).

3. The number of unfair dismissal claims, made by employees, of restaurant businesses is estimated at 4,946 per annum.

4. The proposed arrangements will extend the reach of the federal unfair dismissal jurisdiction to an additional 39.5% of the restaurant industry. This would see an additional 1,953 claims dealt with under federal arrangements (not necessarily by the commission but in the main settled on the basis of federal conditions).

5. The coverage of the majority of businesses, under federal law, would eliminate some of the confusion that surrounds unfair dismissal arrangements and facilitate the provision of advice to employer and employees as to their rights.

6. Whilst the procedural and policy amendments still fail to create complete balance between the interests of the employer and the employee they are amendments that benefit constituents of Restaurant & Catering Australia and there merit access by additional restaurant & catering business (see detail attached).

7. The coverage of the majority of businesses, under federal law, would also eliminate some amount of 'forum shopping' by employees. In jurisdictions where the employee is able to select from either a state or federal system (or a range thereof if there are also canvassing a range of remedies) in which to seek redress, the more favourable to their cause will always win. As this practice is more common in instances where claim is vexatious, any change that achieves a reduction in 'forum shopping' would be supported by the Association.

[6] Restaurant and Catering Industry Benchmarking Report, 2nd Edition, 2000-2001

All Business Amendments

1. Restaurant & Catering Australia surveys, referred to in previous submissions before the Senate Employment, Workplace Relations and Education Legislation Committee, found that of respondent State Association members, 38% had defended an unfair dismissal claim in the past three years – in these cases the defense was at an average cost of $3,675.00 and 63 hours away from their businesses.

2. Measures that seek to reduce the number of claims, through limiting claims where dismissal is for operational reasons or having regard for the conduct of the employee may reduce the burden faced by restaurants and catering businesses.

3. In surveys referred to above, 46% of respondents said that the threat of unfair dismissal claims had stopped them hiring staff and 70% said it had encouraged them to hire casual over permanent staff. In addition to direct cost benefits, more balanced unfair dismissal laws will at least contribute to decasualising the restaurant workforce.

4. Decasualisation adds to industry stability, productivity and eventually profitability.

5. In an industry as fluid as the restaurant industry there are a number of cases where an ex-employee has been re-employed[7]. The measure within the Bill, that requires the commission, when making an order for back pay, to take account of any income an employee who is to be reinstated may have earned since his or her dismissal, would apply in a large number of cases as demonstrated in jurisdiction where such a formula is used[8].

6. The size of a business has an impact on the types of remedies that are appropriate. Small business does not engage specialist workplace relations and/or human resource practitioners. Whilst industry associations provide support advice for small businesses, this advice cannot make up for a specialists on site advising management and administering employment relations. The Commission must be compelled to consider the size of a business in determining an appropriate remedy.

[7] Accommodation, Cafes and Restaurants had the highest percentage of any industry of unemployed persons who had worked two or more weeks in the last two year for whom their last job was in this industry.

[8] Feedback from Restaurant & Catering Queensland

Small Business Amendments

1. 94% of restaurant businesses would by any definition be defined as small businesses. The vast majority of businesses in the restaurant industry would therefore receive the full range of benefits being offered by the Bill.

2. Based on the most conservative case (where all of the larger businesses (6%) are corporations outside Victoria, ACT and NT) an additional 9,689 restaurant businesses would receive the small business benefits proposed within the Bill.

3. Surveys of R&CA constituents' members suggests that some 44% of claims are conceivably vexatious. If the measures proposed under this Bill short-cut these claims to half of the time for half of the cases that would fall into the federal jurisdiction it would save restaurateurs $1.8 Million per annum (without ANY consideration of the owner's time). This is a conceivable flow on from halving the maximum 'payout'.

4. As detailed above, Restaurant & Catering Australia surveys, found that the average cost of defense of an unfair dismissal claim was $3,675.00 and 63 hours away from their businesses (not including the cognitive load on the business operator). This is substantially due to the small business nature of restaurants where the business owner has to handle unfair dismissal claims.

5. Measures that in any way reduce this burden, through streamlining, such as those proposed, will cut costs, improve productivity and increase employment in restaurant and catering businesses.

6. The weight of procedural fairness, in unfair dismissal matters, creates a significant disadvantage for smaller businesses. Small business does not engage specialist workplace relations and/or human resource practitioners. Whilst industry associations provide support advice for small businesses, this advice can not make up for a specialists on site advising management and administering employment relations. There is a case for different small business amendments to unfair dismissal arrangements.