

## **This Submission**

This submission deals with two of the provisions in the Workplace Relations Amendment (Fair Termination) Bill 2002.

These provisions are :

- ◆ The exclusion of short term casuals from the termination provisions, and
- ◆ The insertion of a lodgment fee when termination of employment applications are lodged

As background to these two provisions this introductory section provides basic detail on Restaurant & Catering Australia and the industry it represents.

### **Restaurant & Catering Australia**

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Restaurant & Catering Australia is the peak national industry organisation representing the interests of the 28,925<sup>1</sup> 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<sup>2</sup> in turnover.

The industry employs 217,400 people.

### **The Restaurant, Café and Catering Industry and Commonwealth Legislation**

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In the first instance, the ABS details 20.1% of employees in restaurants and cafes<sup>3</sup> (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<sup>4</sup>. This could account for a further 3.5% of the hospitality workforce.

A conservative estimate of the number employees impacted by the short-term casual exemption is a minimum of 2,877 per annum. This is based on 26.3% of the 10,940 new casuals engaged in cafes, restaurants and catering businesses annually. In total it is estimated that 57,176 workers in the restaurant industry are employed under Commonwealth legislation.

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<sup>1</sup> ABS Business Counts, June 2001

<sup>2</sup> ABS Retail Trade Turnover Data

<sup>3</sup> ABS, Employed Persons, Unpublished data, August Quarter 2001

<sup>4</sup> Current Status of AWAs, Office of the Employment Advocate, 01 March 2002, Source: ABS Cat No: 6248 Sept 2001 Quarter, Table 12

## The Filing Fee

### Background

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A \$50 filing fee for lodging dismissal applications is currently in the regulations that support the Workplace Relations Act. The filing fee is designed to discourage frivolous and vexatious claims while ensuring that genuine dismissal applications can be dealt with efficiently.

The bill is intended to move the provisions out of the regulations and into the act, ensuring that the filing fee is a permanent requirement and providing that the fee be indexed annually in line with movements in the CPI.

### The Restaurant & Catering Australia View

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In a recent survey conducted by Restaurant and Catering Australia<sup>5</sup>, 49% had a staff member threaten to take unfair dismissal action of which (in the restaurateurs view) only 44% would have had reasonably thought they had been unfairly dismissed.

This data points to what is, in the employer's view, a large number of unfair dismissal claims that are vexatious. The average weekly earning of a restaurant employee is \$332.60. The proposed (and current) lodgment fee equivalent to 15% of average earnings would surely be a deterrent to frivolous lodgment termination applications. The indexing of the fee is an important component to enable the deterrent affect of the fee to be maintained.

In the same survey it is suggested that on average 38% of restaurant, café and catering businesses had defended an unfair dismissal claim in the past three years and that in these cases the defense was at an average cost of \$3,675.00 and 63 hours away from their businesses. The significant drain on businesses that are predominately operated by working proprietors must be avoided for frivolous claims.

For these reasons, Restaurant and Catering Australia support the inclusion of the lodgment fee in the Act (thereby making it more permanent) and indexing the fee to CPI.

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<sup>5</sup> Survey conducted March 2002, details Appendix A

## **The Exclusion of Short Term Casuals from Making Dismissal Applications**

### **Background**

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In 1994 exclusion for short-term casual employees from making dismissal applications was first made.

The regulations excluded casual employees from accessing termination of employment remedies, unless they had been working for their employer on a regular and systematic basis for at least 12 months, and had a reasonable expectation of continuing employment with the same employer.

Last November, the Federal Court ruled invalid the regulations excluding short-term casual employees from making dismissal applications, on the technical ground that they went further than allowed by the regulation-making power in the act.

### **Short Term Casual Employees in the Restaurant and Catering Industry**

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In August 2001, the restaurant and catering industry employed 102,800 employees on a less than full time basis<sup>6</sup>. At the same time the hospitality industry more broadly employed 209,500 on this basis. In the case of restaurant and caterers less than full time employees account for 47.2% of employees compares to 46.3% for the hospitality industry at large.

Industry averages suggest that employees leaving the industry account for 11% of the workforce annually<sup>7</sup>. The ABS<sup>8</sup> reports a growth in the employment of 3.7% per annum. The combination of these two figures suggests that the industry requires a minimum of 30,796 new less than full time employees each year.

This number of new less than full time employees is viewed as a conservative estimate as the calculation uses turnover for all employees whereas the turnover is expected to be higher for casuals than full time employees.

Restaurant & Catering Australia benchmarking data<sup>9</sup> suggests that 72.4% of less than full time employees are casual. In total restaurants, cafes and caterers employ 74,427 casual employees of which 10,940 enter the industry annually.

The restaurant and catering industry, and in fact the hospitality industry more broadly, employs casuals for three key reasons. They are: -

- ◆ The 'perishability' of services

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<sup>6</sup> Australian Bureau of Statistics, Employed Persons, Unpublished Data, August 2001

<sup>7</sup> Tourism Training Australia, Labour Market Constraints and Attitudes, 1994

<sup>8</sup> Employed Persons, ABS, August Quarter 2001

<sup>9</sup> Restaurant and Catering Operations Resort, April 2001

- ◆ The fluctuations in business (weekdays to weekends, breakfast to lunch to dinner etc)
- ◆ The lack of predictability of trading trends

Unlike goods, services are unable to be stored. Service businesses are therefore unable to complete work during efficient periods for use at some later time. The service of customers has an absolute immediacy.

The last two to three years have seen a pronounced lack of predictability to trading trends in restaurants, cafes and catering businesses. Whilst turnover has increased, this tendency toward a greater volatility in trading patterns has made the efficient use of labour increasingly difficult. These conditions have contributed to an enhanced use of casual employees.

In summary it is clear that the restaurant, catering and café industry has to use casual employees because of the nature of the industry. Further this number is likely to exceed 10,940 new employees per annum.

### **Unfair Dismissal in the Restaurant, Café and Catering Industry**

70% of respondents to a recent survey conducted by the Association suggested that the threat of unfair dismissal action had resulted in them engaging casual employees over full time employees. 46% suggested, in the same survey, that they had been stopped from hiring staff as a result of the threat of unfair dismissal action.

This would suggest that there is an undisputed link between the propensity of restaurateurs to engage staff and the prevailing unfair dismissal law. 76% of respondents either did not employ staff or employed casuals over full timers as a result of the threat of unfair dismissal action.

There is no doubt therefore that a reduction or removal of the exemption for short term casuals, from the unfair dismissal provisions, would negatively impact on the number of new short term casuals engaged. It is impossible to quantify how many of the 2,877 engaged annually would be affected, in the commonwealth jurisdiction. It is unlikely, however, given the nature of the industry that winding back (or eliminating) the length of the exemption would create an environment favorable to engaging more permanent staff as an alternative.

Short term casuals are engaged explicitly to provide the flexibility in rostering necessary to address the volatility of the restaurant trade. The conditions under which the short term casual is engaged allows for flexibilities in de-rostering these employees, that are not allowed in the case of permanent employees. As a result it is more likely that an unfair dismissal claim will be unwarranted.

**Restaurant & Catering Australia believes that the exemption, for short term casuals, from termination provisions should be included in the Workplace Relations Act.**

## **Appendix A - Summary of Survey Findings**

A survey of six basic questions (copy available on request) was sent out to a number of restaurants / catering organisations (250). Within 24 hours there had been a 12% response rate setting a precedent for the return of survey information. This demonstrates the weight of this issue of the R&CA constituents.

In summary the findings were :

- ◆ In 100% of cases the threat of unfair dismissal had changed the way in which operators managed staff ;
- ◆ 46% said that it had stopped them hiring staff and 70% said it had encouraged them to hire casual over permanent staff ;
- ◆ 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 ;
- ◆ 49% had a staff member threaten to take unfair dismissal action of which (in the restaurateurs view) only 44% would have had reasonably thought they had been unfairly dismissed ;

On average, of those businesses that had been threatened with a claim for unfair dismissal, 2.7 employees had threatened to take action in a three year period (with an average of 16 employees).