



Restaurant
& Catering

FAIR WORK ACT REVIEW

17 FEBRUARY 2012

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Table of Contents

Restaurant & Catering Australia3

About the industry.....3

Fair Work Act Review Terms of Reference.....3

Objects of the Fair Work Legislative framework.....4

The operation of the Fair Work legislation5

The extent to which the Fair Work Act has been operating as intended.....8

Areas where the operation of the Act could be improved.....15

Conclusion16

Restaurant & Catering Australia

- (1) Restaurant & Catering Australia is the only peak organisation representing the interests of the 40,000 restaurants, cafes and catering businesses in Australia.
- (2) The Association has a combined membership of 7,000 in the calendar year 2011.

About the Industry

- (3) The industry turns over some \$19 Billion per annum and is looking down the barrel of 3+% employment growth in the next twelve months. This growth is on top of a sizeable attrition from the industry due to the large number of casual employees engaged.
- (4) Approximately 63% of the industry earns an average 2% after tax and the overall average is only 4%. It is expected profits will further deteriorate in the short term. The restaurant sector is 58% of the hospitality industry and some 62% of employment in the industry. The average employment per business is 8 employees.

Fair Work Act Review Terms of Reference

- (5) The Fair Work Act Review Terms of Reference are detailed in the background paper published by the Department of Education, Employment and Workplace relations on 18 January 2012 as follows:
 1. The operation of the Fair Work legislation and the extent to which its effects have been consistent with the Object set out in Section 3.
 2. The extent to which the Fair Work Act is operating as intended, including in the seven areas listed by the Minister of Employment and Workplace Relations the Hon Bill Shorten MP .
 3. Areas where the operation of the Act could be improved consistent with the objects of the legislation.
- (6) This submission will address the above issues and provide industry and other relevant data and evidence in support of its assertions and difficulties experienced by the Restaurant & Catering sector during the operation of the Fair Work Legislation. Not all questions identified in the Background paper have been addressed in this submission as the Association seeks to only address those issues impacting the industry the most. The Association would be pleased to expand on the issues raised in this submission during consultations with the Panel.

Objects of the Fair Work Legislative framework

(7) The Objects of the Fair Work Act state that:

“The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.”

(8) It should be recognised that the States of Victoria, New South Wales, Queensland, South Australia and Tasmania have referred their powers for industrial relations to the Australian Parliament and as such operate under the Fair Work Act. However, the state of Western Australia has not referred their industrial relations powers and therefore a truly national system of workplace relations covering every business in Australia has failed to materialise under the Fair Work Act.

1. The operation of the Fair Work legislation and the extent to which its effects have been consistent with the Object set out in Section 3.

- (9) Restaurant & Catering Australia argues that the Fair Work Act has achieved its objectives in the sense of improving employee protections and entitlements however, it has failed to deliver on providing flexibility for businesses and failed to acknowledge the special needs of small and medium sized businesses.
- (10) While the Australian Government has for several years promoted the benefits of workplace flexibility, there appears to have been greater emphasis in practice on strategies for developing family-friendly workplaces and raising workforce participation, rather than productivity¹.
- (11) Restaurant & Catering Australia lodged a written submission to the Productivity Commission Inquiry into the Retail Industry and attended a public hearing on 13 September 2011.
- (12) The Productivity Commission made the following key points in Chapter 11, Workplace Relations Regulation of its Final Report for the Retail industry released on 4 November 2011:
- Participants have argued that provisions under the Fair Work Act, in particular the ‘every worker must be better off overall’ test, are increasing the cost and complexity of negotiating enterprise agreements and making productivity improvements more difficult to achieve.
 - The Australian Government should examine these and other concerns about the operation of the Fair Work Act. The signalled post-implementation review of the Act, to commence before 1 January 2012, should provide the appropriate review mechanism.²
- (13) Restaurant & Catering Australia asks the Fair Work Act Review Panel to examine the evidence presented before the Productivity Commission in its inquiry into the retail industry and take this into consideration in formulating recommendations for improvements to the Fair Work Act.
- (14) Restaurant & Catering Australia would argue that the Fair Work Act has not promoted economic growth and productivity across all sectors of the Australian economy. Since the recent resources boom Australia has been operating in a “two speed” economy where service sector businesses have had profit margins reduced by the high Australian dollar and downturn in domestic tourism.
- (15) The Federal Treasurer the Hon Wayne Swan MP made the following statements in respect to the Australian Economy as part of his second reading speech concerning the Commonwealth Budget in the House of Representatives on 10 May 2011:

“Our public debt is a tiny fraction of that carried by comparable economies, our fiscal position the envy of the developed world. An investment boom is gathering pace.

¹ Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra. Chapter 11 Pg 360

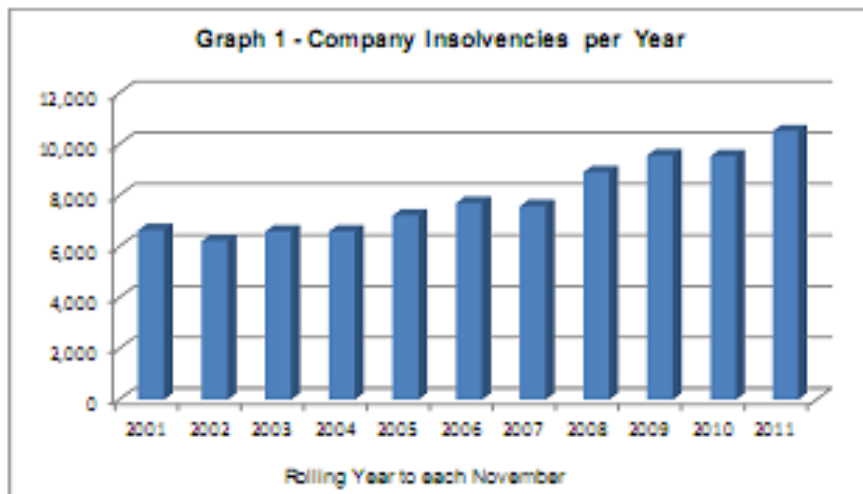
² Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra. Chapter 11 - Pg 313

Yet our patchwork economy grows unevenly across the nation.

Natural disasters have devastated families, cities and towns. The high dollar hurts our tourism and many manufacturing industries, especially small businesses.

*For some, talk of an investment boom seems divorced from reality. Wages are growing, yet many live paycheque to paycheque. **Not every region prospers.***
[Emphasis added]

- (16) Although Australia’s economic performance during the 2000s has been impressive on many dimensions, especially by comparison with that of other ‘advanced’ economies, productivity is not among them. Australia’s productivity performance over the past decade has been poor, to put it mildly, or – both by Australia’s own historical standards, and by contemporary international standards.³
- (17) In order to address the economic forces experienced in recent times Restaurant & Catering Australia sought the means to increase flexibility and productivity in individual workplaces via enterprise agreements directly with employees. However, employers in this industry operate on thin profit margins and the so called Better Off Overall Test (BOOT) pursuant to s.193 of the Fair Work Act has been interpreted by the Fair Work Australia tribunal as a test that ensures there is no financial detriment to employees⁴. This has stifled the number of enterprise agreements being implemented.
- (18) There were 2,132,412 actively trading businesses in Australia as at June 2011⁵. 2011 was the worst year on record for corporate insolvencies⁶. Although the high rate of insolvencies can be attributed to a number of market forces, excessive labour costs are included in the contributing factors for many businesses.



Source: Dissolve - The Business Stress Report: January 2012

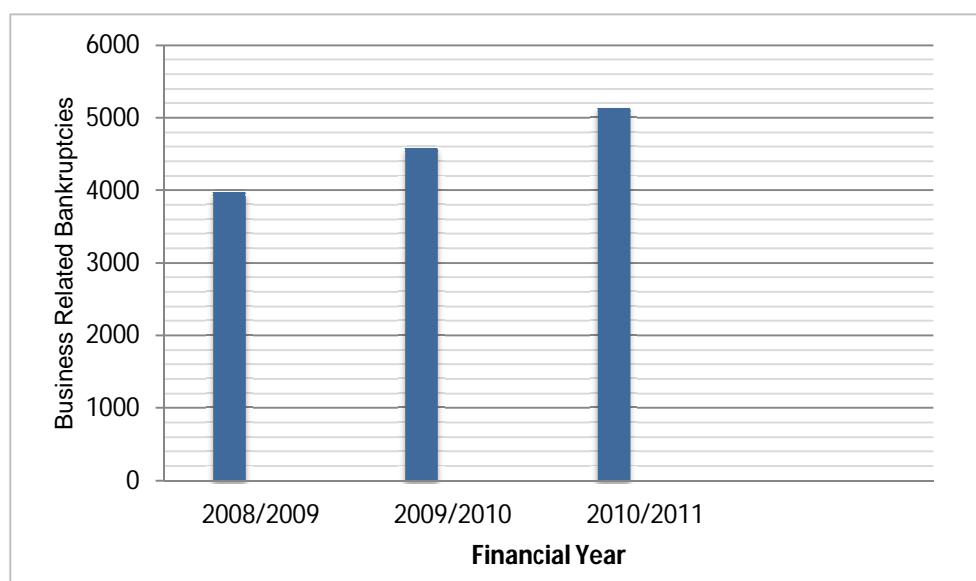
³ Eslake Saul- “Productivity” Paper presented to the annual policy conference of the Reserve Bank of Australia 15-16 August 2011

⁴ [2010] FWAFB 2762- 15 April 2010 pp 73

⁵ ABS Counts of Australian Businesses Including Entries and Exits June 2007 – June 2011 Catalogue No. 8165

⁶ Sanderson C - The Business Stress Report – Dissolve January 2012

- (19) It should be recognised that the number of companies reporting some type of insolvency were much lower under the Workplace Relations Act that regulated workplace law up until 2008.
- (20) The Accommodation and Food Services Sector had some 81,740 businesses operating as at end June 2011 the of which many are structured and operate as sole traders, partnerships and family trusts. Survival rates for businesses operating in this sector remain the lowest of all private sector types. Of the 13,968 new businesses that entered the sector in 2007/08 only 6,813 (48.8%) survived to June 2011⁷.
- (21) Restaurant & Catering Australia conducted an Industry benchmarking survey of its members in late 2011 and this being the fourth edition of a similar survey completed in 2001, 2005 and 2010. In response to a question concerning the obstacles/difficulties in running a restaurant/catering business 90.5% of respondents indicated wages was highest rated factor.
- (22) Labour costs represent some 45% of total expenditure for restaurant and catering businesses and significant spikes in labour costs introduced by the Fair Work Act Modern Award regime must be included in the factors that result in high business failure rates⁸.
- (23) The table below highlights business related bankruptcies has increased by 37% compared to the financial year immediately before the introduction of the Fair Work Act on 1 July 2009.



Source: Business Related Bankruptcies under the Bankruptcy Act 1966 – Insolvency and Trustee Service Australia Annual Report 2010/11 www.itsa.gov.au

- (24) Restaurant & Catering Australia argues that the Fair Work Act has failed in its objective to increase flexibility for businesses and urgently needs to be addressed by the Government. Additionally, incentives need to be included in the legislation in order to promote individual workplace productivity improvements.

⁷ ABS *Counts of Australian Businesses Including Entries and Exits June 2007 – June 2011* Catalogue No. 8165

⁸ Restaurant & Catering Australia Industry Benchmarking Survey 2011/12

2. The extent to which the Fair Work Act has been operating as intended.

The creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand

- (25) The Fair Work Act is not simple or straightforward to understand and this is evident on the volume of calls to the Fair Work Ombudsman Regulator in 2009/10 where one million, one hundred and eight thousand, six hundred and forty eight (1,108,648) enquiries were made to its Infoline⁹. In 2010/11 a further eight hundred and twenty five thousand two hundred and eighteen (825,218) enquiry calls were answered by the Infoline in 2010/11.¹⁰
- (26) The Fair Work Ombudsman Annual Report 2010/11 also highlights that visits to its www.fairwork.gov.au website had substantially increased to three million, five hundred and fifty four thousand, six hundred and thirty four (3,554,634) from two million, nine hundred and five thousand, eight hundred and seventy four thousand (2,905,874) visits in the previous year.
- (27) Restaurant & Catering Australia is concerned that the National Employment Standards (NES) are not operating as intended and need significant amendments before it could be considered as stable framework of rights and obligations under the Fair Work Act.
- (28) The National Employment Standard for maximum weekly hours is a restrictive work practice and no-one can define what additional reasonable hours may be refused by an employee even after considering the criteria set out in s.62 (3) of the Fair Work Act. The maximum weekly hours concept may be appropriate for industries that work Monday to Friday 9AM to 5PM but the standardisation of weekly hours are unworkable in a 24/7 environment such as hospitality industry.
- (29) The National Employment Standard for payment for annual leave s.90 (2) of the Fair Work Act has been interpreted by the Fair Work Ombudsman to override Modern Awards that expressly prescribe annual leave loading is not payable on termination of employment. Despite a previous undertaking by the former Minister for Workplace Relations to clarify the scope of s.90 (2) it remains unresolved some two and half years after the implementation of the Fair Work Act.
- (30) The following extract from the Restaurant Industry Award 2010 highlights a typical award flexibility clause:

“Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

- (a) *arrangements for when work is performed;*

⁹ Fair Work Ombudsman Annual Report 2009-10

¹⁰ Fair Work Ombudsman Annual Report 2010-11

- (b) *overtime rates;*
- (c) *penalty rates;*
- (d) *allowances; and*
- (e) *leave loading.*

7.2 *The employer and the individual employee must have genuinely made the agreement without coercion or duress.*

7.3 *The agreement between the employer and the individual employee must:*

7.3.1 *be confined to a variation in the application of one or more of the terms listed in clause 0; and*

7.3.2 *result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.”*

- (31) Individual Flexibility Arrangements (IFA) are also set out by s.144 of the Fair Work Act however the term “better off overall” is not defined and is considered misleading. Unlike individual Australian Workplace Agreements which were subject to a third party approval process, with IFA’s the BOOT is the responsibility of the employer. The BOOT is so subjective that employers have no way of knowing if what they consider being better off overall will be acceptable to the Fair Work Ombudsman Regulator. The risk of penalties of up to \$33,000 per individual breach combined with back pay for getting the BOOT wrong makes a compelling reason why businesses are reluctant to implement IFA’s.
- (32) In a case that highlights how IFA’s are misunderstood by business owners the Fair Work Ombudsman successfully prosecuted a small business operator in the Federal Court for breaching the Fair Work Act when the company implemented individual agreements that resulted in employees earning less than the applicable Modern Award.¹¹ The company had to repay one employee over \$7000 in retrospective entitlements and the Federal Court Judge awarded a combined \$30,000 penalty for breaches of the Fair Work Act in respect to the invalid IFA’s. As IFA’s are not vetted by a third party, this case is the tip of the iceberg in respect to invalid agreements that may have been implemented unwittingly by businesses across all sectors since the implementation of the Fair Work Act in July 2009.
- (33) Many employees in this industry are students and the only time they can work is at nights and weekends; however due to the high cost of hourly wage rates, fewer people are employed on weekends. This means that students who would like to work additional shifts at their normal rate of pay, cannot, and as such are taking home less money. Many people are willing to work for a rate that is less than the high hourly penalty rates prescribed by Modern Awards on weekends and should be allowed to waive these rates by individual agreement.
- (34) In the recent Industry Benchmarking Survey of members Restaurant & Catering Australia asked the question:

“Do you think individual employment agreements should override Modern Awards?”

A total of 74% of respondents agreed with this question.

¹¹ Fair Work Ombudsman v Australian Shooting Academy Pty Ltd [2011] FCA 1064

- (35) Restaurant & Catering Australia would promote IFA's more widely in the industry if there was more certainty about the types of arrangements that would be deemed acceptable under the BOOT process.

The emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia

- (36) Restaurant & Catering Australia has previously recommended to the Australian Government to provide SME businesses with a pre-approval process within Fair Work Australia so that the content of an agreement can be checked for valid content before being voted on by employees. However, the Australian Government flatly rejected this option and stated as follows:

"It would not be appropriate for FWA to give advice on an enterprise agreement before it has been approved by employees because until that time, its content would not be certain. As a quasi-judicial body FWA must ensure that FW Act requirements for enterprise agreements have been met, and these requirements cannot be judged in advance of an agreement actually being made between the parties."¹²

In other words, you have to wait until after the employees have voted on the terms of the agreement and then subsequently advise the employees that some of the content is prohibited and seek undertakings to change it. This could result in the whole process starting again which is costly, unproductive and another reason employers refrain from implementing formal enterprise agreements under the Fair Work Act 2009.

- (37) McDonalds Australia Pty Ltd made application to Fair Work Australia on 23 December 2009 for approval of a national enterprise agreement. However, some four months later on 23 April 2010 Fair Work Australia rejected the enterprise agreement on the following basis:

"While I accept the Agreement contains a mix of advantages and disadvantages, I have concluded the Agreement would represent an emphatic diminution in overall terms and conditions for the employees who would be subject to its proposed operation.

....The Agreement not only fails to satisfy the no disadvantage test, on various levels it significantly compromises industrial standards that would be expected for agreement-reliant employees – considering, in particular, that these employees are mostly young and mostly casually employed.

The application cannot be approved for the reasons detailed in this decision, including the deficient application; the failure to meet pre-approval requirements; the failure to meet the no disadvantage test; and the inadequacy of some of the proposed written undertakings."¹³

- (38) McDonalds successfully overturned this decision by appeal however it engaged three Barristers at great cost to do this and the validity of the agreement was left in limbo for over six months from the date it was lodged with Fair Work Australia.

¹² Senator Nick Sherry – Minister for Small Business correspondence to R&CA 18 November 2010

¹³ [2010] FWA 1347 (23 April 2010)

Unfortunately, many small and medium sized businesses do not have the resources or financial capacity to appeal enterprise agreement decisions to a Full Bench of Fair Work Australia and many business owners lose confidence in the process because it portrays them as attempting to “dud” their employees.

- (39) The Australian Labor Party Forward with Fairness Policy released before the 2007 federal election claimed that the new body Fair Work Australia would approve collective agreements within seven days. However, the reality is that under the Fair Work Act most single enterprise agreements lodged with Fair Work Australia take around twenty two days from lodgement to approval.¹⁴
- (40) Collective bargaining in theory may take place internationally, nationally, regionally, by industry, enterprise or workplace; however the FW Act largely prevents everything but enterprise bargaining (Thornthwaite, 2011).
- (41) Restaurant & Catering Australia repeats its arguments raised before the Productivity Commission that many employers now find that because of the complex approval process and little ability to genuinely offset award provisions there is no commercial incentive to implement an enterprise agreement.
- (42) Restaurant & Catering Australia therefore argues that the good faith bargaining obligations are not simple and have created a principle that gives precedence to third party unions over direct employee collective agreements.

The promotion of fairness and representation at work

- (43) Restaurant & Catering Australia supports the promotion of fairness and representation at work, however the Australian Government must accept that this principle also applies equally to business owners and not just employees.
- (44) Small businesses such as cafés now find themselves in the absurd situation where some business owners are forced to work seven days a week and earn less than the minimum wage. Employees in small businesses are also affected by being rostered to work less hours or no longer being required to work on weekends and public holidays where high penalty rates make trading commercially unviable.
- (45) Is it fair that some small business owners are now taking home less weekly earnings compared to the weekly wages that they pay their staff?
- (46) Restaurant & Catering Australia argues that the Transmission of business provisions of the Fair Work Act need to be rewritten to ensure they do not become a disincentive for businesses to acquire other businesses.
- (47) If a transfer of business occurs and the new employer wants to prevent the transfer of an EA, it will need to be able to demonstrate the disruption the agreement will cause the business, or the benefits of its own EA (McLaughlin, 2010).
- (48) If the new employer employees new employees and there is no EA or modern award that already covers that work at the new employer, the transferring EA will apply to the new employees (McLaughlin, 2010).

¹⁴ Fair Work Australia Annual Report 2010-11

Effective procedures to resolve grievances and disputes

- (49) The Fair Work Infoline also has a tendency to create workplace disputes by allowing employees to by-pass the dispute settling procedure in the Award or Agreement and escalate payroll and other award matters to the Regulator without first alerting the employer about the complaint.
- (50) In a case study to illustrate how the Fair Work Ombudsman Infoline can create workplace disputes Restaurant & Catering Australia refers to workplace dispute with Oceanic Sorrento Pty Limited¹⁵. In May 2011 two employees of Oceanic Sorrento Pty Ltd contacted the Fair Work Infoline to check on wages and conditions of employment. The Fair Work Infoline Advisors indicated that the collective agreement they were referring to was not a registered collective agreement because it was not coming up on the Fair Work Australia website search facility. This advice was incorrect and exacerbated an existing workplace dispute.
- (51) On 2 May 2011, Restaurant & Catering Australia provided Fair Work Australia with a copy of the Oceanic Sorrento Collective Agreement 2007 and requested that it be made available electronically on its website to resolve the workplace dispute that developed with employees thinking the agreement was not approved. Restaurant & Catering also requested that Fair Work Australia and the Fair Work Ombudsman ensure that staff on their call centres are trained not to comment on the status of Agreements when it is well known that many approved agreements are not available from the Fair Work Australia website because they have been lost or misplaced by the former Workplace Authority. Ironically, the Fair Work Ombudsman prosecutes businesses that fail to keep employment records with penalties of up to \$33,000 per individual breach.
- (52) The Oceanic Sorrento case highlights how employees are by-passing the dispute settlement procedures in the Modern Award or Agreement and escalating disputes that should have been resolved at the workplace level. The case study also highlights that confusion exists between the two entities Fair Work Australia and the Fair Work Ombudsman in respect to existing Enterprise Agreements.
- (53) Restaurant & Catering also remains concerned that the Fair Work Ombudsman has an inherent conflict in advising employers and employees with workplace relations advice. The Association is aware of situations where Fair Work Infoline staff give advice to employers and employees from the same company. This is clearly a conflict and highlights a fundamental flaw in the charter of the Fair Work Ombudsman under the Fair Work Act.
- (54) The Fair Work Information Statement also has the unintended effect of encouraging employees to contact the Fair Work Infoline for advice on employment conditions that are best resolved at the local workplace level in the first instance. After years of devolution of industrial relations to the workplace level the Fair Work Information Statement has the unintended consequence of escalating issues outside the workplace and a potential departure of the dispute settling procedure in Modern Awards.
- (55) The Fair Work Ombudsman, Mr Nicholas Wilson responded in writing to these concerns raised by Restaurant & Catering Australia in a letter dated 5 August 2010, however, the issues largely remain unresolved.

¹⁵ Fair Work Ombudsman Ref: MAT -0001-5581 [2011]

- (56) Restaurant & Catering Australia often receives calls from members who are paying the correct entitlements to employees that have obtained conflicting information from the Fair Work Infoline. Employees in some cases are using Fair Work online calculators or other website products and then demanding rates of pay that apply to different employers such as incorporated businesses trading prior to 27 March 2006.
- (57) Most of FWA powers in dispute resolution relate to incidents of the bargaining process, particularly issues concerning protected industrial action and good faith bargaining (Thornthwaite, 2011).
- (58) The FW Act has not only significantly reduced the role of the tribunal as an “independent umpire” in setting disputes over the content of collective agreements, it has virtually eliminate the tribunal’s power to resolve interest disputers (Thornthwaite, 2011).
- (59) Restaurant & Catering Australia therefore argues that the Fair Work Act has significantly increased workplace conflict and provided no avenue to have the issues resolved effectively in an impartial manner.

Genuine unfair dismissal protection

- (60) The concept of the Fair Work Act providing genuine unfair dismissal protection for employees is an understatement. There were some 14,897 termination of employment applications to Fair Work Australia in 2010/11 a 14% increase on termination claims lodged with the tribunal in the previous financial year.¹⁶
- (61) Restaurant & Catering Australia argues that the Small Business Fair Dismissal Code is a clear example where s.388 of the Fair Work Act is not operating as intended. Under the Small Business Fair Dismissal Code employees may be terminated without warning or notice for serious misconduct such as theft, fraud, violence and serious breaches of occupational health and safety. In other cases such as poor performance employees must be warned either verbally or in writing and given the opportunity to respond to the warnings and advised when he or she risks being terminated where there is no improvement.
- (62) However, in *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café [2010] FWA 7891* Deputy President Bartel of the Fair Work Australia Tribunal was dealing with an application for unfair dismissal by an employee who was terminated for theft of money from the Café where he was employed as a Cook under a s.457 Visa. The case highlights that small business employers can still be dragged before the Fair Work Australia Tribunal where clearly the employee was terminated for theft. The legal costs in defending this claim before the Fair Work Australia Tribunal remain excessive considering there were two days of hearings and a number of employees were called to give evidence before the Tribunal. Even though the café owners won the case and the tribunal ruled that they had complied with the Small Business Fair Dismissal Code it appears no one can recompense them for the time and stress away from their business operations; let alone recovery of the tens of thousands of dollars stolen.
- (63) This Banana Tree Café case appears to contradict the Government rhetoric that under the Small Business Fair Dismissal Code:

¹⁶ Fair Work Australia Annual Report 2010-11

"Employers will no longer need to pay "go away" money, since the process will be quick, simple and informal"

- (64) From 1 January 2011 the small business definition changed from fewer than 15 full time equivalent employees to a simple headcount. This means that irregular casual employees are now included in the total number of employees being employed in a business and therefore excluding more businesses from the Small Business Fair Dismissal Code. Restaurant & Catering Australia is concerned that the headcount change may have the unintended impact of reducing casual employment in rural and regional Australia.

The creation of a new institutional framework and a single and accessible compliance regime

- (65) The Australian Government indicated that the new institutional framework would provide a "one stop shop" under the Fair Work legislation. However, the way in practice this has evolved to work results in a confused line between the responsibilities of the Fair Work Australia Tribunal and the Fair Work Ombudsman.
- (66) Given the Fair Work Ombudsman powers to investigate and prosecute employers with penalties of up to \$33,000 for each individual breach of the Fair Work Act there is a direct conflict of interest in the same Agency being entrusted to advise employers on employment matters including compliance. The absurd scenario arises that some employers may in fact be self incriminating by revealing employee issues to the Fair Work Infoline.
- (67) Restaurant & Catering Australia argues that the Fair Work Ombudsman Agency should have its advisory services returned to the Department of Education, Employment and Workplace Relations.
- (68) Restaurant & Catering Australia argues the Right of Entry provisions under the Fair Work Act should restrict trade union officials from entering workplaces unless they have a direct request in writing from a member. Hospitality workplaces are constantly disrupted by a revolving door of Local Council Inspectors, Workcover Inspectors, ACCC Inspectors and Fair Work Ombudsman Inspectors and any reduction in this form of 'red tape' would be welcome relief to business owners.

Any differential impacts across regions, industries, occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking backgrounds.

- (69) The National Employment Standards for Public Holidays has created additional public holidays resulting in a doubling of the days attracting public holiday penalty rates under Modern Awards. This is in direct conflict with the previous Full Bench Test Case determined by the Australian Industrial Relations Commission that established the principle of substitute public holidays ensuring businesses were generally not penalised with a doubling of penalty rates where recognised public holidays fall on weekends.¹⁷

¹⁷ AIRCFB Public Holidays Test Case Decision 1995 Print L9178

- (70) The Fair Work Act National Employment Standard for public holidays is not operating as intended when one considers the following passage from paragraph 457 of the Explanatory Memorandum, Fair Work Bill 2008:

“an employee is entitled to be absent on the substituted day instead of the original public holiday, not on both days and an employer will not be required to provide public holiday entitlements on 2 days in respect of the one holiday.”

- (71) The interaction between the Fair Work Act National Employment Standard and the Western Australian Public Holiday and Bank Holidays Act 1972 resulted in national system employers being liable for **six** public holidays attracting public holiday penalty rates over the Christmas/New year period in 2010/11. In comparison, unincorporated businesses in Western Australia operating under the old state award system were liable for payment of public holiday penalty rates on only **three** days over the Christmas/New year period in 2010/11 because the state awards do not operate under the National Employment Standards.
- (72) The National Employment Standard for Long Service Leave continues to default to state long service leave legislation and therefore fails to be a truly national standard. Restaurant & Catering Australia remains concerned that any attempt to standardise long service leave entitlements nationally should not add additional costs to businesses by applying the most beneficial employee entitlement from each state statute.

3. Areas where the operation of the Act could be improved

- (73) That the Australian Government should make the following amendments to its Fair Work Act:
- Increase the unfair dismissal small business threshold to 25 full time equivalent employees and enshrine this into the Small Business Fair Dismissal Code;
 - Introduce a pre approval assessment process for enterprise agreements giving small business employers more certainty in the enterprise bargaining process;
 - Rectify the public holiday provisions in the National Employment Standards that double the entitlements in some states and resolve the national standard for long service leave;
 - Include in the Fair Work Information Statement a requirement that employees must comply with the dispute settlement procedure before contacting the Fair Work Ombudsman;
 - Provide certainty over the use of Individual Flexibility Agreements allowing employers and employees to reach local level workplace agreements;
 - Reduce the responsibilities of the Fair Work Ombudsman office to ensure overlapping with the Fair Work Australia Tribunal is eliminated;
 - Allow variations of Modern Awards within the four year review period to where economic benefits can be demonstrated;
 - Restrict right of entry provisions for trade union officials
 - Update the transfer of business provisions to simplify for employers acquiring other businesses.

Conclusion

- (74) Restaurant and Catering Australia has highlighted a number areas where the Fair Work Act is not operating as intended and is failing to meet its objectives, particularly in relation to 'promote productivity and economic growth for Australia's future economic prosperity'¹⁸. By making some substantial amendments to the Fair Work legislation there is an opportunity for the Government to improve workplace productivity by ensuring that flexible work practices are readily available to stakeholders at the workplace level. Further deregulation of the labour market is important for Australia to be internationally competitive and to empower entrepreneurs to set up and maintain commercially viable businesses. If these workplace issues remain unresolved it may further exacerbate the alarming trends in increased corporate insolvencies and business related individual bankruptcies.

Restaurant & Catering Australia will be available to expand on its written submission during consultations with the Fair Work Act Review Panel.

¹⁸ Fair Work Act 2009 (Cth.) – Division 2 (3)

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