




Restaurant & Catering

Productivity Commission

Public Inquiry: Workplace Relations Framework

MARCH 2015

RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the national industry association representing the interests of 35,000 restaurants, cafes and catering businesses across Australia. R&CA delivers tangible outcomes to small businesses within the hospitality industry by influencing the policy decisions and regulations that impact the sector's operating environment.

R&CA is committed to ensuring the industry is recognised as one of excellence, professionalism, profitability and sustainability. This includes advocating the broader social and economic contribution of the sector to industry and government stakeholders, as well as highlighting the value of the restaurant experience to the public.

Cover images courtesy of Tourism Australia

Restaurant & Catering

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ABOUT THE INDUSTRY

(1) The industry turns over some $24 billion[1] per annum and has a projected five year employment growth rate of 8.5 per cent[2] to November 2018. This growth is on top of a sizeable attrition from the industry due to the large number of casual employees engaged.

(2) Café, restaurants and takeaway food services is the largest employer of the Accommodation and Food Services industry, employing approximately 524,323 or 67.9 per cent of workers in the sector[3]. Approximately 93.1 per cent of café, restaurant and catering businesses are small businesses[4]. The average employment per business is eight employees[5].

(3) The average turnover of small businesses in the restaurant and café sector is $1 million[6]. The average net profit is 3.6 per cent[7]. It is expected profit will further deteriorate in the short term.

TERMS OF REFERENCE

(4) The Productivity Commission has been given the following terms of reference by the Australian Government for its inquiry into the workplace relations framework:

The Productivity Commission will assess the performance of the workplace relations framework, including the Fair Work Act 2009, focusing on key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people. A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy.

In particular, the review will assess the impact of the workplace relations framework on matters including:

- *unemployment, underemployment and job creation;*
- *fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net;*
- *small businesses;*
- *productivity, competitiveness and business investment;*

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[1] ABS (2015) 8501.0 Retail Trade, Australia; State by Industry Subgroup, Original

[2] Department of Employment (2014) *Industry Outlook: Accommodation and Food Services -December 2014*

[3] Department of Employment (2014) *Industry Outlook: Accommodation and Food Services - December 2014*

[4] ABS (2014) 8165.0 *Counts of Australian Businesses, including Entries and Exits, Jun 2009 to Jun 2013*

5 ABS 8655.0 Cafes, Restaurants and Catering Services, Australia, 2006-07

[6] Restaurant & Catering Australia (2014) *Industry Benchmarking Report, 2012-2013 Financial Year Results*

7 ABS 8655.0 Cafes, Restaurants and Catering Services, Australia, 2006-07

- *the ability of business and the labour market to respond appropriately to changing economic conditions;*
- *patterns of engagement in the labour market;*
- *the ability for employers to flexibly manage and engage with their employees;*
- *barriers to bargaining;*
- *red tape and the compliance burden for employers;*
- *industrial conflict and days lost due to industrial action; and*
- *appropriate scope for independent contracting.*

In addition to assessing the overall impact of the workplace relations framework on these matters, the review should consider the Act's performance against its stated aims and objects, and the impact on jobs, incomes and the economy. The review should examine the impact of the framework according to business size, region, and industry sector. It should also examine the experience of countries in the Organisation for Economic Co-operation and Development.

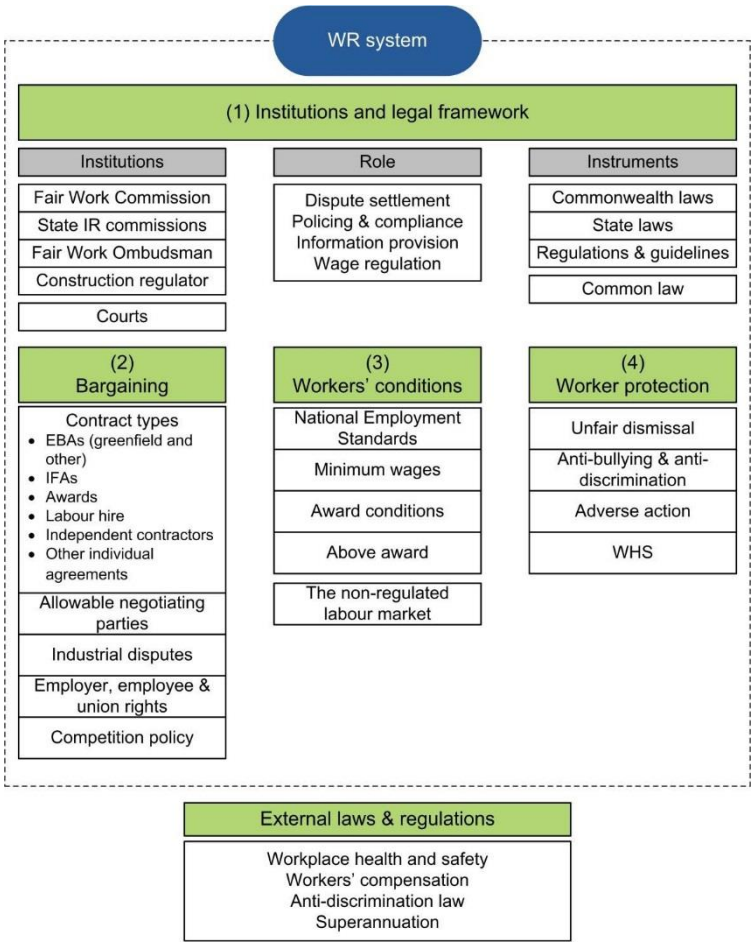
The workplace relations framework encompasses the Fair Work Act 2009, including the institutions and instruments that operate under the Act; and the Independent Contractors Act 2006.

The review will make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.

The Productivity Commission will identify and quantify, as far as possible, the full costs and benefits of its recommendations.

(5) This submission will address the above issues and provide industry and other relevant data and evidence in support of its assertions, highlighting the difficulties experienced by the restaurant and catering industry during the operation of the Fair Work Legislation. Not all questions identified in the Issue Papers have been addressed in this submission as the Association seeks only to address those issues with the greatest impact on the sector. The Association would be pleased to expand on the issues raised in this submission during public hearings with the Commission.

(6) The Productivity Commission has identified the main elements of the workplace relations framework in Figure 1.1 reproduced below[8]:



(7) However, Restaurant & Catering Australia (R&CA) believes the workplace relations framework is more complex than the above framework suggests, and it is not until one understands the full regulatory burden imposed by Federal and State Governments when it comes to employment legislation and regulations that this is realised. The following table sets out the applicable employment-related legislation and regulations that apply to private sector businesses across Australia.

[8] Workplace Relations Framework: The Inquiry in Context Productivity Commission Issues Paper 1 January 2015 @ Pg. 3 Australian Government Productivity Commission

FEDERAL EMPLOYMENT RELATED LEGISLATION AND REGULATIONS

NAME	PAGES
AGE DISCRIMINATION ACT 2004	77
DISABILITY DISCRIMINATION ACT 1992 AND REGULATIONS 1996	89
FAIR WORK ACT 2009 AND REGULATIONS 2009	1135
PAID PARENTAL LEAVE ACT 2010	333
RACIAL DISCRMINATION ACT 1975	58
SEX DISCRMINATION ACT 1984 AND REGULATIONS	124
SUPERANNUATION GUARANTEE CHARGE ACT 1992	9
TOTAL	**1825**

STATE AND TERRITORY EMPLOYMENT RELATED LEGISLATION AND REGULATIONS

Australian Capital Territory	Pages
Discrimination Act 1991	104
Holidays Act 1958	14
Long Service Leave Act 1976	43
Payroll Tax Act 2011	128
Training and Tertiary Education Act 2003	50
Work Health and Safety Act 2011 and Regulations 2011	245 / 482
Workers Compensation Act 1951 and Regulations 2002	366 / 84
Workplace Privacy Act 2011	46
TOTAL	**1563**
New South Wales	
Anti-Discrimination Act 1977	93
Apprenticeship and Traineeship Act 2001 and Regulations 2010	34 /4
Long Service Leave Act 1955	21
Payroll Tax Act 2007	57
Public Holidays Act 2010	4
Work Health and Safety Act 2011 and Regulations 2011	89 / 278
Workers Compensation Act 1987	231
Workplace Surveillance Act 2005 and Regulations 2012	16 / 12
TOTAL	**840**
Northern Territory	
Anti-Discrimination Act and Regulations	64 / 4
Long Service Leave Act	17
Northern Territory Employment And Training Act	69
Payroll Tax Act	90
Public Holidays Act and Regulations	12 / 4
Work Health & Safety (National Uniform Legislation) Act and Regulations	175 / 673
Workers Rehabilitation and Compensation Act and Regulations	171 / 12
TOTAL	**1292**

Queensland	
Anti-Discrimination Act 2001	162
Child Employment Act 2006 and Regulations 2006	51 / 31
Holidays Act 1993	16
Industrial Relations Act 1999 (LSL)	906
Payroll Tax Act 1971 and Regulations	214 / 21
Vocational Education, Training and Employment Act 2000 and Regulations 2000	14 / 74
Work Health and Safety Act 2011 and Regulations 2011	246 / 737
Workers Compensation and Rehabilitation Act 2003 and Regulations 2014	522 / 278
TOTAL	**3273**
South Australia	
Equal Opportunity Act 1984	100
Holidays Act 1910	8
Long Service Leave Act 1987 and Regulations 2002	15 / 8
Payroll Tax Act 2009	70
Return to Work Act 2014	191
Training and Skills Development Act 2008 and Regulations 2008	56 / 3
Work Health and Safety Act 2012 and Regulations 2012	157 / 56
Workers Rehabilitation and Compensation Act 1986 and Regulations 2010	213 / 520
TOTAL	**1398**
Tasmania	
Long Service Leave Act 1976 and Regulations	22 / 4
Payroll Tax Act 2008	66
Work Health and Safety Act 2012 and Regulations 2012	127 / 440
Workers Rehabilitation and Compensation Act 1988 and Regulations 2011	194 / 12
TOTAL	**866**
Victoria	
Accident Compensation Act 2001	497
Child Employment Act 2003 and Regulations 2014	66 / 10
Education and Training Reform Act 2006	673
Equal Opportunity Act 2010	157
Long Service Leave Act 1992	66
Occupational Health and Safety Act 2004 and Regulations 2014	178 / 550
Payroll Tax Act 2007	141
Public Holidays Act 1993	14
Workers Compensation Act 1958	216
TOTAL	**2569**
Western Australia	
Employment Dispute Resolution Act 2008 and Regulations 2008	24 / 11
Equal Opportunity Act 1984 and Regulations 1986	213 / 13
Industrial Relations Act 1979 and General Regulations 1997	353 / 20
Long Service Leave Act 1958 and Regulations 1997	29 / 7
Minimum Conditions of Employment Act 1993 and Regulations 1993	51 / 8
Occupational Health and Safety Act 1984 and Regulations 1996	156 / 413

Payroll Tax Act 2002 and Assessment Regulations 1996	12 / 41
Public and Bank Holidays Act 1972	11
Vocational Education and Training Act 1996 and Regulations 2009	81 / 83
Workers Compensation and Injury Management Act 1981 and Regulations 1982	476 / 245
TOTAL	2248

(8) The overlapping of state and territory employment-related legislation make compliance extremely difficult for small businesses and an enormous regulatory burden for all businesses. An analysis of legislative and regulatory requirements for small businesses revealed 15,874 pages of documentation - an excessive administrative red tape burden for operators.

(9) Many business owners struggle to understand entitlements such as long service leave and public holidays because the Modern Awards refer operators to the National Employment Standards of the *Fair Work Act 2009* which is then either silent or redirects the operator again to state legislation to find the benefit.Western Australia continues to operate on a dual system basis with many unincorporated café owners operating under the *Industrial Relations Act 1979* and state award system of common rule awards.

(10) Apprentices have their pay regulated nationally by Modern Awards yet other conditions change radically from state to state by vocational education and training legislation which creates another legislative minefield for businesses in multiple states.

(11) R&CA advocates that it is important to remove the red tape and regulatory burden on businesses across Australia by repealing the *Fair Work Act 2009* and legislating a new Commonwealth "Workplace Relations and National Employment Act" that voids state and territory employment related legislation for national system employers.

(12) Furthermore, the duplication of legal technicalities with multiple Federal, State and Territory legislation for discrimination law should be replaced with a new Commonwealth *"National Equal Opportunity Act"*.

(13) Finally, although the harmonisation of the Work Health & Safety legislation has failed to materialise after four years, a new Commonwealth *"Work Health and Safety and Compensation Act"* should replace the plethora of state and territory laws.

FAIR WORK ACT OBJECTIVES

(14) The Objects of the *Fair Work Act 2009* are set out in s.3 and 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."

(15) The objective (3) (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; is a political statement rather than an objective and must be deleted.

(16) The objective 3(f) "achieving productivity" is a motherhood statement as there is no requirement in the agreement-making part of the Act for the Fair Work Commission (FWC) to take into account productivity when approving agreements or deciding any bargaining applications. The agreement-making section needs to properly recognise the need for quantifiable productivity gains to give this objective credibility.

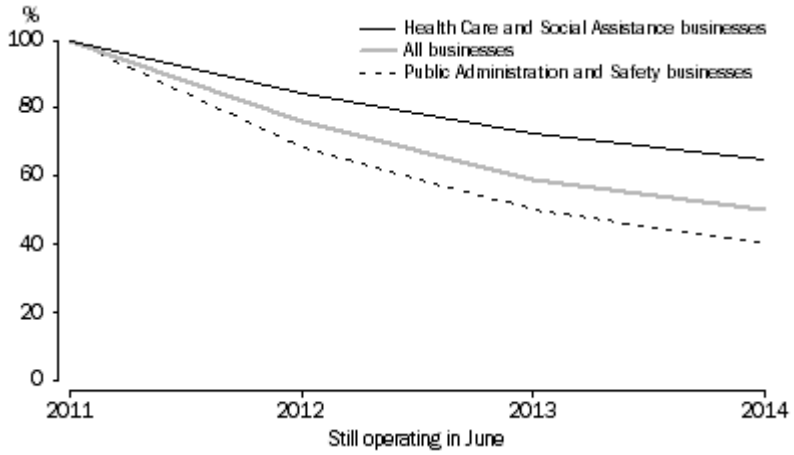
(17) The objective (3) (g) "acknowledging the special circumstances of small and medium sized businesses" is rhetorical and fails to ensure that the FWC should take into account "commercial viability" in every decision or Award provision that impacts small and medium sized businesses.

(18) The objectives of the *Fair Work Act 2009* need to be totally rewritten to meet future challenges of the modern day workplace and balanced to ensure businesses are not subjected to employment conditions that are internationally uncompetitive and unsustainable.

(19) R&CA would argue that the *Fair Work Act 2009* 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 considerably to commercially unviable levels.

(20) There were 2,100,162 actively trading businesses in Australia as at June 2014. However, as set out in the graph below, only half of the businesses that started operating in 2010 were still operating in 2014[9].

Survival Rates of businesses that started in 2010-11



(21) 2011/2012 was the worst financial year on record for corporate insolvencies. 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 in the accommodation and food services sector.

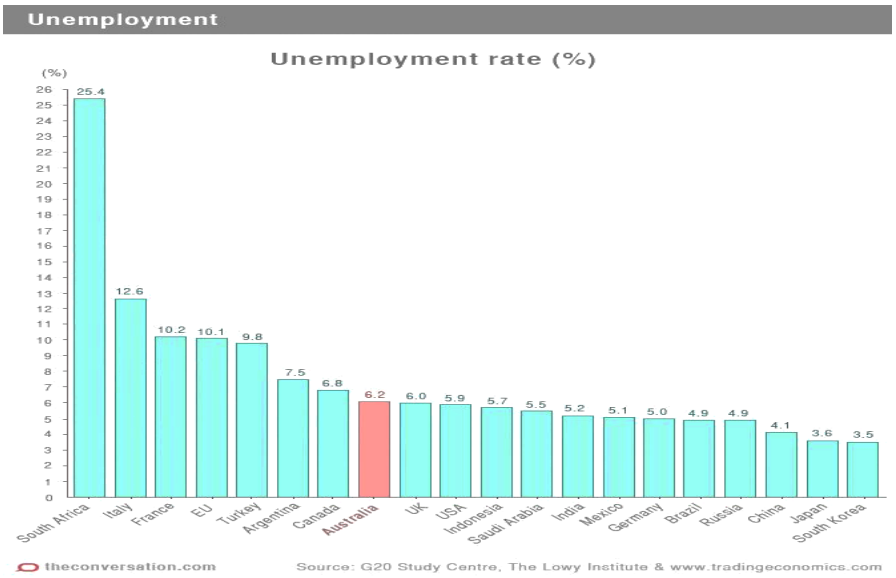
[9] ABS *Counts of Australian Businesses Including Entries and Exits June 2010 - June 2014* Catalogue No. 8165

(22) R&CA argues that the Fair Work Act 2009 has failed in its objective to increase flexibility for businesses and urgently needs to be addressed by the Australian Government. Additionally, incentives need to be included in the legislation in order to promote individual workplace productivity improvements.

Source: Australian Securities and Investment Commission (ASIC) Statistics Series 1 Companies entering into External Administration

(23) As illustrated in the table above the number of companies entering corporate insolvency were much lower under the *Workplace Relations Act 1996* compared to the years of operation under the *Fair Work Act 2009*.

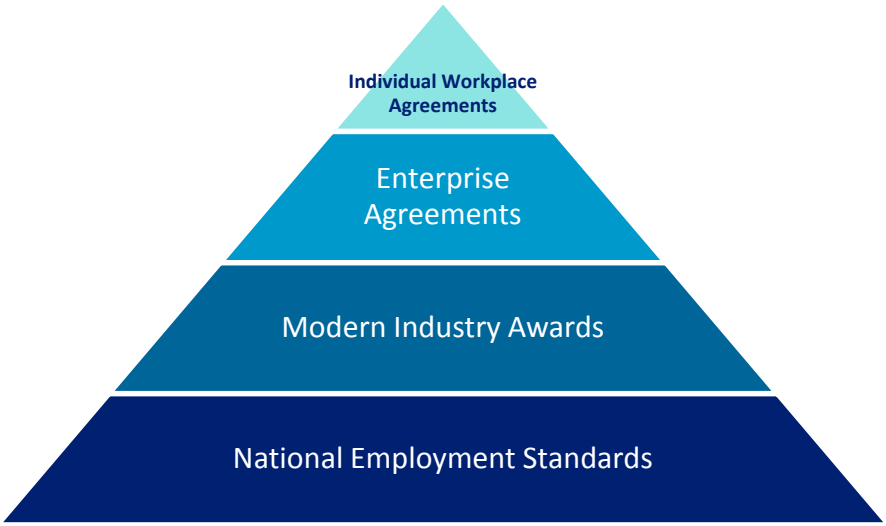
(24) Australia's unemployment rate is currently 6.2 per cent, up from 4.9 per cent in April, 2012. Australia now has an unemployment rate higher than 12 of the G20 countries. Unemployment could be reduced by creating more jobs in service industries such as hospitality, however, this will not occur where employment costs are prohibitive, acting as a disincentive for companies to set up in Australia.



THE WAY FORWARD

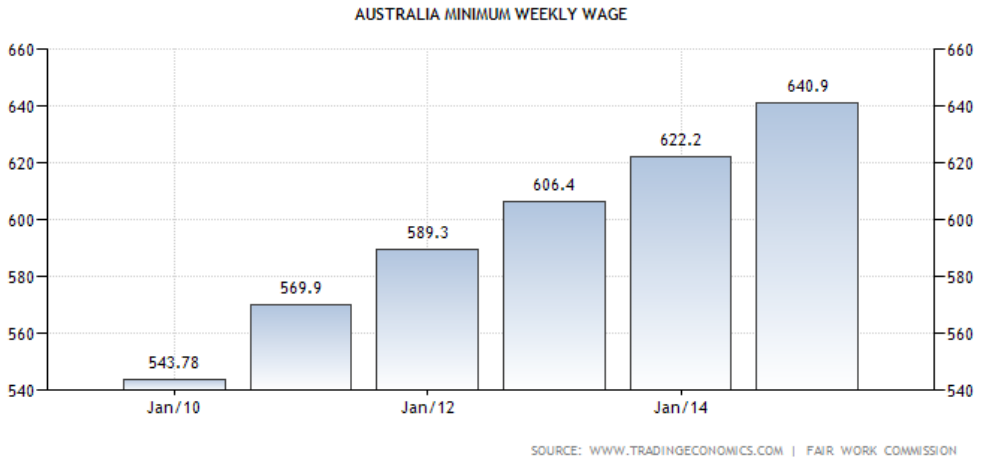
(25) R&CA argue that the workplace relations system in Australia needs to be reformed by introducing a model of flexibility and innovation. This is because the Individual Flexibility Arrangements established under the *Fair Work Act 2009* lack the necessary power to become an effective form of agreement making.

(26) The following diagram illustrates the hierarchy of instruments and safety nets that should be available to employers:



(27) In the above model only award free employees would be covered by the National Employment Standards and employees covered by Modern Industry Awards may have different industry conditions compared to the National Employment Standards. Similarly, Enterprise Agreements could override both Modern Industry Awards and the National Employment Standards. Ultimately, individual workplace agreements would have the statutory power to override all instruments subject to application.

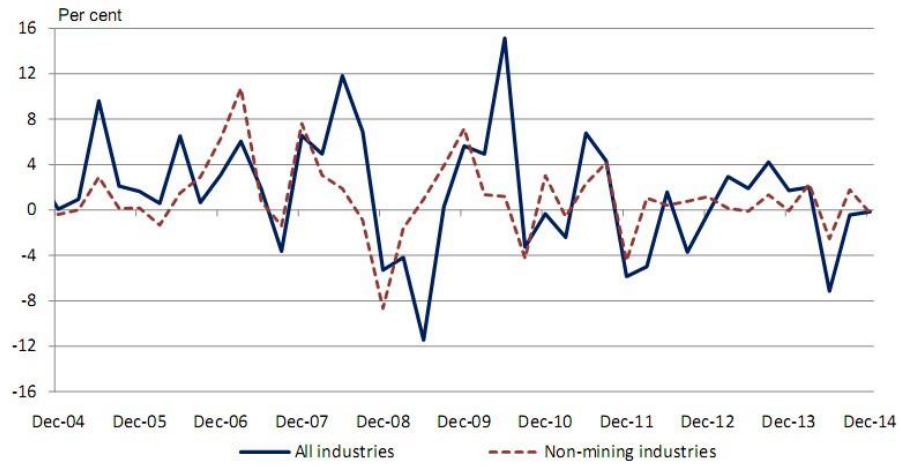
(28) Minimum Wages in Australia increased to $640.90 in 2014 from $622.20 in 2013. Minimum Wages in Australia averaged $595.41 from 2009 until 2014, reaching an all-time high of $640.90 in 2014 and lowest level of $543.78 in 2009.



(29) Labour costs represent some 45 per cent 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 rates[10].

(30) The table below highlights business profit margins remain exceptionally week[11].

Chart 3.2: Company gross operating profits, quarterly growth rates



[10] Restaurant & Catering Australia Industry Benchmarking Survey 2014

[11] Statistical Report - Annual Wage Review 2014-15 Fair Work Commission 5 March 2015

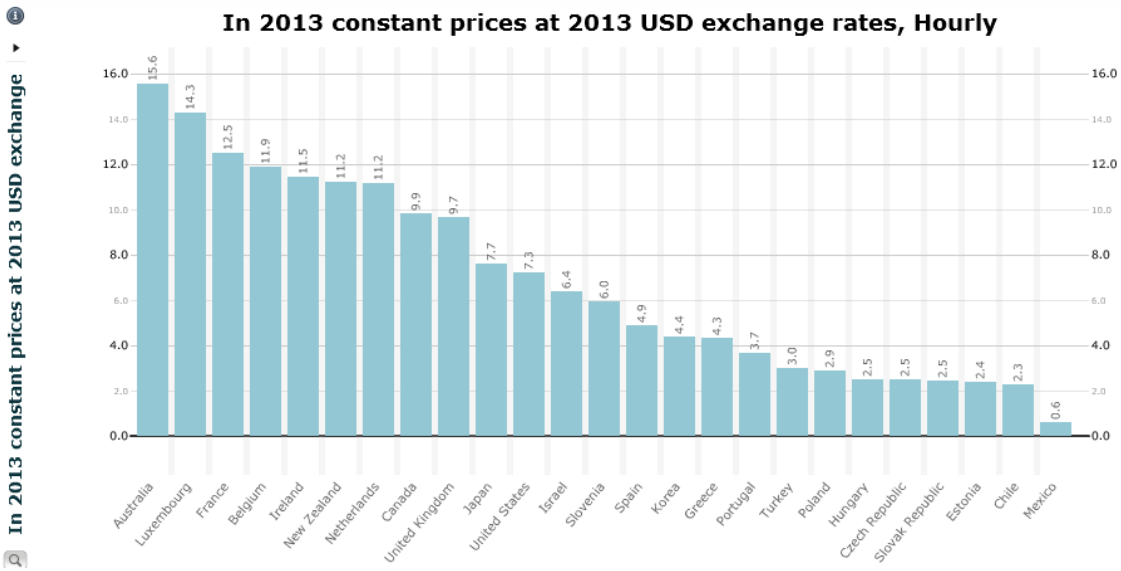
(31) R&CA has consistently argued to the Minimum Wage Panel of the FWC (and formerly Fair Work Australia) that there needs to be an ability to carve out industry sectors that are experiencing exceptional circumstances or financial hardship.

(32) The FWC Expert Panel identified the following in the 2013-4 Annual Wage Review:

"The practical difficulty created by the present legislative framework remains and this does impact on the ability of some parties to effectively raise exceptional circumstances matters with the Panel. This is an issue for the parliament."[12]

(33) Accordingly, the legislation for minimum wage setting is flawed and needs to allow industry sectors the ability to run exceptional circumstances or other compelling industry grounds for exemptions.

(34) Minimum Wages in Australia are the highest in the world as set out below in the OECD table:



(35) What exacerbates the problem in Australia is that unlike other countries, minimum wages are subject to multipliers of penalty rates and overtime under Modern Awards that make labour costs prohibitive.

(36) R&CA has also pointed out to the FWC in previous annual wage review submissions that minimum wages also spiked significantly under the transitional arrangements that moved classifications and wages from the state award system to the federal Modern Award System under the *Fair Work Act 2009*.

[12] [2014] FWCFB 3500 - 4 June 2104 pp 520

(37) R&CA's members are obliged to operate at times which are identified as "outside ordinary hours". They must do so or else they do not have a business. If the minimum wage is increased by say, $10 per week, that is all an employer whose business operates within the ordinary hours, is obliged to pay. But R&CA members are obliged to pay a premium, for the same basic week's work their employees are engaged to perform. So the minimum wage for R&CA members is in fact more than $10. This compounding has gone on for 70 years and goes a long way to explaining why R&CA members do not indulge in enterprise bargaining which now, by law, requires employees to be better off under the agreement than the award. The award is routinely delivering higher increases to R&CA members' employees than other industries.

(38) The Fair Work Act requires an Expert Panel (Panel) to conduct and complete a review of minimum wages in modern awards and the national minimum wage in each financial year. The Panel must include three expert members with knowledge or experience in one or more of (i) workplace relations, (ii) economics, (iii) social policy, (iv) business, industry or commerce. R&CA believes the Panel majority should comprise economists and experts experienced in business.

(39) R&CA is of the view that because of the real impact on its members of the National Minimum Wage (NMW), it is not merely some abstract safety net with minimal impact. It is the rate of pay (including the respective higher rates for various skills within the modern awards which are set against this benchmark rate). In R&CA's view this requires expertise in reviewing the NMW which focuses on the impact on jobs and business' capacity to pay. The current preference for 'one size fits all', apart from the compounding issue of penalty rates discussed elsewhere in this submission, does not take into account the economic conditions in various sectors of industry. It is trite to say that economic prosperity is not uniformly spread across the economy.

(40) The universal application of an increase in the NMW has extraordinarily different impacts across sectors. Some sectors (e.g. resources) pay so far above these minima as to virtually not notice increases in the NMW. On the other hand, every time there is an increase in the NMW, R&CA members pay that and a premium due to penalties immediately, regardless of how their sector is travelling. If the claims are made to assist "low income earners" then that begs the question: why aren't the tribunals identifying what is actually meant by that term, and assuming they can do that, why aren't increases restricted to that class of persons?

(41) As set out in the table below, wages have increased in some states by over 20 per cent in the last four years:

State/ Territory	Pre Modern Award Instrument	Grade	Pre Modern Award Weekly Rate @ 30/06/2010	Restaurant Industry Award @ 01/07/2014	Actual Increase to Business
ACT	Liquor and Allied Industries Catering, Café, Restaurant etc. (ACT) Award 1998	Level 1 Hospitality Services	$560.50	$659.40	**$98.90 pw OR $5142 pa**
NSW	Restaurants & C., Employees (State) Award NAPSA AN 120468	Grade 1	$550.62	$659.40	**$108.78 pw OR $5656 pa**
NT	Hotels, Motels, Wine Saloons, Catering, Accom, Clubs and Casino Employees (NT) Award 2002	Hospitality Worker Level 1 (Food & Bev DIV)	$543.78	$659.40	**$115.62 pw OR $6012 pa**
QLD	Hospitality Ind, Rest Catering & Allied Estab Award (SE) Div 2002 NAPSA AN140144	Food & Beverage Attendant Grade 1	$552.14	$659.40	**$107.26 pw OR $5577 pa**
SA	Café and Restaurant (SA) Award NAPSA AN150025	Food & Beverage Attendant Grade 1	$568.46	$659.40	**$90.94 pw OR $4728 pa**
TAS	Restaurant Keepers Award	Food & Beverage Attendant Grade 1	$560.50	$659.40	**$98.90 pw OR $5142 pa**
VIC	Liquor & Accommodation Industry- Restaurants Victoria Award	Food & Beverage Attendant Grade 1	$560.50	$659.40	**$98.90 pw OR $5142 pa**
WA	Restaurant, Tea Room and Catering Workers Award NAPSA AN160276	Food & Beverage Attendant Grade 1	$560.50	$659.40	**$98.90 pw OR $5142 pa**

(42) Award wages have increased so dramatically that small business owners find themselves making less money each year than they pay to their staff in wages. This is illustrated in the table below[13]:

Region	Wages & salaries	Own unincorporated business	Investment	Superannuation & annuities	Other Income (excl. Govt pensions & allowances)	Total income from all sources (excl. Govt pensions & allowances)
	$	$	$	$	$	$
NSW	**53 917**	**24 471**	**8 497**	**23 208**	**2 701**	**54 110**
Greater Sydney	57 612	28 803	9 615	22 706	3 142	**58 828**
Rest of	46 514	18 538	6 390	23 843	1 853	**45 169**
Victoria	**50 276**	**22 841**	**9 529**	**20 863**	**2 152**	**51 398**
Greater Melbourne	52 470	25 187	10 086	21 473	2 360	**54 104**
Rest of Victoria	43 072	18 004	7 750	19 297	1 471	**42 987**
Queensland	**49 863**	**19 086**	**6 969**	**21 738**	**2 144**	**49 057**
Greater Brisbane	52 171	23 408	6 797	22 303	2 149	**52 016**
Rest of Queensland	47 571	16 264	7 133	21 212	2 140	**46 269**
South Australia	**46 551**	**26 343**	**7 879**	**26 038**	**2 082**	**47 853**
Greater Adelaide	47 862	25 788	8 199	26 820	2 270	**49 031**
Rest of South	41 665	27 409	6 765	22 677	1 456	**43 743**
Western Australia	**57 365**	**28 328**	**9 229**	**23 384**	**2 919**	**58 291**
Greater	58 181	30 581	9 682	24 005	3 111	**59 579**
Rest of WA	54 168	22 719	7 465	20 432	2 186	**53 409**
Tasmania	**43 521**	**20 002**	**6 278**	**22 579**	**2 235**	**44 018**
Greater	45 671	24 761	6 394	23 750	2 616	**46 840**
Rest of Tasmania	41 800	17 012	6 183	21 231	1 904	**41 788**
Northern Territory	**54 082**	**22 630**	**3 423**	**29 339**	**1 305**	**54 794**
Greer Darwin	55 788	24 251	3 565	30 621	1 341	**56 468**
Rest of NT	49 768	16 812	2 969	23 813	1 178	**50 367**
ACT (b)	**60 987**	**27 248**	**5 011**	**34 729**	**1 825**	**61 608**
Australia (c)	**51 923**	**23 458**	**8 329**	**23 483**	**2 408**	**52 240**

(a) The whole of the Australian Capital Territory is one GCCSA.
(b) Australia totals include data for the Other Territories and regions unknown or not stated.

[13] Estimates of personal income for small areas, Time series 2010-11 ABS Cat No. 6524.0.55.002

NATIONAL EMPLOYMENT STANDARDS

(43) The National Employment Standards (NES) under the *Fair Work Act 2009* have radically increased benefits for employees and increased costs for employers.

(44) Under the *Workplace Relations Act 1996* the Australian Fair Pay and Conditions Standard contained 5 key standards which has now doubled under the Fair Work Act to 10 National Employment Standards as follows:

1. Maximum weekly hours (38 hours, plus reasonable additional hours);
2. Request for flexible working arrangements;
3. Parental leave;
4. Annual leave;
5. Personal/carers leave and compassionate leave;
6. Community service leave;
7. Long service leave;
8. Public holidays;
9. Notice of termination and redundancy pay; and
10. Fair Work Information Statement.

(45) There should be nothing in the NES that is not a national standard. Public holidays, community service leave, and long service leave are not settled matters in that the NES refers to state/territory legislation. Either the item on the NES is a national standard, or not. Access to any aspect of an NES should not be conditional on it being contained in an award or enterprise agreement beforehand. Again, either it is a national standard or not.

(46) For example, the ability to cash-out annual leave ought to be clearly stated in the relevant NES as a universal right, not contingent on some other action elsewhere, so that the capacity to actually implement what the law allows can't be thwarted by a third party action in another forum.

(47) The NES should not be immutable, but capable of being re-packaged in the course of bargaining or in individual employment contracts to provide the same level of overall benefit.

(48) Any workplace condition, right or responsibility contained in an NES should be clearly and unambiguously stated so that all levels of businesses can understand and comply with the law.

(49) Annual leave loading has been deemed to be payable on termination as a result of the wording contained in the annual leave NES. This was not the case in most industries and awards immediately prior to the establishment of the NES in 2009, adding to employment costs. Some awards specifically exclude it from applying which contradicts the NES.

(50) The Australian labour market is one of the most generous of all OECD countries, with 20 days annual leave, 10 days personal/carers, up to 13 public holidays annually. This compares to larger industrial markets like the USA which provide 10 days holiday leave, and no guarantee for paid sick leave. When Modern Award benefits are combined with the National Employment Standards some 55 paid days off (out of the 260 an employee works in a year) are available to an employee in a year which can only be described as a productivity killer.

(51) The 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."

(52) In practice where a public holiday is declared an "additional day" in a state or territory the Modern Award requires the business to pay 250 per cent penalty rates or in some cases such as the Hospitality Industry (General) Award 2010 casual employees receive 275 per cent penalty rates making trading on such days unprofitable.

(53) These problems require legislative amendment and must be addressed by Parliament if our labour market is to be considered truly balanced.

(54) Similar problems arise with the public holiday item in the NES. These are listed either as dates, or named days. This is unhelpful because state/territory governments routinely gazette holidays on different dates. This leads to confusion. Only a very small number of public holidays actually can be called national days where every jurisdiction observes the same day. There are a plethora of additional local holidays, plus substitutions and transfers of so-called national holidays such that it is inappropriate for public holidays to be deemed a national standard. Also, the inclusion of these holidays in the NES makes it difficult to trade them in enterprise bargaining, a practice that was available, and adopted, under previous legislative regimes.

(55) These anomalies highlight the need for an overhaul of the NES and the way in which they interact with awards, enterprise agreements, Individual Flexibility Arrangements (IFA) and the other various layers of workplace relations regulation.

THE AWARD SYSTEM AND FLEXIBILITY

(56) The FWC is obliged to review modern awards every four years. There is capacity to apply to vary an award at any time (s.158 of the Act refers). However there are legislative hurdles (s.157 of the Act refers) and the matter must be determined by a full bench of the FWC.

(57) R&CA is of the view that provided an applicant can demonstrate the issue in play is of industry wide significance, then the ability to process matters outside of the four yearly review timetable ought to be more readily available. The process should not require a full bench but rather be dealt with by a single commissioner who has specific industry knowledge (as the FWC panel system of expertise is designed to facilitate).

(58) The four yearly review process is cumbersome and slow. The Act requires each award to be reviewed individually. Full benches are constituted for this purpose but there is no reason why single FWC members could not deal with many of these issues and speed up the process. R&CA suggests that if access to changing an award was less prohibitive in between four yearly reviews as argued above, the reviews could be less frequent and then only if a person has made a specific application on the award.

(59) R&CA believes there are flaws in the practice adopted by the FWC of identifying certain applications as a "common issue" and then dealing with that issue across multiple, if not all, awards at once. The problem with this approach is that in some instances, the issue has different impacts on industries that have been grouped together in the name of efficiency. R&CA would contend it is far more important for businesses to run efficiently over the long term with relevant awards then the FWC to run its case management efficiently.

(60) R&CA considers the *Fair Work Act 2009* requires the FWC to examine each award separately. R&CA's view is unless the "common issue" is unquestionably the same in the awards grouped together, and the application to change the awards has the same impact on the relevant participants covered by the awards in question, then each award should be reviewed separately.

PENALTY RATES

(61) Penalty rates have increased for most restaurant and catering businesses under the Modern Awards regime despite Ministerial requests to the tribunal by the then Minister for Workplace Relations, the Hon. Julia Gillard MP that Modern Awards were not intended to increase costs for employers[14].

(62) R&CA sought to wind back the excessive penalty rates in the *Restaurant Industry Award 2010* using the 2012 two year review of Modern Awards to argue that penalty rates should

[14] Ministerial Request to AIRC under s.576 C (1) of Workplace Relations Act 1996 - 28 March 2008

be significantly reduced on weekends as these were core operating hours for hospitality businesses.

(63) A Full Bench of the Fair Work Commission on Appeal reduced penalty rates under the Restaurant Industry Award by 25 per cent for casual employees engaged on Sundays at the introductory and levels 1 & 2 finding that:

"Although a 50 per cent Sunday penalty rate is generally appropriate for employees under the Restaurant Award, for transient and lower-skilled casual employees working mainly on weekends, who are primarily younger workers, the superimposition of the casual loading of 25 per cent in addition to the 50 per cent penalty tends to overcompensate them for working on Sundays and is more than is required to attract them for work on that day."[15]

(64) Evidence was also provided to the Fair Work Commission by Mr Ken Burgin a Consultant from Profitable Hospitality that although restaurants and cafes can surcharge consumers to mitigate the cost of penalty rates, the margins with a 50 per cent penalty rate on Sundays hardly justifies trading because the profit margin is minimal.

	Income and Costs for One Day of a Restaurant in Australia				
	Number of Customers	**Spend P.**	**Total**		
Sales	100	$15	$1,500		
Surcharge	100	$1	$100		
		Total Income	**$1,600**		
	Wages as % of Sales	33%	$495		
	Extra W-end or PH		$248	150%	
	Cost of Goods	30%	$450		
	Other Variable Costs	15%	$225		
	Rent		$150		
	Other Fixed Costs		$50		
		Total Costs	**$1,618**		
		Net Profit	**-$18**		

(65) Naturally, where small business owners have a choice they will not trade when they will lose money. Many cafes that do trade are often forced to by oppressive lease conditions within shopping centres.

(66) The then Workplace Relations Minister, the Hon. Bill Shorten MP, amended the Modern Awards Objective of the *Fair Work Act 2009* with the successful passage through Parliament of the *Fair Work Amendment Bill 2013* which resulted in a new Modern Award Objective set out below as s.134 (1) (da). This clause must be removed.

[15] [2014] FWCFB 1996 -14 May 2014 @ para 154 pg. 69

"The need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts."

(67) The passage of this new Modern Award Objective has the effect of constraining any industry from effectively abolishing penalty rates where such a case could be made given our economy is rapidly becoming dependent on 24/7 services.

(68) R&CA's position is that penalty rates in the awards governing its members' operations are inappropriate. The requirement to pay penalties arises when an employee is working outside of what are described as "ordinary hours". For decades various industrial tribunals have generally applied a clerical and administrative standard, fixed on daylight hours, Monday to Friday across a wide range of industries regardless of the business realities those tribunals sought to regulate.

(69) The inappropriateness of identifying such hours as "ordinary" for R&CA members is self-evident. These are fundamentally irrelevant to our industry. The absence of these restrictions in other industry awards (see for example Alpine Resorts Award, Sporting Organisations Award, Professional Divers (Recreational) Award and the Architects Award) demonstrates that, industrially, there is no fixed norm for this term "ordinary hours". It is proof that penalty rates are not universal, nor some fundamental employment right enjoyed by all Australians.

(70) These significant differentials highlight why R&CA believes penalty rates should be dealt with industry by industry, and not as some universal issue as with the FWC's approach currently. The factual historical record shows that there is no standard in this area. So there is no justification for the examination and treatment of these restrictions on the basis currently preferred.

(71) Industrial tribunals have identified for decades that so-called 'penalty rates' are often not set as a penalty but as an incentive. The seminal decisions establishing these incentives all occurred in the era of universal, or near universal, award coverage. The mechanism of enterprise bargaining was not available. At a time when enterprise bargaining has not only matured, but is supposedly the cornerstone of workplace regulation (and productivity enhancement measures), the incentive aspects of remuneration properly lies wholly within the enterprise domain. Penalties in service industries like hospitality should be abolished and employers and employees should be able to establish the incentives needed to attract and retain labour in their areas and industries, and at the times of day or days of the week that suit the immediate circumstances and parties involved.

(72) R&CA sought the means to increase flexibility and productivity in individual workplaces via enterprise under the *Fair Work Act 2009*. 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 2009* has been interpreted by the Tribunal as a test that ensures there is no financial detriment to employees[16]. This has stifled the number of enterprise agreements being implemented.

Table 4.4: Reasons for not having an enterprise agreement, per cent of enterprises that do not have an enterprise agreement in place

	Enterprises using award(s) only (%)	Enterprises using individual arrangements only (%)	Enterprises using both individual arrangements and awards (%)	All enterprises without an enterprise agreement (%)
The financial cost of negotiating an agreement would outweigh any performance/productivity benefits	3.8	2.8	4.2	3.6
Do not have the management resources to initiate negotiations with employees (e.g. do not have the legal and/or facilitation expertise within the business/organisation)	2.8	1.2	2.4	2.2
Too difficult to implement (i.e. too much red tape and legal work)	14.4	9.6	12.1	12.2
Concern about the financial cost of meeting employee demands/expectations	1.6	0.4	1.2	1.1
Prefer to negotiate with individual employees than a collection of employees	6.4	37.6	13.9	18.3

[16] [2010] FWAFB 2762 - 15 April 2010 pg. 73

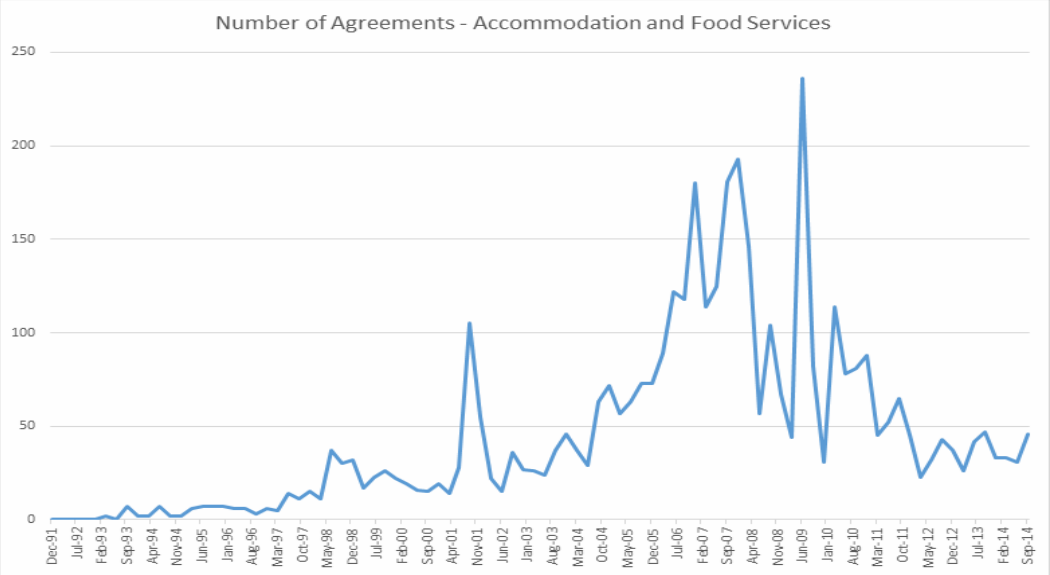
	Enterprises using award(s) only (%)	Enterprises using individual arrangements only (%)	Enterprises using both individual arrangements and awards (%)	All enterprises without an enterprise agreement (%)
Concern about negative effects of negotiations on employee relations (i.e. potential to disrupt stability and lead to industrial action)	1.3	1.9	1.5	1.5
The diversity of operations and roles across the business/organisation would require more than 1 enterprise agreement	2.7	11.6	6.1	6.5
Wages and conditions pre-set by controlling/owning company or franchisor	1.1	1.4	0.7	1.1
Award rates and conditions are adequate	46.9	7.7	33.2	30.4

Source: AWRS 2014, Employee Relations survey.

Base = 2177 enterprises. Enterprises that did not know whether a particular method of setting pay was used, or chose not to provide a response, are excluded from the analysis. Also excluded are enterprises that did not know if an enterprise agreement had been considered. Percentages by cell. Columns will not add to 100% as multiple responses were permitted.

(73) The preliminary findings of the Australian Workplace Relations Study shows that by far the biggest reason for not having an enterprise agreement is that businesses find Award rates and conditions adequate. Examining this further, and considering that 14.4 per cent of respondents considered Enterprise Agreements too difficult to implement (i.e. too much red tape and legal work), one can surmise that the benefits of an enterprise agreement, with the BOOT in place, do not outweigh the difficulty in implementing them. As a consequence, respondents 'find award rates and conditions adequate'. This is likely due to that fact that the BOOT restricts such operators from finding manageable and equitable rates and conditions, and therefore they choose to remain covered by the award.

(74) The effect of these limitations, among others, has resulted in a sector-wide slowing of enterprise agreement making. The graph below demonstrates the downturn in agreement making in the accommodation and food service sector in recent years[17]:



NOTE: The majority of agreements since 2007 have been in the accommodation sector.

(75) The rigid nature of applying for, and negotiating an Enterprise Agreement acts contrary to the very intention of workplace bargaining. The framework surrounding agreement making ought to encourage businesses of all sizes to negotiate an agreement of mutual beneficence, irrespective of business size. However, smaller operators are often put off by the inflexible rules and technicalities.

(76) Failure to meet one of the specified periods (e.g. issuing of representational rights within 7 days of sighting intention to bargain, cannot institute a vote less than 21 days after the representational rights have been issued, adhering to the 7 day accessing rule) can lead to the entire agreement being rejected by the FWC. This inflexibility can be detrimental to small operators, who may not be practically able to follow such a rigid timeline. Larger businesses with external assistance, or in-house legal/HR teams have the ability to adhere to such timeframes, however in smaller operations, unforseen events can arise making such adherence impossible. These timeframes ought not to be a contributing factor in the legitimacy of an agreement, particularly in circumstances where both parties have come to a consensus on the terms of an agreement. Having to begin the process again can incur significant and materially destructive costs for small to medium sized enterprises.

[17] Department of Employment (2014) *Historical table: All wage agreements, by ANZSIC division, current on the last day of the quarter: December quarter 1991 - June quarter 2014*

(77) R&CA calls for a total overhaul of the agreement making process to simplify and make it more user-friendly to small and medium sized businesses. This system should allow for the following:

- *A less regulated agreement-making process that provides FWC the discretion to waive technical process issues;*
- *An exemption from the good faith bargaining requirements for "small businesses";*
- *The need for all bargaining representatives to be appointed in writing;*
- *The ability for template agreements to be pre-approved by the FWC;*
- *The mandatory consideration of productivity benefits by the FWC; and*
- *A change to a "Better Off All Together" test so all employee benefits can be taken into account.*

FWC APPROVAL AND SMALL BUSINESSES EXEMPTION FROM GOOD FAITH BARGAINING REQUIREMENTS

(78) Since the commencement of the *Fair Work Act 2009* bargaining, in particular bargaining by employers who have not previously bargained has ground to a halt.

(79) A combination of the bargaining process, the BOOT and the differing approaches to agreement approval in the FWC has led to this sharp decline.

(80) The bargaining process has become too difficult for two reasons. Firstly, the good faith bargaining requirements place a formalised bargaining process on a business that decides to bargain. No small or medium size business has the capacity to bargain in good faith without a high level of outside assistance.

(81) It is important to note that R&CA does not quibble with the 'good faith' aspect, i.e. the behaviour of parties, but rather the broader compliance and process issues that all come under the umbrella of 'good faith bargaining'. For example, the issue of scope orders, majority support ballots and a plethora of other rules, regulations and process requirements that an employer can unwittingly let themselves into once they decide to bargain.

(82) Additionally, there is little discretion in the bargaining process meaning that if a business misses even a small, technical step in the process they run the risk of having the agreement fail at the FWC approval stage meaning the business has to either start the process all-over or withdraw from it all-together.

(83) The problems with the good faith bargaining requirements and the regulated bargaining process are only compounded when a trade union becomes involved, or has the potential to become involved in bargaining. Where this occurs, or is likely to occur, the business can become involved in a long and drawn out process that does nothing to improve the overall business.

(84) Changes need to be made to the *Fair Work Act 2009* to give FWC the discretion to consider whether a technical process-driven issue should lead to an agreement failing the FWC approval. Additionally, small business should be exempted from the good faith bargaining requirements of the Act. Again, to be clear, R&CA is referring to the processes, not the basic obligation to 'act in good faith' when dealing with employees or their representatives.

EMPLOYEE REQUESTS FOR UNION INVOLVEMENT

(85) The current bargaining system automatically assumes that if an employee is a member of a trade union, the employee wants the trade union to represent them in the bargaining process. This is often not the case. Employees join a trade union for a range of reasons e.g. in case of unfair dismissal, not just for assistance in bargaining.

(86) The rules authorising a trade union to be a bargaining representative should be the same as the general rule for the appointment of a bargaining representative - that is, the appointment should be made in writing by the person or persons who wish to appoint the representative.

(87) Changes to this process will not only ensure equality in how bargaining representatives are appointed but will also ensure that a bargaining representative are only appointed where a person genuinely seeks to engage them as such.

(88) To explain this concept in a different way, R&CA has 8,100 member outlets across Australia. The association encourages those members to use the skills and experience of R&CA when bargaining. R&CA is not though automatically appointed to be the members bargaining representative and nor should it as it is up to the individual member to choose how they want to bargain including if they wish to appoint a representative and, if so, who that representative ought to be.

THE NEED FOR CONSISTENCY IN FWC APPROVAL DECISIONS

(89) As demonstrated in the graph setting out the Number of Agreements - Accommodation and Food Services agreement-making has slowed particularly whereby, on our analysis, any agreement-making that has been done in accommodation and food services has predominantly occurred in the accommodation sector where the larger hotel chains are more likely to have the scale, capacity, and resources to enter agreements under the Act.

(90) Agreement-making under the *Fair Work Act 2009* is problematic for any employer; it is particularly problematic for a sector that is dominated by small businesses. This is partly due to the regulated process, the good faith bargaining requirements and the lack of quantifiable productivity gains.

(91) It is also due to the FWC approval process not taking place until after all the mandated enterprise level bargaining and process steps have occurred, including an employee vote. Whilst R&CA acknowledges the need for FWC commissioners to make their own decisions on applications, it does not assist agreement-making where these decisions vary to such a level that an agreement that has been approved by a commissioner will not, where it contains reasonably similar conditions and work patterns, be approved by a different commissioner.

(92) This not only leads to a great deal of uncertainty but can also result in one employer having a competitive advantage over another employer.

(93) Consistency of approach from the FWC is vital. The formal processes to seek approval of an agreement include the filling out of detailed application forms. These are referred to by practitioners colloquially, by their numbers, F16 and F17. On both these forms, the FWC asks applicants to nominate if there are agreements already approved by FWC that are the same or substantially the same, as the one the subject of the application.

(94) Employers and their agents presume this to be a mechanism whereby consistency for decision-making from FWC is assisted. Otherwise the point of the question is difficult to grasp. Nevertheless when members of the FWC have been dealing with agreements and it has been pointed out to the member that another agreement substantially the same has already been approved, the FWC members argue that "each member of the tribunal has a separate commission"[18]. This inconsistency has recently been further exacerbated by a single commissioner refusing to follow a full bench authority[19]. The employer had to go to the expense of an appeal.

(95) For these reasons, agreement-making would be greatly assisted if template agreements, covering businesses with similar employee work patterns, could be pre-approved by the FWC via an application by an employer association or other representative body.

(96) This would give employers the confidence that the agreement they spend time and resources implementing at a workplace level will be approved by the FWC.

18 See Hotel Grand Chancellor Surfers Paradise for example https://www.fwc.gov.au/documents/documents/Transcripts/150213AG201212021.htm

19 See BRB Modular Pty Ltd v AMWU for example https://www.fwc.gov.au/documents/decisionssigned/html/2015FWCFB1440.htm

BETTER OFF OVERALL TEST

(97) The Act's Better Off Overall Test (BOOT) was introduced to replace the Fairness Test and the previous No Disadvantage test.

(98) The BOOT is an impediment to bargaining as it only requires that one side be better off overall, not both sides. This approach is contrary to bargaining producing a "win-win" for employees and the employer. There are two ways this situation can be addressed:

1. To reframe the BOOT as the 'Better Off All Together' test. A Better Off All Together test would look to all elements of the employment relationship to check that both the employer and the employees are better off all together under the proposed agreement. R&CA deal with the employer aspect of the Better Off All Together test under (2) below. For employees, a Better Off All Together test would mean the inclusion of non-monetary (e.g. preferred work times) and monetary benefits (e.g. meals provided at no-charge) could be included in the test.
2. For the employer, a Better Off All Together test would mean the FWC would need to ensure the employer is better off all together under the proposed arrangement - not just the employee. This would mean the FWC would need to ensure there are quantifiable productivity gains in the proposed agreement. An object of agreement making under the Act is for enterprise agreements to "deliver productivity benefits" yet there is not a single requirement for FWC to consider, let alone ensure, that a proposed agreement contains "productivity benefits". This means the Act is currently only paying lip service to the need for productivity gains out of bargaining. A requirement for quantifiable gains to be attested to from the bargaining process will mean that productivity is taken much more seriously both in bargaining and in the approval process. R&CA is not aware of one union claim that suggests or offers a true quantifiable productivity benefit to an enterprise.

(99) The current construction of the Better Off Overall test leads to further problems with agreement-making as on a read of the Act it would firstly appear that "each employee" (section 193(1)) needs to be better off overall. It is only on reading further that it is established that when "if a class of employees …. would be better off overall …. FWC is entitled to assume … that the employee would be better off overall …" (section 193(7)).

(100) Section 193(7) is a vitally important section as is means the Better Off Overall test is properly measured at a 'class' not 'individual' level. Section 193(7) is vital to the successful approval of any agreement that seeks to modify an award's penalty rate structure. It is particularly vital in the restaurant industry where agreement-making turns on the ability to increase base rates of pay in return for lowering weekend and late-night penalties.

(101) No restaurant can pass an 'individual' BOOT if the restaurant has increased the base pay but reduced weekend penalties as it would only take one employee to only work on weekends for the agreement to fail an individualised BOOT.

(102) Where the same agreement is assessed at a 'class' LEVEL (presumably classification level), and therefore read as a whole, it would pass the Better Off Overall test providing it can be established the increase in base rates across the business compensates for the reduction in weekend and night penalties.

(103) Better still, the test ought to be a global test in the true sense, that is, if the employer can demonstrate that the employees, as a whole, in that workplace are better off that ought to be the end of the matter. After all, the agreements are made between, on the one hand the employer, and on the other hand, all the employees covered by it.

(104) As previously explained, agreement-making under the Act has become almost non-existent. The biggest detriment not only to agreement making is an individual BOOT which due to the wording of section 193(1) of the Act is presumed to be the case.

INDIVIDUAL FLEXIBILITY ARRANGEMENTS

(105) Individual flexibility arrangements (IFAs) where introduced into the *Fair Work Act 2009* to allow employers and employees to agree on arrangements that meet the genuine needs of the employer and an employee.

(106) They are, if adopted, an important mechanism to allow for genuine discussions at the individual workplace level to tailor conditions that work for both the employer and an employee.

(107) They are a particularly important mechanism for small business in a system where agreement making has no upside for an employer and has become so complex and regulated.

(108) Under an individual flexibility arrangement an employee needs to be 'Better Off Overall' - on the face a similar test to the test FWC are required to conduct on enterprise agreement approval applications.

(109) The Explanatory Memorandum to the Act sets out an example (paragraph 867 on page 137) of an IFA and explains how it is appropriate. In the example the employee, Josh, is paid less under the IFA than under his award as he trades-off some shift allowances in order to work at times that allows him to coach his son's soccer team.

(110) In R&CA's view this example sets out an appropriate use of an IFA as it allows an employee who wants to work at a certain time the ability to trade-off penalty rates to do-so. Adequate protections are in place for the employee as the employee has the ability to unilaterally withdraw from the IFA without impacting their employment contract. Additionally, duress cannot be placed on an employee to enter an IFA.

(111) The IFA Better Off Overall test appears to be a very different test to the agreement-making Better Off Overall test. Even though it would have more in common with the Better Off All Together test proposed in this submission by R&CA.

(112) IFAs have the potential to have wide-spread use in restaurant and catering as they encourage genuine agreement-making at the individual level.

(113) R&CA believes the use of IFAs would be greatly expanded if it was clear the actual test is a 'Better Off All Together test' as per the example in the Act's Explanatory Memorandum.

(114) Additionally, the requirement on an employer in section 203(4) that an employer needs 'to ensure' that an IFA is better off overall (or better off all together) places a heavy onus on the employer to make an assessment that he or she is not capable of making. It should be left to the parties to the IFA, and in the case of minors, their guardians, to make this assessment themselves.

(115) The Fair Work Commission received 14,797 unfair dismissal applications in 2013-14[20]. This represents a trend similar to previous years:

Year	Unfair Dismissal Applications
2010-2011	14,897
2011-2012	14,027
2012-2013	14,818
2013-2014	14,797

(116) Unfair dismissal applications are a time and costly affair for businesses. The restaurant and catering sector tend to try and resolve the applications in the conciliation stage rather than proceed to the added expense of arbitration before the FWC. This is due to the time this represents away from their business and can be excessively costly. The expense involved in proceedings however, is difficult to quantify as it is variable in each case.

(117) R&CA argues that the Small Business Fair Dismissal Code has failed to operate as intended under the *Fair Work Act 2009*.

(118) 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.

(119) 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 heard 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 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 operation; let alone recovery of the tens of thousands of dollars stolen.

[20] Fair Work Commission Annual Report 2013-14

(120) This Banana Tree Café case appears to contradict the Labor Government rhetoric that under the Small Business Fair Dismissal Code:

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

(121) The unfair dismissal laws need to have the exemption cap increased from 15 to 20 employees in order to alleviate the costs to small businesses.

(122) R&CA contends a standardised definition of small business (a business with less than 20 employees) is required in line with most common definitions used to define small business, as outlined below[21]:

Metric	Threshold	Institution	Purpose
Employees	< 15	FWA	Unfair dismissal laws
	< 20	ABS	Business surveys
		ACCI & Sensis	Business surveys
		RBA	Business liaison
	< 50	ASIC	Annual financial reports
Legal structure	Unincorporated	RBA	Analysis of financing conditions
Revenue	< $2 million	ATO	Taxation
	< $50 million	APRA	Prudential supervision
Individual loan size	< $1 million	APRA	Prudential supervision
	< $2 million	RBA	Analysis of financing conditions

(123) On 21 March 2014 the FWC issued one of its first comprehensive anti-bullying orders [Print PR548852] in the following terms:

"The employee, the subject of the application:

1.Shall complete any exercise at the employer's premises before 8.00a.m.

2.Shall have no contact with the applicant alone.

3.Shall make no comment about the applicant's clothes or appearance.

4.Shall not send any emails or texts to the applicant except in emergency circumstances.

5.Shall not raise any work issues without notifying the Chief Operating Officer of the respondent, or his subordinate, beforehand.

Orders to be followed by the employee, the applicant:

1.The applicant shall not arrive at work before 8.15 a.m."

[21] Connolly, E., Norman, D., & West, T. (2012) *Small Business: An Economic Overview*, Small Business Finance Roundtable, May 2012

(124) Employers traditionally have the common law right to set hours of work and the FWC has in this case set specific orders against an employee for alleged bullying of another staff member. This outcome appears to encroach on the business owners' right to set hours of work for individual employees and awkwardly have it further regulated by orders of the tribunal.

(125) This leads to a myriad of issues in that in certain circumstances the employer may be asking the employee to breach the order of the tribunal by simply requiring the employee to start earlier than that prescribed in the order. This is unwarranted micro-management of workplace relations and should not be the subject of orders by the FWC.

(126) R&CA argues that bullying is a workers compensation matter and should not be subject to the jurisdiction of the FWC.

ISSUE PAPER 5 - Other Issues

(127) Confusion still remains between the institutions of the Fair Work Commission (the tribunal) and the Fair Work Ombudsman (the inspectorate). This has been highlighted in numerous cases where employees have filed unfair dismissal cases with the Fair Work Ombudsman (FWO) and not the Fair Work Commission (FWC).

(128) R&CA argues that the FWO Agency should have its advisory services returned to the Department of Employment which would eliminate the current inherent conflict of advising employers and employees in some cases even from the same business.

(129) The FWO Agency should be restructured and renamed the "Employment Inspectorate" with powers to investigate and prosecute employers and employees that breach the regulatory system.

(130) The FWO is very successful at prosecuting businesses for breaches of Modern Awards and the Fair Work Legislation however, the penalties under the *Fair Work Act 2009* of up to $51,000 apply equally to large multinational businesses and small businesses.

(131) Many of the technical breaches of the legislation carry the same regulatory penalty of $51,000 and R&CA argues that there should be a two tired system of penalties with large businesses capped at $51,000 and small businesses capped at $5,100.

(132) Furthermore, the FWO should be required to give employers advice in writing. Employers should be able to use that advice as a defence if subsequently the employer is prosecuted for an award or other breach where the FWO advice had been relied on.

(133) The same requirements should be placed on the Fair Work Commissions Office of the General Manager as the responsible person in respect to registered organisations. R&CA's industrial entity, Restaurant & Catering Industrial (RCI) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and relies on timely accurate advice from FWC in respect to R&CA's obligations and responsibilities, rights and privileges as a registered organisation. R&CA is often unable to do so because so much of the transactions between R&CA and the relevant authorities is not backed up with consistent reliable written advice. This should be rectified. The ATO issues Rulings and parties are entitled to rely on them, FWC can do the same.

(134) The FWC is a jurisdiction that has conciliation and arbitration powers. When arbitration occurs it is a win/loss process and one party feels it was not fair at all. The Tribunal should be renamed the Workplace Relations Commission.

(135) Further, the lack of consistency and certainty of FWC decisions, evidenced by such extraordinary decisions as the three-way split in *Newlands Coal Pty Ltd v CFMEU (ref: [2011] FWAFB 7325)* demonstrates serious consideration ought be given to an appeals court external to the FWC. In another matter, *Canavan Building Pty Ltd (ref: [2014] FWCFB 3202)*, again, a FWC full bench overturned an earlier full bench decision which had been made just two and a half years earlier. The issues at stake had ramifications well beyond the immediate parties in both these cases, and the subsequent changes of mind of the FWC in such short time frames is bad public policy.

(136) It is fair to say some of this activity could be attributable to the new legislation, however the tribunal should be staffed by personnel of sufficient capacity to handle whatever legislation is enacted. This means closer scrutiny of the methods of selection of FWC personnel is needed. It is reasonable to conclude that a high number of successful appeals means FWC members are getting it wrong too often. The process for selecting FWC members must be predicated on balance and expertise.

(137) Unions now represent less than 20 per cent of the workforce so it is an imbalance to have ex-union officials dominating the appointments to the FWC. There is simply nowhere near enough representation of small to medium sized companies and there has never been, to R&CA's knowledge, a former business owner appointed to the tribunal. Most of the employer representatives are either from the legal profession or large corporations. There needs to be more appointments from employer organisations which have a large percentage of SMEs in their membership.

(138) The Productivity Commission notes the observation by the Commonwealth Court of Conciliation and Arbitration in 1910 that the approach adopted was through a bog of technicalities, however, in just over 100 years we now have some 15,874 pages of legislation and regulations, making our progression minimal if not stifled.

CONCLUSION

(139) R&CA has highlighted a number areas where the *Fair Work Act 2009* has failed in its objectives and requires a major overhaul.

(140) There is an opportunity for the Australian 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 the workplace relations framework remains in its current bungled transitional mess of bureaucratic red tape it may further exacerbate the alarming trends in business failure.

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RESTAURANT & CATERING AUSTRALIA

PO Box 121
SURRY HILLS NSW 2010

T | 1300 722 878

F | 1300 722 396