



Restaurant
& Catering

Productivity Commission Draft Report: Workplace Relations Framework

Supplementary submission

SEPTEMBER 2015

RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the national industry association representing the interests of 35,000 restaurants, cafés 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.

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EXECUTIVE SUMMARY

Restaurant & Catering Australia (R&CA) welcomes the Productivity Commission's draft report into Australia's Workplace Relations Framework. As a sector that employs over 190,000 people across Australia - many in temporary, casual, part-time or seasonal positions – the café and restaurant industry is a key stakeholder in the debate on labour flexibility.

Many countries in Europe with comparable economies to ours have embarked on similar reviews of their employee protection systems to ensure that flexibility is coupled with worker security. The draft report contains many sensible reforms that would go some way to streamlining and simplifying Australia's complex workplace relations system.

In particular, the report's recommendation of a flat penalty be applied across both Saturday and Sunday for the hospitality, restaurant and cafe industries is welcomed by industry. The further recommendation that the National Employment Standards be amended so that employers are not required to pay leave or any additional penalty rates for any newly-designated state and territory public holidays will also significantly address the economic cost of lost productivity on these days.

As the country tackles the challenges of the twenty first century including shifts in community expectations and lifestyle choices, Australia needs an industrial relations system that not only provides income security and job protection for workers but also flexibility for employers to adapt to a challenging operating environment. A balanced approach, as laid out in the draft report is consistent with Australia's history as an innovator in business practices and also a guarantor of minimum social standards.

The following submission is in response to the commission's draft report and should be viewed as a supplement to the association's initial submission from March 2015. In this supplementary submission we do not seek to reiterate points made in our earlier submission on the ideal outcome the industry would like to see through reform to the system. The industry's award, the Restaurant Industry Award, is currently being reviewed by the Fair Work Commission and, as such, detailed examination of the specifics of the existing regime will be left for that process.

Instead, this submission outlines some further evidence of the lost productivity in both the hospitality sector and the wider Australian economy as a result of the current workplace relations framework. R&CA seeks to clarify, in particular, some of the misconceptions around the appropriate compensation for Sunday work.

THE INSTITUTIONS (§ 3)

3.1 Fair Work Commission - Appeals Panel

R&CA notes the comments by the Productivity Commission in respect to the merit of establishing an Appeals Panel within the Fair Work Commission (FWC). However, R&CA remains concerned that there is a lack of jurisdiction for the Association to appeal decisions that have industry or sector wide implications. The Appeals Panel (TAP) should be enlivened by any decision of the FWC where there remains industry ramifications or implications. In other words where more than one employer is aggrieved by a Decision of the FWC the TAP may be enlivened to hear and determine the matter by way of application by any party.

The jurisdiction should retain the existing costs jurisdiction of the FWC as all parties should be allowed to afford representation in the appeals process.

Composition of the TAP could be from members within or outside the FWC and appointed by the Minister for Employment. The TAP should be comprised of at least one more member than the composition of the Decision being appealed in first instance.

The existing s.604 Full Bench Appeal process would remain for single employer appeals.

Registered Organisations

R&CA note that the Productivity Commission has not focussed on the role of the FWC in regulating Registered Organisations.

Although the Federal Government has attempted to reform regulation of Registered Organisations under the Fair Work (Registered Organisations) Amendment Bill 2014, the Productivity Commission should address the review of this arm of the FWC.

R&CA argue that Registered Organisations should be regulated by a separate agency called the Registered Organisations Commission and headed by a Registrar with appropriate investigative and administrative powers to ensure that registered organisations are regulated effectively.

Restaurant & Catering Industrial - the industrial arm of R&CA - is a Registered Organisation under the Fair Work (Registered Organisations) Act 2009 and has experienced the dysfunctional administrative arrangements in complying with the current regime as structured under the FWC.

In particular, rule alterations and other matters take excessive time to process because of inconsistent rulings and a complex web of procedural rules¹.

3.2 Fair Work Ombudsman

The association notes the commission's commentary regarding the success of the Fair Work Ombudsman (FWO).

The FWO is the regulator of award compliance in Australia. Among other functions, the FWO seeks to prosecute employers who have failed to comply with award conditions. R&CA note that whilst some employers may intentionally seek to circumvent their obligations under the Fair Work Legislative regime, many employers found to be non-compliant are so due to confusion rather than deliberate non-compliance.

Employers who are unaware of their award coverage or obligations are able to seek clarification from their relevant industry association. Additionally, opinions can be sought from the FWO info line or online tools, external legal advice, or industry consultants. Irrespective of advice being sought, employers operating a business with questionable coverage are subject to the opinions of FWO inspectors and ultimately tribunals or courts³.

Within the hospitality industry Award coverage can be ambiguous, particularly when businesses meet some of the indicating criteria for more than one of the following industry awards:

- Restaurant Industry Award 2010
- General Retail Industry Award 2010
- Fast Food Industry Award 2010
- Hospitality Industry (General) Award 2010

Some practical examples of this ambiguity include General Stores, which are common in regional Australia, yet operate as a convenience store, take away store and café. One or two employees usually perform duties that are indicative of multiple awards. Rarely could one say that among their multifaceted role, that one duty is performed more regularly than another. Fish and chip shops and pizzerias with eat-in facilities and wait staff are yet another example of cross-award coverage being an issue, where significant proportions of their trade are derived from take-away sales. Many

¹ See Decision by Carruthers [2012] FWAD 10233 18 December 2012

³ See Pop Art Article The Australian <http://www.theaustralian.com.au/national-affairs/fair-work-backflip-on-pop-art/story-fn59niix-1225914011969>

businesses can easily be classified, yet for some that operate in the 'grey-area', coverage is a big issue. An entire operation can be forced into administration by an underpayment prosecution based solely on employers or their advisors, navigating the award coverage incorrectly.

This can be rectified by an overhaul of award coverage, however it is the experience of the association that the more complex and specific the coverage clause is, the more confusion can be created in the process. We would advise consideration be given to this in any coverage reforms.

It is our experience that not only is an overhaul of award coverage clauses needed, but so too is the creation of a division within the existing regulator that is capable of providing an interpretation of award coverage able to be lawfully relied upon. This division could be formed through an expansion of the already mobile inspectorate division, and be accessible by existing or newly formed businesses. Going to this 'compliance division' upon commencement of trade would allow businesses to know with certainty which award applied to them, thus basing commercial decisions on information they can later rely upon. Where award coverage is unknown, or simply assumed, businesses can apply for a determination by a FWO Inspector who could make a formal ruling on behalf of the FWO. With the guarantee of legal force, decisions about operation, staffing levels, and financial forecasting can safely be made. Where businesses receive a surprising determination, an appeal process should exist, allowing the Fair Work Commission to make a final ruling.

It is acknowledged that over time businesses can evolve and change, thus affecting their coverage. This 'coverage determination' would therefore have to be subject to a timeframe by which legal coverage could apply. For example, after 5 years or major change of operation, the coverage determination made by the compliance division could no longer be relied upon and would therefore need to be reassessed.

NATIONAL EMPLOYMENT STANDARDS (§ 4)

4.2 Long service leave

R&CA acknowledges content in the draft report pertaining to the harmonisation of long service leave provisions. R&CA would support such harmonisation on the basis that the provisions are simplified to one jurisdiction.

Portable long service leave is not a concept R&CA would support on the basis of the additional cost that would be borne by employers, without any offsetting benefit of longevity that the current long service leave provisions provide.

4.3 Public holidays

R&CA strongly supports the recommendation of limiting public holidays on which additional penalties are paid to those already contained within the National Employment Standards.

State government decisions to declare public holidays have significant ramifications given the industrial relations system that governs conditions of employment. Penalty rates on public holidays under the *Hospitality Industry (General) Award* and *Fast Food Industry Award* are 275 per cent for casual employees, while under the *Restaurant Industry Award*, the rate is 250 per cent.

A recent Regulatory Impact Statement on the gazettal of two additional public holidays in Victoria found that the economic loss attributed to both these days was between \$717-898 million. The wage impact of the two new public holidays was estimated at around \$286 million annually, borne almost exclusively by employers. In contrast, the expected benefit of the additional leisure time only equated to between \$156 million and \$312 million⁴.

As identified in the report, employers that operate on public holidays are subject to increased labour costs, with the impact concentrated in those industries that operate outside 'standard' business hours. As a result, many small business operators in the café and restaurant industry will opt not to trade on these days. This is particularly true for the Easter long weekend, which now represents four consecutive public holidays in a row. An alternative as supported by R&CA in its submission to the

⁴ PricewaterhouseCoopers (2015) *Regulatory Impact Statement on proposed new public holidays in Victoria*. Prepared for Department of Economic Development, Jobs, Transport and Resources, July 2015

Victorian Government is to designate these days (particularly AFL Grand Final Eve) as a local event day, such as the holiday granted in southern Tasmania only for the Royal Hobart Show.

Recent gazettals of public holidays in South Australia, Victoria and the ACT place further pressure on restaurant business operations, increasing the days on which they close. This in turn means fewer hours of work available to existing staff.

There is also evidence to suggest that not all public holidays are equal in the minds of workers. For example, the social inconvenience of working on Christmas Day is greater than that of working a shift on the Queen's Birthday long weekend is instinctively and anecdotally true. This theory was tested by a recent University of South Australia study in conjunction with the NSW Business Chamber that surveyed 445 workers covered by either the *Restaurant Industry Award* or the *Retail Industry Award* to understand their attitudes towards unsocial working hours. The researchers asked respondents to weight the various public holidays in an index of 100 (see table above). The study found Christmas Day and New Year's Day to be the most important days among those surveyed, followed by Australia Day and Boxing Day⁵.

Table 1 – Perceived relative importance of public holidays

Public holiday	Average allocated value
Anzac Day	6.27
Australia Day	8.49
Boxing Day	8.28
Christmas Day	23.45
Easter Monday	4.48
Good Friday	6.44
New Year's Day	13.90
Queen's Birthday	2.50

Overall, for employees operating under the *Restaurant Industry Award*, the average threshold value at which respondents would elect to work on a weekday public holiday was found to be 125 per cent - the existing reported average normal hourly weekday pay rate for the sample. However, significant differences were reported between major public holidays and minor recreation days as described above.

⁵ Professor John Rose (2015) *Value of Time and Value of Work Time during Public Holidays*, report prepared for The Institute for Choice and the New South Wales Business Chamber by the University of South Australia. North Sydney July 2015

UNFAIR DISMISSAL (§ 5)

5.6 Reform options

The association notes the commentary in the report on the appropriateness of some additional unfair dismissal protections for small businesses. Over 90 per cent of restaurant and cafés in Australia employ fewer than 20 staff. Even larger employers in the sector can often lack the human resources sophistication of firms in other sectors, due to the complexity and labour intensity of the hospitality sector.

The association agrees that the current Small Business Fair Dismissal Code does not work in its current form. R&CA agrees that overriding clear exemptions under the code (and in some cases the determinants of an unfair dismissal) by procedural aspects of the employment relationship, makes no sense for small businesses in the sector and often leads to the payment of ‘go-away’ money. This is a clear example of where the objectives of the code that is not working.

Employers must be able to rely on an application for unfair dismissal being struck out on the basis of dismissal being within the probation period, the employee being engaged as a casual, or serious misconduct (such as theft, fraud or violence), without each criterion being tested under some constructed procedural framework. In order to achieve this a simple exemption of small businesses with less than 20 employees would be the most practical solution.

MINIMUM WAGES (§ 8)

8.1 Australia's minimum wages

On minimum wages, R&CA notes that the comparison table of minimum rates in countries belonging to the Organisation of Economic Co-operation and Development submitted with its original submission shows Australia just behind France and Luxembourg. It should be noted, however, that the table is based on the 2013 rate of exchange between the Australian dollar and the US dollar.

If the table were recalibrated using a 2014 average, Luxembourg's €11.12 and France's €9.61 would equate to a nominal rate of US\$14.75 and US\$12.75 respectively, ranked behind Australia's US\$15.58 for the \$17.29 minimum wage. R&CA acknowledge the comments in box 8.3 on the difficulties in comparing minimum wages between different countries using a fixed exchange rate.

It should also be noted that Germany recently introduced a minimum wage, ending a post-war tradition of reliance on industry awards and collective bargaining and enterprise agreements in place of federal legislation. The new German rate of €8.50 (approximately \$13.50) per hour⁶ is almost one third lower than that of Australia's. In neighbouring Switzerland voters recently rejected a new national minimum wage of SFr22 (approximately \$32) per hour which would have been the world's highest, fearing lost employment opportunities for young people⁷.

R&CA notes the analysis of minimum wage matters in the draft report and suggests that it is this sort of analysis that should be undertaken in the Annual Wage Review.

⁶ Gesetzlicher Mindestlohn, Soziale Gerechtigkeit, Die Bundesregierung, Berlin 2015

⁷ Switzerland rejects world's highest minimum wage, BBC News, 18 May 2014

VARIATIONS FROM UNIFORM MINIMUM WAGES (§ 9)

9.3 Arrangements for apprentices and trainees

The restaurant and catering industry has one of the highest apprenticeship to workforce ratios of any sector. As such, the commentary and analysis contained in the draft report around apprenticeship rates, particularly mature-aged apprentices, is very relevant to this industry. As noted in the draft report, numbers of mature apprentice commencements have declined significantly.

The association acknowledges the recommendations in the draft report and also recognises that the federal government has recently announced the formation of an Apprenticeship Advisory Board to address some of the policy challenges surrounding the apprenticeship framework. R&CA is convinced, however, that the minimum pay rate for adult apprentices needs to be at the same rate for other apprentices if older apprentices are not to be priced out of the market. There is a role for federal government in ensuring the two levels remain on par.

It is also worth noting that due to high share of micro and small businesses in hospitality, the gross value added (GVA) per employee is almost half that of the national average⁸. As a result, payroll tax and superannuation obligations place a higher compliance cost burden on smaller businesses operating in this sector.

⁸ Tourism Research Australia (2013) Tourism Businesses in Australia, June 2010 to June 2012, p1

ROLE OF AWARDS (§ 11)

11.2 Coverage and application of awards

R&CA notes the analysis in the report in relation to award reliance and the extent to which employers enter into agreement-making to negotiate penalty rates on Sundays. The association believes that the prevalence of small businesses operating in the industry and the difficulties in the agreement negotiation process itself means it is unlikely that bargaining would be an option for many operators in this sector.

In addition, the historical information in relation to the take-up of enterprise agreements is used to justify the level of award reliance. We note for the commission that, at this time a large number of individual agreements were also being used by the sector. These agreements were used because of the ease with which small businesses were able to enter into agreements of this type.

REGULATED WEEKEND PENALTY RATES (§ 14)

The section within the draft report that merits the most attention from the restaurant and catering industry is section 14 covering regulated weekend penalty rates for selected consumer services. Below and overleaf R&CA has provided additional comment on each of the subheadings.

14.1 Weekend penalty rate arrangements

R&CA welcomes the general view contained within the draft report that social norms have shifted since the introduction of the awards system. R&CA agrees with the commission's findings that penalty rates have a legitimate role in compensating employees for working long hours or at unsociable times. R&CA also agrees that some form of compensation should be maintained in these circumstances. R&CA strongly supports the commission's comments that "Sunday penalty rates for cafés, hospitality, entertainment, restaurants and retailing should be aligned with Saturday rates".

The commission has appropriately recognised that the hospitality industry is different from other occupations where weekend working may be required, but is not essential. As a service industry, restaurants and cafés need to respond to customer demand. People enter the industry with full knowledge of the likelihood that unsociable hours will be required. For example, a recent study into value of hospitality workers' time found that the least important time for those engaged in restaurant or café work was between 5pm and midnight, a time most other cohorts report as being more important⁹.

This is in contrast to industries such as manufacturing where penalty rates are required to discourage exploitative practices. Restaurant and hospitality sector is a fiercely competitive industry with many thousands of small businesses all vying for the same consumer discretionary spend. As such, it is keenly price sensitive. Unlike other industries where the unit cost of production falls the more a physical asset or machinery is used, making weekend work of limited labour attractive, some 46 per cent of all costs incurred by restaurants are staff-related¹⁰.

These high operating costs are magnified on Sundays and public holidays through penalty rates. Despite heavier footfall and busier trading which can sometimes be experienced on Sundays, trading is often unviable. Most businesses reduce staffing while many others close early or entirely on Sundays. Restaurants that charge a Sunday and public holiday surcharge often face customer

⁹ Professor John Rose, *Value of Time and Value of Work Time during Public Holidays*, report prepared for The Institute for Choice and the New South Wales Business Chamber by the University of South Australia. North Sydney July 2015

¹⁰ *Cafés, Restaurants and Catering Services (8655.0)* 2006-07. Australian Bureau of Statistics. Canberra, April 2008

resistance. Yet without it many either trade at a loss on Sundays or break even. For example, despite being the third busiest day by patronage (after Saturday and Friday), the average Sunday spend in high-end restaurants is \$51 compared with \$59 on a Saturday and \$56 on a Friday¹¹.

Research conducted by R&CA indicates that of those restaurants and cafés open on Sundays, 24.3 per cent said doing so made their overall business less profitable, with a further 18.5 per cent saying it had no effect. Although 51.1 per cent of businesses said opening on Sundays made their business more profitable, the rate falls to 43 per cent for small businesses with fewer than 10 staff¹².

As a result, 71 per cent of business owners surveyed indicate they reduce staff hours on weekends and public holidays due to the cost of operating on these days¹³. This leads to fewer jobs and shorter shifts for those employed.

14.2 The shift to a seven-day consumer economy

As the commission notes, changing social norms around weekend shopping times, a reduction in religious observance and a softening of trading hour restrictions have led to an increased demand for hospitality services on weekends.

Dining out on a Sunday is a new national pastime, with marked increases in all-day breakfast offerings on Sundays. While America largely contributed to 'brunch' as weekend cuisine, Australian multiculturalism has taken the traditional English breakfast and improved it through new techniques, fresh produce and ethnic influences¹⁴. A further trend unknown two decades ago is the Cantonese dim sum style of service, known in Australia as 'yum cha', which is also popular on Sundays in metropolises.

The take up of Sunday dining in Australia is one of the highest in the world and Australian dining habits generally mirror those in southern Europe more closely than Anglo-Saxon countries¹⁵. Household spend on meals out of home has jumped more than 55 per cent in real terms between the 1980s and 2010 by which time one-third of household food budgets was spent in restaurants, cafés, takeaways or pub food¹⁶. Much of this upswing can be attributed to weekend dining. Today half

¹¹ Dimmi Australian Dining Index 2015, Dimmi 2015

¹² Restaurant and Catering Industry Association Penalty Rates Survey, Jetty Research, May 2015

¹³ Weekend Labour Costs Survey. Elections Australia for R&CA, Roseville June 2015

¹⁴ Sydney Food Trends, Restaurant Australia Media Information, Destination NSW, Sydney October 2014

¹⁵ Time series (gender), Organisation of Economic Cooperation and Development, Paris 2015

¹⁶ Household Expenditure Survey (6530.0): Summary of Results, 2009-10 Australian Bureau of Statistics. Canberra May 2010.

of all Australians eat out on weekends, with few seeing any differentiation between Saturday and Sunday¹⁷.

This is further supported by the International Visitors Survey and National Visitors Survey which indicates domestic and international visitors spend a significant proportion of trip expenditure on eating out at a café or restaurant. Tourists expect dining experiences to be available seven days a week, although are occasionally disappointed to find closures, as occurred in February during the Cricket World Cup in Adelaide when 20,000 fans were left wanting for dining options, as a large majority of restaurants were closed on Sunday¹⁸.

14.3 The effects of working on weekends for employees and their families

The commission has demonstrated its understanding of the price elasticity of labour supply in restaurants and cafés in the draft report. As has been demonstrated, penalty rates reduce the amount of available work for employees in restaurants and cafés¹⁹.

It is also worth drawing the commission's attention to the effect this has on the families of the owners of cafés and local restaurants. In response to wage pressure resulting from penalty rates, many small businesses rely on the owner-operator and family labour on Sundays, with 69.5 per cent of business owners working weekends²⁰. In considering the overall effect on families, some thought needs to be directed to the family life and work-life balance of the small businessmen and women who own restaurants and cafés in every corner of Australia.

A further consideration is how automation in the café and restaurant sector is likely to impact employment prospects and service cultures in Australia. In the USA, fast food chains are rapidly replacing order staff with self-service kiosks, a trend that originated in Japan in the last decade. As robots acquire cognitive skills, food preparation is likely to be transformed. On-demand milk frothers and sensitive coffee dosers are appearing in airport lounges and will likely spread to cafés, reducing the need for baristas, for example. US technology analysts Gartner predict that one third of all jobs will be replaced by robots or software by 2025²¹. If the cost pressure on labour remains, the incentive to invest in human capital will decrease, even for small businesses.

17 I-view Online Omnibus Survey. 015Y0106APR22 – 22 April 2015

18 Paul Starick, Our city's missed out on massive free hit, Adelaide Advertiser. 17 February 2015

19 Prof Phil Lewis. Paying the Penalty? The High Price of Penalty Rates in Australian Restaurants, Agenda vol 21, No. 1 pp5-26

20 Restaurant and Catering Industry Association Penalty Rates Survey, Jetty Research, May 2015

21 Joshua Barajas, Smart robots will take over a third of jobs by 2025, Public Broadcasting Service, Washington DC, October 2014

14.4 The implications of the higher value people place on weekends

Weekends are considered special by many people, a fact reflected in the current legislation. Sporting competitions and socialising with friends are still important aspects of Australian culture today, as they were at the time of the framing the workplace relations framework many years ago.

However, the assumption that Sunday is any more special than Saturday is increasingly looking anachronistic in a non-religious society. Although some 61 per cent of the population of Australian described themselves as Christian in the last census, church attendance is low at eight per cent²².

The commission appropriately recognises that ‘rates for Sundays appear at odds with rates for times that are also important for social activities,’ as many other social activities have now replaced church attendance as the primary activity on a Sunday. For followers of other religions, the special status attached to the Christian Sabbath through penalty rates is irrelevant. In the Islamic faith Fridays are reserved for prayers, in Judaism the Sabbath runs from Friday evening to Saturday evening and Buddhist rest days occur every 7-8 days according to the cycle of the moon. In short, for the non-Christians who represent about eight per cent of the population, other days are far more significant.

Among the general population, research into workers’ value of time shows little statistical difference between the premiums placed on Saturday compared to Sunday. A recent study found that current hourly pay rates for those working in hospitality are in line with employee expectations for weekdays and for Saturdays, where workers placed a 21-35 per cent premium on their time (with the higher relating to Saturdays during a public holiday weekend)²³. However, the research found the premium restaurant and café staff expect for working a normal Sunday to be 46 per cent. This compares to the 75 per cent payable to most grades under the current award.

The draft report reflects this in its statement that ‘employees working in Sundays have no worse a life balance or feel any more rushed than those working on a Saturday.’ R&CA’s own research also validates this view. Our research found that 59 per cent of the general population believe there is no difference between working either weekend day, with only 33 per cent stating that Sundays were more inconvenient a work day than Saturday, with the remainder choosing Saturday as the most inconvenient work day²⁴.

²² Church attendance in Australia, McCrindle Research, 2014

²³ Professor John Rose, Value of Time and Value of Work Time during Public Holidays, report prepared for The Institute for Choice and the New South Wales Business Chamber by the University of South Australia. North Sydney July 2015

²⁴ I-view Online Omnibus Survey. 015Y0106APR22 – 22 April 2015

14.5 What does the evidence suggest about the level of penalty rates?

The commission suggests that the market can respond to the higher penalty rates payable on Sundays by increasing prices or by not trading. This ignores, however, the other market pressures placed on restaurants and cafés such as contractual obligations with shopping centres, competitive pressure by rivals and the uneven playing field with other businesses operating under different awards (such as licensed clubs where meal prices are underwritten by other revenue streams).

In addition, with tougher economic conditions leading to consumer apprehension around discretionary spend, industry notes considerable consumer distain towards surcharges applied to cover the cost of operating on these days, with only 36.1 per cent charging a surcharge on weekends²⁵.

14.6 The impact of change

Through R&CA's earlier submission and expert witness testimony delivered by Professor Phil Lewis, the job stimulatory effect of a reduction in penalty rates for Sunday work is well documented. R&CA research indicated that 54 per cent of restaurants and cafés currently closed on Sundays would consider reopening if reform were to occur. R&CA notes the commissions observation that the original research did not quantify the change that would need to occur in order to stimulate further employment.

R&CA can confirm that further research revealed that 60.9 per cent of restaurateurs and café owners would employ an additional three people if the Sunday and public holiday penalty rate were reduced to the same level as Saturday²⁶.

More interesting than the overall picture is the evidence that reduced Sunday penalty rates would lead to longer opening hours. Earlier research indicated that 71 per cent of businesses in the sector either reduce staff hours on Sundays and public holidays. Even United Voice recently noted that 'if penalty rates were reduced on a Sunday, there may be some extra hours available'²⁷.

As the commission found, a comparable market to Australia with a high preference for Sunday dining is New Zealand. In the draft report the commission found that Auckland and Wellington had 10.4 per cent more businesses open and a 26.5 per cent increase in opening hours on Sundays. As such, we

²⁵ Restaurant & Catering Australia (2014) *2014 Industry Benchmarking Report, 2012-13 Financial Year Results*

²⁶ Weekend Labour Costs Survey. Elections Australia for R&CA, Roseville June 2015.

²⁷ Lauren Waldhuter, *Lower weekend rates would create 1,000 Tasmanian jobs, hospitality group claims*, ABC News, Hobart, 16 September 2015

welcome the view of the commission in its finding that restaurants and cafés would extend their opening hours if the Saturday penalty rate applied on Sunday. The initial R&CA submission included evidence from a survey commissioned by the association by Jetty Research into the attitudes and projections by its members under the scenario of lowered Sunday penalty rates. It found, inter alia, that the average business would employ an additional 3.15 staff if penalty rate reform were achieved²⁸.

14.7 Change is warranted

R&CA supports recommendations 14.1 and 14.2 of the draft report. As the commission gathers its final evidence, it is worth viewing reform in an international context. Labour flexibility in the hospitality sector has been achieved in several other countries without major social disruption.

In Germany over half of all workers in the restaurant and catering sectors work under conditions known as minijobs²⁹. Minijobs are those whose monthly wage does not exceed €450 (approximately \$707) and whose employment does not exceed 15 hours per week. Exemptions for longer hours exist during Christmas trading periods.

Minijobs were introduced in 1996 as part of the wide-reaching Hartz IV labour reforms³⁰. Minijobs are paid tax-free, with employers instead paying a 15 per cent payroll tax in addition to health insurance and superannuation contributions. Minijobs were introduced to combat Germany's previously chronic unemployment issues, particularly among young workers.

Minijobs are particularly attractive to students, who make up the bulk of the estimated five million minijobbers currently employed in German hospitality and retail sectors (out of around 7.3 million in total).

The long-term unemployed also use the casual minijob as a transition to the midijob, a more protected part-time position, as minijobs do not disqualify those on benefit payments from losing social security entitlements.

²⁸ Jetty Research for R&CA (2015). The effect of penalty rates on staffing, opening hours and profitability in Australian restaurants and cafés. May 19 2015.

²⁹ *Minijobs in Germany*, The World of Labour, Universidad de Huelva, April 3, 2012

³⁰ Lena Jacobi and Jochen Kluge, Before and After the Hartz Reforms: *The Performance of Active Labour Market Policy in Germany*, Forschungsinstitut zur Zukunft der Arbeit/ Institute for the Study of Labor, Bonn April 2006

Another useful international example is France, where rigid trading rules prohibited Sunday trading for a whole host of sectors. Last year French students led calls for relaxed Sunday trading laws to secure more youth jobs³¹.

The result was new Sunday trading laws - named the Macron laws after finance minister Emmanuel Macron - which deregulated Sunday trading across France, but with specific designations for tourism and hospitality. In designated high tourism areas, restaurants, cafés, shops and other service businesses can open every Sunday (in non-tourist areas the figure is now 12 Sundays per year, up from the previous five)³².

More historical evidence from overseas can be found in Canada, whose Sunday trading regulations were in stark contrast to those over the border in the USA, leading to significant reform in the late 1980s and 1990s. The Canadian process of Sunday shopping deregulation began in 1985 when the Supreme Court of Canada found the federal *Lord's Day Act*, which had designated Sunday as a weekly day of rest since its adoption in 1907, to be unconstitutional³³.

The results in Canada suggest that the increase in labour demand that followed deregulation led to between 5-12 per cent additional employment, with around seven per cent growth in the restaurant and café sector (principally those establishments located in shopping centres).

³¹ Henry Samuel, *French shops to open on Sundays to revive flagging economy*, The Daily Telegraph (UK). 18 Nov 2014, retrieved 26 August 2015

³² Ministre de l'Économie, de l'industrie et du numérique (Emmanuel Macron). Media release "*Le projet de loi pour la croissance, l'activité et l'égalité des chances économiques adopté par la commission spéciale de l'Assemblée nationale*", Paris 20 January 2015.

³³ Mikal Skuterud, *The Impact of Sunday Shopping on Employment and Hours of Work in the Retail Industry: Evidence from Canada*. Family and Labour Studies Division Statistics Canada, Ottawa

ENTERPRISE BARGAINING (§ 15)

15.2 Current rules around enterprise bargaining

It is worth making particular mention of the references within section 15 to the Better off overall test (or BOOT). The commission does not explicitly recommend the continuation of the test (which replaced the previous fairness test) nor does it recommend that the test needs review. R&CA believes this is a lost opportunity, given the general tenor and tone of the report. R&CA believes, as outlined in original submission, that a Better off all together, or BOAT, test should replace the BOOT. By recognising that any new agreement under the enterprise bargaining system needs to be of value to the employer as well as the employee, the concept of fairness and equality would be enshrined. This would go to the very heart of increasing both employment flexibility and security.

R&CA would therefore encourage the commission to revisit this test in its final report.

THE ENTERPRISE CONTRACT (§ 17)

R&CA support the concept of Individual Enterprise Contracts as proposed by the Productivity Commission. For too long flexibility in the workplace has been limited and small businesses need the employment instruments to create more jobs tailored to business needs.

Small businesses have diverse requirements for employment conditions and these can vary considerably based on location, demographics and socio economic circumstances where the business trades. Such circumstances require small business entrepreneurs to establish terms and conditions of employment that work for both parties.

The concept of Enterprise Contracts should be explored further with input from the small business community in order to ensure its structure and content is easy to understand, and provides the necessary flexibility sought. Lessons should be learnt by the failure of Individual Flexibility Arrangements that promised so much but delivered very little in practice because of the vagaries of the legislation itself.

MIGRANT WORKERS (§ 21)

Section 21 of the draft report details the numbers of skilled migrants working in Australia. It is acknowledged that many of the overseas workers work in the restaurant, café and catering sector.

R&CA would contend that far from taking away unskilled work from locals, skilled migration enables businesses to take on more local Australians. This is because skilled workers are required in order to up-skill and provide direction to lower-skilled workers. For example, a restaurant needs a trained chef before it can employ apprentices and kitchenhands. This point is explored in the 2014 independent review of the skilled migrant 457 visa class³⁴ and should be considered in the context of the hospitality sector.

Yet the sector is experiencing chronic shortages of skilled labour. In 2014-15, the Accommodation and Food Services industry was the largest user of the 457 Temporary Work (Skilled) visa programme, with 4,350 applications granted. Cooks, Café and Restaurant Managers, and Chefs ranked in the top 15 nominated occupations for primary applications in 2014-15.

Whilst the draft report generally refers to past employment growth, R&CA would also point to the Department of Employment's projections, which shows employment growth in the café, restaurant and takeaway food sector is expected to reach 16.9 per cent or 93,600 additional jobs by November 2019³⁵.

In this context, R&CA would strongly object to any attempt to curb the use of skilled migrant workers in the sector.

³⁴ Azarias, J., Lambert, J., McDonald, P. and Malyon, K. Robust New Foundations: A Streamlined, Transparent and Responsive Sydney for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme, Sydney September 2014.

³⁵ 2015 Employment Projections, Department of Employment, Canberra August 2015

CONCLUSION

The draft recommendations of the Productivity Commission Inquiry into the Workplace Relations Framework will significantly boost hospitality employment and make businesses more sustainable.

The report's recommendation that a flat penalty be applied across both Saturday and Sunday for the hospitality, restaurant and cafe industries is welcomed by industry. In addition, the report has recommended the National Employment Standards be amended so that employers are not required to pay leave or any additional penalty rates for any newly-designated state and territory public holidays.

Overall, R&CA finds the recommendations to be constructive and represent common-sense thinking on the industrial relations framework. Enterprise contracts, for example, create the precise flexibility small businesses need.

The current system does not work; it leads to underemployment, business closures and reduced productivity. Australia needs an industrial relations system that provides operators with greater flexibility particularly in industries that operate outside pre-defined standard business norms, such as hospitality.

The café and restaurant industry is hamstrung by the current regime which sees businesses operating at a loss on some days, particularly public holidays.

The further research and findings presented in this supplementary submission are designed to aid the commission in finalising its report, aimed at achieving a flexible workplace relations framework, while ensuring worker protection remains in place.

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