Restaurant & Catering Australia

Submission for the Productivity Commission into the Economic Structure and Performance of the Australian Retail Industry 2011

Restaurant & Catering

Introduction

Restaurant & Catering Australia (R&CA) is the only peak organisation representing the interests of the 40,000 restaurants, cafes and caterers in Australia. R&CA is thankful for the opportunity to provide a submission for the enquiry by the Productivity Commission into the Economic Structure and Performance of the Australian Retail Industry 2011.

R&CA provide a variety of broad services to their members such as; advocacy & representation suited to large and small businesses; industrial relations advice, occupational health and safety, tenancy and consumer law advice.

R&CA notes that restaurants, cafes and caterers are defined as 'food retailing' under the definition of Division G of the Australian Bureau of Statistics and Australian New Zealand Industrial Classification. For the purpose of drafting a submission to the Productivity Commission into the Economic Structure and Performance of the Australian Retail Industry 2011, R&CA recognises this scope but maintains that the sector is aligned to, but separate from the retail industry

R&CA have addressed the following issues rather than going through each individual criteria:

- Market trends in Retail trade and drivers of structural change;
- Online trading: opportunities and challenges;
- Appropriateness of current indirect tax arrangements; and
- Other issues impacting on the performance and efficiency of the industry.

Market

According to the ABS (Retail Trade Data for the Year to July 2011) the restaurant, café and catering sector turned over $17.9 billion last year. Data released from the Australia Bureau of Statistics results for the Year (to July 2011) represent a 5.8% growth for the year on the year before.

The June Retail Trade data shows the first negative of turnover for cafes and restaurants since March 2009. Nation-wide July 2011 turnover was $1.51 billion, 1.9% down on July 2010. This brought to an end, 28 months of month on month revenue growth.

The State by State result was even more concerning with WA still achieving strong growth (30%) leaving Victoria, South Australia, Queensland, South Australia and the ACT in negative territory.

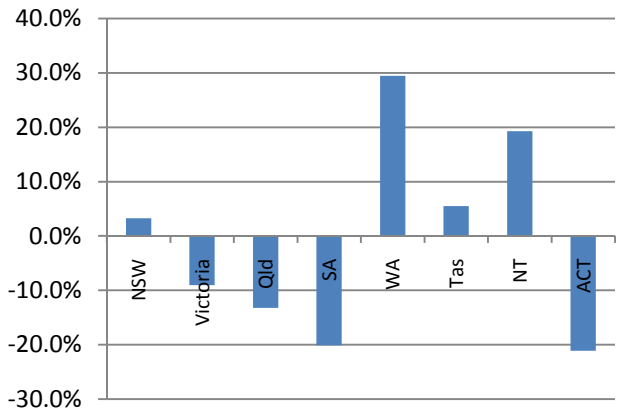

Figure 1 - Turnover Growth rate by State & Territory- July 2011 (ABS Retail Trade) – Cafes, Restaurants and Caterers

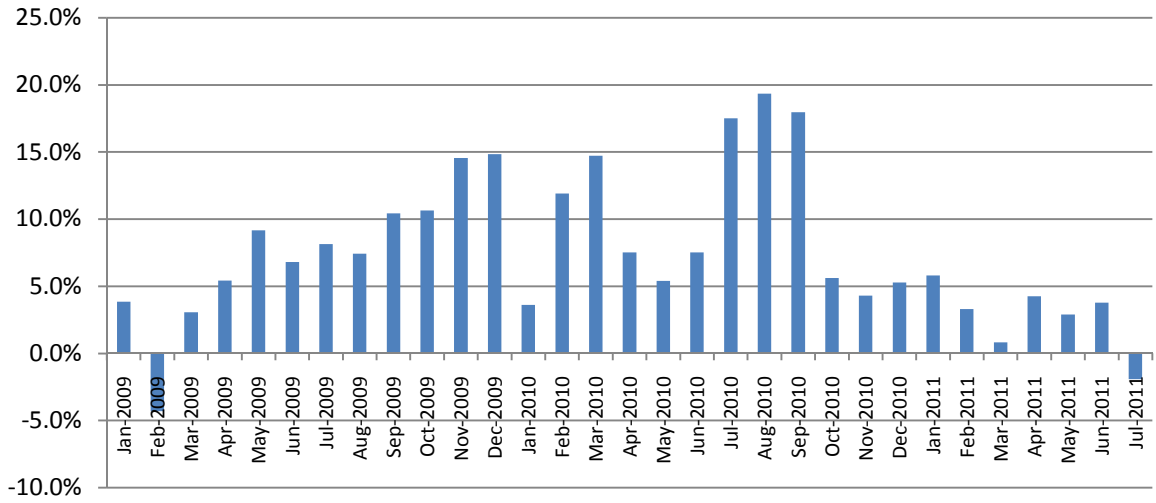

Figure 2. Turnover Growth rates – Cafes, restaurants and Catering Businesses – Month to Month.

The graphs above demonstrate that the food service industry is generally experiencing positive growth in most states. From a profitability perspective however, the margins are being continually eroded. At the same time, work force numbers have increased this year by 4.5% and are expected to grow a further 2.8% this year.

The food service industry in Queensland has faced some tough times especially at the beginning of the year with floods and cyclones. Apart from this problem the whole industry is facing a tough time with domestic and international visitors to Australia. Domestic tourism has dropped and Australians are taking advantage of the high Australian dollar and visiting overseas, and on the other hand international visitors are not coming to Australia due to the high dollar and either staying home or visiting other countries.

Employment

The cafés, restaurants and takeaway food sector dominates employment in the Accommodation and Food Services industry, accounting for 456,600 workers (or 61.6 per cent of industry employment) as at February 2010.

The Department of Education, Employment and Training estimates that in the five years to 2014-15, employment in Cafés, Restaurants and Takeaway Food is expected to grow at an average rate of 2.6 per cent per annum (see Figure 5), which equates to around 59,358 new jobs.

Employment growth in the overall restaurant industry (including quick-service / fast food restaurants) has been at 4.5% in the 12 months to February 2010[1].

[1] ABS Labour Force Survey cat. no. 6291.0.55.003 (DEEWR trend data); DEEWR projections to 2014-15

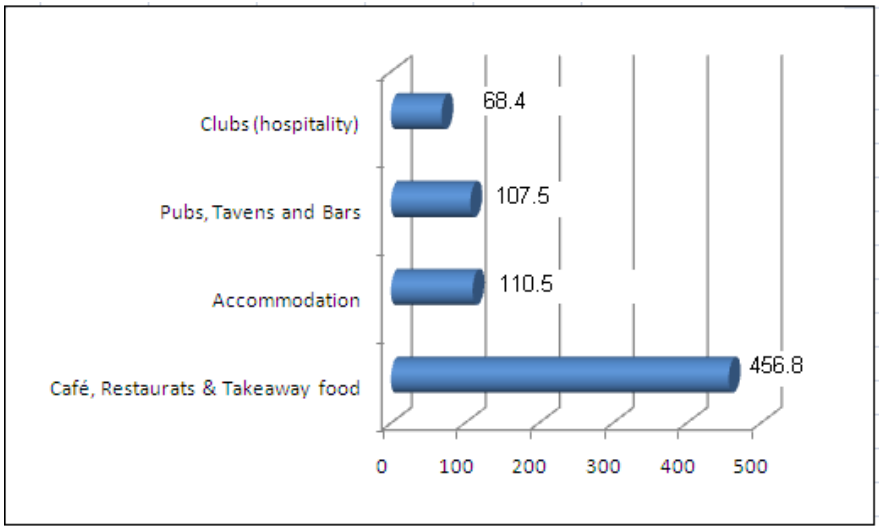

Figure 3. ABS Labour Force Survey cat.no. 6291.0.55.003 (DEEWR trend data)

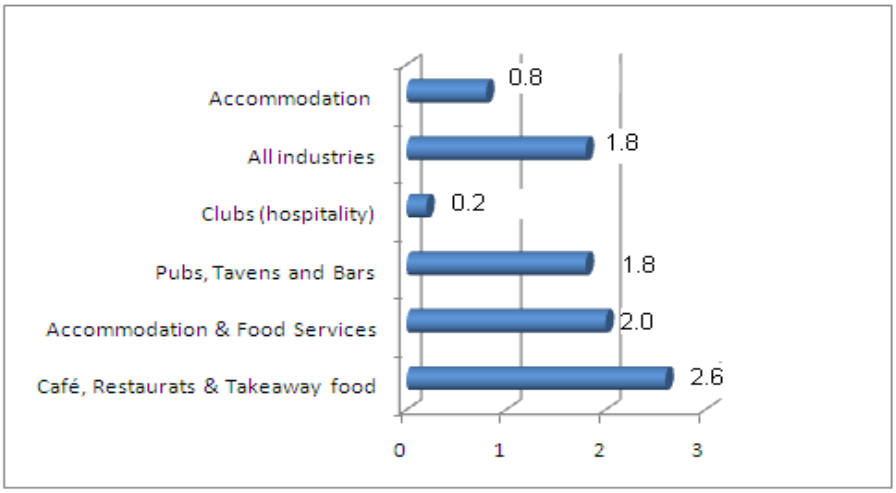

Figure 4. ABS Labour Force Survey cat.no. 6291.0.55.003 (DEEWR projections to 2014/2015)

The Department of Education, Employment and Training describe that Accommodation, Cafés and Restaurants as a relatively low skilled industry.

The Accommodation and Food Services industry is providing job opportunities for large numbers of low skilled workers. Although there is a stronger emphasis now on formal qualifications in the industry, 60.9 per cent of workers had no non-school qualification as at May 2009 compared with 38.7 per cent for all industries (see Figure 18). In part, this reflects the younger age profile in the Accommodation and Food Services industry, including students working while studying. Over one third (39.1 per cent) of workers in the industry had completed a non-school qualification. The most prevalent non-school educational attainment was a Certificate III/IV (13.9 per cent), reflecting trade qualifications required of Chefs and Cooks.

Rental

R&CA have real concerns for small businesses that do not own the premises they occupy. As is self-evident restaurateurs particularly occupy large areas of retail space and are therefore subject to movements on the retail tenancy market. R&CA believe there is no effective mechanism to accurately determine the market rate of commercial tenancies. The tenancies are initially calculated incorporating a theorised retail turnover figure and at the point of re-negotiation specific data has been collected by the landlord and then leveraged. Such a practice does not encourage small businesses to strive for profit from their business, as when the lease is up for renewal the landlord will raise the rents and probably have done nothing to the premises to receive an increased benefit. An independent market rental valuation for a building should be mandatory before entering in to a new lease for existing tenants, as currently there is no determined market rate for commercial tenancies only what the landlord wants to charge for rent.

R&CA notes that since January 1 2011 three states, New South Wales, Queensland and Victoria have adopted uniformity in the information required to be exchanged between lessor and lessees through common format disclosure statements.

R&CA believe there should be uniformity on a national level and a national registry should be considered to improve inequities between landlords and tenants when it comes to leases for small business, whether it is in hospitality or retail. The NSW model for mandatory registration of rental leases should be recorded with an appropriate regulator; this regulator shouldl have appropriate powers to police non-compliance and would be rolled out nationally.

Workplace Regulation

R&CA supports the key points identified in Chapter 10 of the Productivity Commission Draft Report, however these findings extend to businesses allied to retail including those regulated by the Restaurant Industry Award such as cafes and restaurants, Fast Food Industry Award including large and small fast food outlets and the Hospitality Industry (General) Award including catering and hospitality businesses.

Industrial relations laws and institutional arrangements

R&CA argues that the regulation of the labour market in Australia under the Fair Work Act 2009 and associated employment legislation has resulted in excessive red tape that is inhibiting small and medium size businesses from reaching their full potential and underlying commercial viability.

Name of Legislation	Effective Date	Impact to Businesses
Fair Work Act	1 July 2009	• Modern Award wage regulation with complex transitional arrangements • Payroll system updates to reflect new employment conditions and rates of pay • Unfair dismissal compliance requirements • Fair Work Information Statement must be given to new employees • Reduction in workplace flexibility with individual agreements prohibited • Penalties of up to $33,000 for individual breaches
Paid Parental Leave Act	1 January 2011	• Payroll function applied to businesses from 1July 2011 requiring businesses

		to pay employees directly. • Businesses must receive and process instalments from Government for employees taking paid parental leave.
Work Health and Safety Act	1 January 2012	• Complex health and safety compliance obligations • Draconian financial penalties • Jail sentences for certain offences • Impossible for SME businesses to comply

Concerns about awards and labour costs

R&CA raised concerns with Fair Work Australia about escalating labour cost increases in its submission to the 2011 Annual Wage Review on 18 March 2011. To this end R&CA raised the following issues with Fair Work Australia:

International Comparisons

Of significant concern to the industry is the growing move away from international benchmarks and fear that many entrepreneurs will set up businesses overseas where labour costs are not as excessive as they are in Australia.

The following examples are illustrative of the significant disparity with minimum wages provided in comparable economies overseas.

Country	***Minimum Wage as at 1 March 2011***	
	Hourly Rate	*Approximate $AUS Currency Equivalent*
Australia	*$15 per hour*	*$15 per hour*
New Zealand	*NZ$12.75 per hour*	*$9.18 per hour*
United Kingdom	*£5.93 per hour*	*$9.66 per hour*
Canada	*$8.00-$10.25 per hour*	*$8.00-$10.25 per hour*
Ireland	*€7.65 per hour**	*$13.08 per hour*

**Rate reduced from €8.65 per hour on 1 February 2011 due to economic downturn.*

The above table in addressing minimum wages is further distanced from international rates when one takes into account significant penalty rates such as double time and one half for working on public holidays. The impact of these labour cost increases when passed on to consumers resulting in more Australians choosing to travel overseas for cheaper vacations where food and beverage is significantly less compared to Australia.

In New Zealand a waiter is paid time and one half penalty rates for working on public holidays where in Australia some transitional rates such as a Food and Beverage Attendant Level 2 previously employed under the Restaurants, & C., Employees (State) Award NAPSA AN120468 are paid a minimum rate of $46.80 per hour for working on public holidays. It should be noted that the duties of a Food and Beverage Attendant Level 2 include the preparation of simple food items such as sandwiches, general waiting duties and seating guests.

Wage rates of $46.80 per hour excessively exceed the international rates of pay paid to hospitality employees in overseas markets.

However, the Fair Work Australia Minimum Wage Panel in a decision handed down on 3 June 2011 found that:

> *"**Labour productivity is growing,** the profit share remains at historically high levels and underlying inflation is well within the RBA's medium-term target band. Employment is growing, unemployment is reducing and labour force participation remains high. In the circumstances a significant increase is appropriate which will improve the real value of award wages and assist the living standards of the low paid." [Emphasis added]*
>
> These conclusions by the Minimum Wage Panel are at odds with what the Reserve Bank of Australia has for some time now outlined as concerns in respect to productivity in Australia. After the significant decline in 2009, growth in wages has returned to rates seen prior to the downturn, though productivity growth remains weak.[2]
>
> Although Australia's economic performance during the 2000's has been impressive on many dimensions, especially by comparison with that of other 'advanced' economies, productivity is not among them. Australia's productivity performance over the past decade has been poor, to put it mildly, or – both by Australia's own historical standards, and by contemporary international standards.[3]
>
> The Fair Work Australia Minimum Wage Panel decision was also at odds with Federal Treasurer the Hon Wayne Swan MP where he made the following statements in respect to the Australian Economy as part of his second reading speech concerning the Commonwealth Budget in the House of Representatives on 10 May 2011:
>
> *"Our public debt is a tiny fraction of that carried by comparable economies, our fiscal position the envy of the developed world. An investment boom is gathering pace.*
>
> ***Yet our patchwork economy grows unevenly across the nation.***
>
> ***Natural disasters have devastated families, cities and towns. The high dollar hurts our tourism and many manufacturing industries, especially small businesses.***
>
> *For some, talk of an investment boom seems divorced from reality. Wages are growing, yet many live paycheque to paycheque.* ***Not every region prospers."*** *[*Emphasis added]

R&CA in its written submissions to Fair Work Australia argued that sectors that are not experiencing financial growth such as retail and hospitality should be exempt from wage increases because the one size fits all approach to wages will cripple some small business operations. R&CA also argued that penalty rates and high labour costs under the Gillard Governments Modern Award regime have resulted in many businesses no longer trading on public holidays and weekends. In this respect the Minimum Wage Panel found in their Decision:

> "*The ACTU opposed these proposals, arguing that affording differential treatment to particular industries was inconsistent with the Panel's obligation to establish and maintain a fair and relevant minimum safety net, and would distort award relativities,*

[2] Media Release Statement by Glenn Stevens, Governor, Reserve Bank of Australia: Monetary Policy Decision 2 August 2011

[3] Eslake Saul- "*Productivity"* Paper presented to the annual policy conference of the Reserve Bank of Australia 15-16 August 2011

and lead to disparate wage outcomes for award-dependent employees with similar or comparable levels of skill.

In its Annual Wage Review 2009–10 decision the Panel dealt with claims for special treatment based on the alleged costs of award modernisation.[i] Nothing has been advanced this year which has caused us to review the conclusions reached then—either in relation to the costs of award modernisation or in relation to the desirability of giving special treatment to a particular industry, or part of an industry, because of award modernisation. To the extent that difficult trading conditions are relied on, it is relevant that aggregate hours worked in award-reliant industries have increased quite significantly in the last 12 months. While retail sales are flat, they are still growing. For these reasons we have decided not to adopt these proposals either."

These conclusions by the Minimum Wage Panel of Fair Work Australia have enshrined the one size fits all approach to wage fixation which fails to accommodate any relief for small and medium size businesses in flat sectors of the economy.

In 2008/09 there were more business closures than new entrant businesses in the sector[4]. This trend is continuing and is alarming and has resulted in labour costs now attributing to 44% of total expenditure for average businesses.

Small businesses such as cafés now find themselves in the absurd situation where the business owner is forced to work seven days a week and earn less than the minimum wage. Employees in small businesses are also affected by being rostered to work less hours or no longer being required to work on weekends and public holidays where high penalty rates make trading commercially unviable.

Enterprise Agreements

The Productivity Commission Draft Report notes:

"Participants have suggested that provisions under the Fair Work Act, in particular the 'every worker must be better off overall' test, are increasing the cost and complexity of negotiating enterprise agreements and making productivity improvements more difficult to achieve."

R&CA argues that regulation of what can and can't be included in an enterprise agreement has restricted the ability of employers to strike genuine flexibility in the workplace.

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

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

….The Agreement not only fails to satisfy the no disadvantage test, on various levels it significantly compromises industrial standards that would be expected for agreement-

[4] Australian Bureau of Statistics Counts of Australian Businesses including Entries and Exits June 2007 – June 2009 Cat No. 8165.0 - 21 October 2010

reliant employees – considering, in particular, that these employees are mostly young and mostly casually employed.

The application cannot be approved for the reasons detailed in this decision, including the deficient application; the failure to meet pre-approval requirements; the failure to meet the no disadvantage test; and the inadequacy of some of the proposed written undertakings."[5]

McDonalds successfully overturned this decision by appeal however it engaged three Barristers at great cost to do this and the validity of the agreement was left in limbo for over six months from the date it was lodged with Fair Work Australia. Unfortunately, many small and medium sized businesses do not have the resources or financial capacity to appeal enterprise agreement decisions to a Full Bench of Fair Work Australia and many business owners lose confidence in the process because it portrays them as attempting to "dud" their employees.

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

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

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

For these reasons R&CA categorically reject the repeated rhetorical statements by the Minister for Workplace Relations Senator Chris Evans such as:

"This demonstrates that the Fair Work enterprise bargaining system is flexible, linking wage outcomes to industry circumstances." [6]

Furthermore, many employers now find that because of the complex approval process and little ability to genuinely offset award provisions there is no commercial incentive to implement an enterprise agreement compared to previous collective agreements including those first implemented in Australia by the Keating Government in the 1990's.

Individual Flexibility Agreements

Employers also remain very sceptical about Individual Flexibility Agreements or (IFA's) because if the terms of the IFA are subsequently deemed to include a financial detriment to the employee compared to the Modern Award the business may be subjected not only to retrospective pay adjustments but a monetary penalty of up to $33,000 for breaches of the Fair Work Act 2009. With such high stakes involved R&CA argue IFA's should be renamed to *"Inflexible Fake Agreements".*

[5] [2010] FWA 1347 (23 April 2010)

[6] Media Release the Hon Senator Chris Evans 27 June 2011

Many employees in the hospitality industry recognise that it is a 24/7 business environment and seek to work ordinary hours from Wednesday to Sunday however, because the Modern Awards detail mandatory penalty rates for weekends of up to 150% any form of agreement must include the penalty payments as part of the better off overall test (BOOT). This is an area where it is the employee seeking to work particular days to accommodate lifestyle or family responsibilities but the IFA penalises the business for entertaining such an agreement.

Fair Work Ombudsman

R&CA remains concerned that the Fair Work Ombudsman (FWO) has an inherent conflict in advising employers and employees with workplace relations advice. We are aware of situations where Fair Work Infoline staff give advice to employers and employees from the same company. This is clearly a conflict and highlights a fundamental flaw in the charter of the FWO under the Fair Work Act 2009.

The Fair Work Information Statement also has the unintended effect of encouraging employees to contact the Fair Work Infoline for advice on employment conditions that are best resolved at the local workplace level in the first instance. After years of devolution of industrial relations to the workplace level the Fair Work Information Statement has the unintended consequence of escalating issues outside the workplace and a potential departure of the dispute settling procedure in Modern Awards.

R&CA argues that the Productivity Commission draft recommendation 10.2 does not go far enough in resolving the workplace regulation problems identified, as the scope of the 2012 review proposed by the Australian Government is limited and will not provide a mechanism to properly address reforms required.

R&CA Australia submits to the Productivity Commission that the following reforms to the Fair Work Act 2009 should be recommended to the Australian Government:

- Introduce a pre approval assessment process for enterprise agreements giving small business employers more certainty in the enterprise bargaining process;
- Provide certainty over the use of Individual Flexibility Agreements allowing employers and employees to reach local level workplace agreements;
- Reduce the responsibilities of the Fair Work Ombudsman office to ensure overlapping with the Fair Work Australia Tribunal is eliminated;
- Allow variations of Modern Awards within the four year review period to where economic benefits can be demonstrated;
- Update the transfer of business provisions to simplify for employers acquiring other businesses.
- Use take home pay as the measure for assessing the needs of the low paid and in so doing incorporate adjustments to the taxation system into their decision making processes;
- Reduce penalty rates and casual loadings for SME businesses so that Modern Award rates are split into large and small business minimum rates of payment.
- Increase the unfair dismissal small business threshold to 25 full time equivalent employees;
- Rectify the public holiday provisions in the National Employment Standards that double the entitlements in some states and resolve the national standard for long service leave;

Other issues

R&CA believe there are several other areas of concerns; these can be broken down in to State government issues and Federal government issues.

Firstly at a State level, the impost of payroll tax needs to be reduced across the States along with workers compensation premiums and stamp duties when it arises. Also, registration and licence fees for small business need to be consistent and currently there is no uniformity from States as to, whether it be liquor licensing or food safety supervisor training.

Secondly from a Federal level, GST, fringe benefit tax, property taxes, ASIC registration, property taxes, Queensland flood levy and the carbon tax are all burdens on small business operators.

These taxes reduce profitability, without any productive gain and can account for lost time for business owners who need every hour they can working for a business. The Association calls on the Productivity Commission to have Local, State and Federal Government streamline the regulatory burden, reduce red tape and taxation burden.

Conclusion

R&CA are thankful for the opportunity to provide a submission to the Productivity Commission into the Economic Structure and Performance of the Australian Retail Industry 2011. R&CA believe the Government can take guidance from the Productivity Commission response to limit regulatory burden on the industry and assist small business in areas where there is an opportunity to uniform some laws and regulations across the states.

If you would like to discuss this submission in further detail, please contact John Hart (Chief Executive Officer) on 02 9966 0055.