



Restaurant
& Catering

Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

R&CA Submission

October 2019

RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the national industry association representing the interests of more than 47,000 restaurants, cafés and catering businesses across Australia. The café, restaurant and catering sector is vitally important to the national economy, generating over \$37 billion in retail turnover each year as well as employing 450,000 people. Over 92 per cent of businesses in the café, restaurant and catering sector are small businesses, employing 19 people or less.

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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INTRODUCTION

Restaurant & Catering Australia (R&CA) welcomes the release of the discussion paper 'Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance' by the Attorney-General's Department and is pleased to provide the department with its submission. As the only national industry association representing the interests of over 47,000 café, restaurant and catering businesses across Australia R&CA is well-placed to provide comment on relevant policy issues affecting the sector.

R&CA has been actively involved in discussions concerning non-compliance across the sector, most recently through its submission to a parliamentary inquiry conducted in South Australia through *Select Committee on Wage Theft in South Australia* and in a similar parliamentary inquiry through the Queensland Parliament. R&CA has also liaised with the Victorian Government regarding its election proposal to introduce laws making the underpayment of wages and entitlements a criminal offence, punishable by up to 10 years jail and fines in excess of hundreds of thousands of dollars.

R&CA's position on these matters can be generally summarised as follows:

1. We agree that there are real and genuine concerns regarding the incidence of underpayment / non-compliance across the hospitality industry with workplace laws in Australia, albeit in the absence of reliable data relating to the true prevalence and nature of this problem. In short, Australia has an underpayment problem.
2. Hospitality Businesses sincerely share these concerns but must be an important and equal voice in not only understanding the problem, but also informing Government's consideration of actions that will and will not be effective in addressing this problem (or in fact the multiple causes of non-compliance).
3. Significant actions have already been taken by the current government, with the support of R&CA. Strong penalties for non-compliance have already been increased significantly in response to high profile cases.
4. These changes are still flowing through the workplace relations system and their full impact to improve compliance have not yet been fully realised and their effect in deterring compliance not yet fully understood.

5. Further increases in fines will not improve compliance nor will the addition of criminal penalties to the system.
6. R&CA is of the strong view that alternative measures available to government will deliver sustainability better outcomes for both employees, businesses, the community and government to ensure more employees are paid lawfully and correctly.

POLICY RECOMMENDATIONS

R&CA has outlined its position regarding the issue of wage theft in previous representations to governments and other stakeholders. R&CA in no way condones the actions of any business-owners that are not fully compliant with the various legal and regulatory obligations to their staff. R&CA would also like to take the opportunity in this submission to reaffirm its commitment to ensure the highest possible standards of compliance with the relevant legal and regulatory frameworks across the hospitality sector, in all Australian states and territories, including South Australia.

Another key aspect of R&CA's overarching policy position is that the strongest possible sanctions under the law are warranted for any business-owners found to be deliberately and systematically avoiding compliance with their workplace obligations towards their staff. R&CA is dismayed and frustrated by these practices believing that they significantly undermine the integrity of the hospitality industry and unfairly disadvantage and penalise business-owners who operate their businesses legitimately and in full compliance with the law.

The R&CA makes the following policy recommendations in relation to the discussion paper:

1. **Repeatedly increasing penalties is not a silver bullet solution to underpayment of wages.** Instead better compliance work and clear education and promotion efforts should bear the primary burden of further tackling non-compliance, and it is these measures that can yield genuine and material improvements for Government looking to do more in this area going into 2020.
2. **There is an urgent requirement for a significant ongoing national government advertising campaign to increase compliance.** This would work to increase the familiarity of Australians with their rights to minimum wages and where to go for information and support and also educate businesses on their duties and responsibilities under the Fair Work Legislation, which has not been done since the introduction of the act more than a decade ago. The business focused campaign should direct businesses to their industry associations for advice and rather than the FWO.

- 3. The FWO is conflicted in its dual roles to provide advice to employees and employers.** As the regulator focused on ensuring compliance with IR laws across the country, the FWO naturally has as a core function the protection of vulnerable workers as a priority. R&CA has long advocated that this puts them in direct conflict with their role to provide advice and support to employers. R&CA submits that industry associations should be empowered by the Government and the FWO to provide clear, unambiguous advice on IR matters to their members and thus remove the inherent conflict within the FWO.
- 4. Scope should be explored for some form of legally reliable advice or ruling to be added to the Fair Work Act through either the FWO or industry associations.** The FWO works extensively to support employers in complying with workplace laws. However, periodically employers complain of insufficient certainty and reliability of FWO advice. The application of the law to particular circumstances has become more complex, there is a growing demand from employers for clear and reliable declarations of what they must pay (or do or not do). Employers could formally seek a ruling from the FWO and which would then be reliable as a defence in any subsequent claims. Specifically, consideration should be given to employers being able to seek a ruling (as it done on tax) on the proper application of an award on a particular matter, or a particular roster.
- 5. Require the FWO to support / partner with industry driven initiatives to increase compliance:** Subdivision A of Division 2 of Part 5-2 of the Fair Work Act 2009 should be amended to make one of the FWO's functions cooperation with and support initiatives put forward by industry to assist in increasing compliance across a particular sector. Neither policing nor penalties can in isolation have a significant effect in this area. The FWO should partner (and in certain cases fund) work done by industry associations to improve the compliance level of their members with IR instruments.
- 6. It is time to genuinely tackle the complexity of the rules for employment and the calculation and application of minimum wages in Australia.** While complexity is not an excuse for non-compliance, it is an explanation and it is a key factor contributing to too

many persons working in Australia being underpaid – especially within the hospitality and restaurant awards. Matters relating to non-compliance under these awards have attracted significant media attention without the requisite commentary on the difficulty faced by businesses in comprehending and then complying with these awards. R&CA

Recommendations for tackling this inherent complexity include:

- a. A Discussion Paper as part of the current review process that invites submissions on where the hospitality and restaurant award is complex especially in comparisons to awards such as the retail award, how this complexity impacts on compliance, and what may be done to address and reduce this complexity without creating unfairness or disadvantage;
- b. A commissioned review of Australian law and practice against other OECD countries for comparable work (commissioned by Government).
 - i. For example, you could take a waiter, chef or bar assistant in Australia, New Zealand, the UK, France, Canada and the US and compare the level of regulation, the number of different instruments, wage points etc and different minimum wages they work under.

KEY ISSUES TO CONSIDER

DEFINITIONS RELATING TO NON-COMPLIANCE

In discussions surrounding the issue of 'wage theft', many other employer groups, peak bodies and industry associations have expressed their opposition around the use of the term 'wage theft'. R&CA would also argue against the use of 'wage theft' as a catch-all term in the belief that it does not adequately capture the full scope of activities which this Committee is seeking to examine. For instance, employers failing to provide employees with pay slips or paying undeclared cash wages is explicitly against the legal obligations of business-owners towards their staff yet is often mentioned as part of a broader problem concerning underpayment of wages and entitlements and therefore covered by the umbrella term 'wage theft'. Given these inaccuracies, R&CA would contend that use of the term 'non-compliance' is more appropriate to capture the scope of activities currently associated with the term 'wage theft'.

ISSUE OF CRIMINALISATION

The Discussion Paper poses the following question: *In what circumstances should underpayment of wages attract criminal penalties?*

R&CA would like to state clearly that it does not believe that there are any circumstances in which the underpayment of wages should attract criminal penalties., incarceration or the imposition of a criminal record.

State and territory criminal laws already set out stealing and theft related offences. For example, under the Crimes Act 1958 (Vic) in Victoria a person can be jailed for up to 10 years for theft (section 74). Section 72 defines theft as circumstances in which a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Another example is section 94(b) of the Crimes Act 1900 (NSW) which provides that a person who 'steals any chattel, money or valuable security from the person of another' shall be liable to imprisonment for 14 years. There are a range of other more specific offences such as larceny by bailee (section 125).

In South Australia section 134 of the Criminal Law Consolidation Act 1935 (SA) provides that a person is guilty of theft and can face imprisonment for up to 10 years if they deal with property dishonestly; without the owner's consent; and intending to deprive the owner permanently of the property; or to make a serious encroachment on the owner's proprietary rights.

Therefore, it is already possible for underpayments to be subject to criminal sanction where the behaviour constitutes theft and falls within the types of offences already in existence at both a state and commonwealth level.

In addition, at the federal level, the Criminal Code 1995 (Cth) already provides that a body corporate may be found guilty of any offence in the Criminal Code, including those punishable by imprisonment. In particular, section 12.2 of the Criminal Code provides that if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or with his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Characterising underpayments as a criminal offence akin to theft will only serve to set a disastrous precedent in our workplace laws where any behaviour that does not completely accord with the law can suddenly be considered criminal in nature. It may sound far-fetched but if underpaying someone becomes a criminal offence then so too could the misuse of sick leave (an activity which surveys suggest almost 1 in 5 employees engage in every year) as a form of 'time theft'. The same could also be said for workers who falsely report their time sheet or who falsely inflate their mileage claims. Section 5 asks the valid question of whether union lawbreaking will also be criminalised.

If the Parliament ultimately intends to pursue the criminalisation of underpayments of wages and entitlements contrary to what employer say is evidence and merit then it is critical that a distinction be drawn between deliberate and systematic non-compliance with workplace regulation and genuine mistakes and oversights, which are often immediately corrected upon discovery. That is, mistaken conduct or otherwise reasonable conduct should not be prosecuted under any circumstances as a criminal offence.

Most underpayments occur as a result of genuine mistakes and accidental payroll errors. Even businesses that promote themselves on the basis of their social conscience, are closely aligned with

unions or operate as experts in the workplace relations field have previously been identified as making very large underpayments to employees as a result of mistakes in the interpretation of the NES, awards and enterprise agreements, as well as a result of payroll errors.

Genuine and accidental errors in the payment of wages and other entitlements are largely due to the inherent complexities of Australia's workplace relations system. As research conducted by the Australian Payroll Association recently found, almost 90% of payroll managers find the current workplace laws difficult to apply to real-world situations and are unsure of how to interpret the wording of awards and legislation.

R&CA strongly submits that there must be a clear distinction between deliberate, egregious and systematic non-compliance and genuine accidental errors when deciding enforcement and penalties. If the two are considered interchangeable it is likely to only discourage employers from self-reporting underpayments, they have discovered due to error and may discourage constructive remedial actions being taken to rectify pay errors for fear of criminal prosecution and conviction against both the company and individuals. Put another way if we start to treat every contravention as deliberate, and as criminal we risk evermore reactive compliance outcomes.

EDUCATIVE FUNCTION OF R&CA

Given the significant reach of the Association to its members and wider connections with industry, R&CA acknowledges and emphasises the educative role it plays in informing individual business-owners of their various workplace obligations and responsibilities towards their staff. R&CA has taken a proactive approach in performing this role, maintaining a workplace relations advisory service staffed by industrial relations specialists which assists members in interpreting and applying the Fair Work Act and the various modern awards as well as correcting any errors which may have occurred. The enquiries fielded by R&CA's workplace relations advisory service cover a wide range of workplace relations issues relating to correct pay rates under the Awards, entitlements such as annual leave, personal leave, breaks and superannuation and penalty rates on Sundays and Public Holidays. R&CA incurs a significant cost to maintain this service for members and devotes significant resources to ensuring its continued operation. This service is used extensively by Association members, receiving an estimated 1,200 calls from hospitality operators with enquiries in any given

year. This does not include any additional emails fielded by members of the Association by businesses with other enquiries related to their legal and regulatory responsibilities and obligations.

In addition to maintaining an on-demand workplace relations advisory service, R&CA has also used the various communications channels at its disposal to continually emphasise the vital importance of businesses complying with their relevant legal and regulatory obligations. R&CA's communication channels include direct members emails distributed on a weekly basis, bespoke newsletters and EDMs, company website updates, social media platforms and the publication of an industry trade magazine. R&CA also provides members with bespoke EDMs to advise of any relevant updates in workplace relations legislation that may have occurred impacting the operation of their businesses.

R&CA also provides significant resources to members to assist with their HR practices offering them the best chance of a comprehensive grasp of their legal obligations in employing staff. R&CA also submits that being able to partner with the FWO to offer a voluntary accreditation of businesses who sought to ensure 100% compliance would provide enormous benefits to the hospitality industry and would assist R&CA with its concerted efforts to raise the level of compliance across the sector.

COLLABORATION WITH THE FAIR WORK OMBUDSMAN

Furthermore, R&CA has a collaborative working relationship with the Fair Work Ombudsman (FWO) to address issues of non-compliance across the hospitality sector, which has resulted in a Memorandum of Understanding (MOU) that has now been in place for several years. R&CA is strongly committed to continuing its relationship with the FWO and updating its MOU wherever necessary to reflect the priorities of both organisations. R&CA argues that the resources of the FWO should be significantly bolstered so that it is properly equipped to pursue businesses who continually fail to comply with their various legal and regulatory obligations. R&CA also notes that there is a strong likelihood that businesses failing to comply with their obligations in regard to staff wages and entitlements, are also failing to comply with other obligations such as taxation requirements.

FWO has gone on the record to state that businesses that are members of their industry association have a much higher rate of compliance than non-members, demonstrating the value that membership offers the industry, their staff and the broader community.

R&CA also notes that it does not have the capacity or resources to act as a de facto ombudsman in policing of businesses who have failed to comply with their various workplace relations obligations. R&CA believes that this is outside the scope of its role as an industry association and that this activity should continue to be undertaken by the FWO, albeit on a more comprehensive level made possible through additional resourcing and funding.

DISTINCTION BETWEEN DELIBERATE UNDERPAYMENTS AND GENUINE ERRORS

R&CA, alongside other industry and employer groups has also expressed the view that there is a need to draw a clear and obvious line between business-owners' deliberate and systematic non-compliance with workplace regulation and genuine mistakes and oversights which are often immediately corrected upon their discovery. R&CA objects to the use of the term 'wage theft' to classify these activities due to the accidental nature of these mistakes and attempts to rectify them once discovered. R&CA notes that reports of these errors have occurred across many industry sectors outside the hospitality sector, with recent media reports covering alleged underpayments in other industries such as cleaning, security, hairdressing and even accountancy firms.

Although it is difficult to estimate a precise amount, R&CA believes that at least some incidences of genuine and accidental errors in the payment of wages, superannuation and other entitlements can be attributed to the inherent complexities of Australia's workplace relations system. R&CA would therefore caution against the categorisation of deliberate, systematic non-compliance and genuine, accidental errors as interchangeable as far as the relevant enforcement mechanisms and penalties are concerned. Any overarching strategy designed to address instances of underpayments and non-compliance across the sector must recognise the difficulties in navigating Australia's workplace relations system.

COMPLEXITIES OF AUSTRALIA'S WORKPLACE RELATIONS SYSTEM

Australia's workplace relations legislation and the current structuring of the Awards system is inherently complex and consequently can be difficult for business-owners to fully comprehend, particularly in the absence of professional assistance from an industrial relations professional. R&CA believes that the difficulties some business-owners experience in understanding their workplace

obligations may contribute to some genuine errors and oversights being made thus resulting in accidental non-compliance, especially in relation to the hospitality and restaurant award.

In order to minimise the propensity for accidental errors and oversights being made, R&CA argues that simplification of Australia's workplace relations system is vitally necessary and that such action would improve current rates of workplace compliance, both accidental and deliberate. R&CA believes that having overly complex workplace relations legislation is particularly problematic for industry sectors that have a comparatively high proportion of operators and employees who are from migrant backgrounds and who do not speak English as a first language. R&CA points to the high volume of calls received by its workplace advisory service with hospitality operators seeking clarification on aspects of the Awards system as evidence of the various complexities at hand.

PREVALENCE OF THE BLACK ECONOMY AND FEDERAL GOVERNMENT'S BLACK ECONOMY TASKFORCE

In addition to instances concerning underpayments and failure to pay staff entitlements, R&CA has also worked closely with the Federal Government's Black Economy Taskforce to address issues relating to the black economy in the hospitality sector. The main manifestation of the black economy as it relates to the hospitality sector is the payment of workers' wages in cash. R&CA notes that this practice is, in many cases, driven by employees asking their employers to be paid in cash. In a survey of R&CA members, roughly one-quarter (26.9 per cent) of hospitality sector businesses indicated that their staff members had requested cash-in-hand payments at some point in time. When asked to provide the reasons why staff requested cash-in-hand payments, the most commonly reported answers were to avoid tax or losing Centrelink payments and other Government benefits. Businesses also reported that some staff made requests to receive cash-in-hand payments due to specific restrictions on their visas.

R&CA argues that the prevalence of the black economy also significantly disadvantages and penalises legitimate business operators who act in accordance with their various legal and regulatory obligations. R&CA's feedback to the Black Economy Taskforce, provided in its submissions and

meetings with the Chair, emphasised four explicit recommendations designed to minimise the occurrence of the black economy in the hospitality sector:

- Simplifying the existing regulatory system facing small businesses and reducing barriers to compliance;
- Pursuing policies which facilitate easier acceptance of non-cash payments;
- Reducing the costs involved in the current business operating environment; and
- Increasing synergies and data-sharing across government agencies at both a state and federal level.

R&CA welcomed the response of the Federal Government to the findings of the Black Economy Taskforce as part of the 2018-19 Federal Budget which acknowledged R&CA's feedback in its findings. Many of the high-priority recommendations contained in the final report may be of relevance to the findings of this parliamentary inquiry, including 'making enforcement more visible, better tailored to the offence and more effective' and 'improving agency's' ability to enforce existing laws by promoting better sharing of data and more modern data analytics. R&CA argues that continued, decisive action targeting the black economy as it relates to the hospitality sector will help to lift overall rates of compliance and eliminate practices such as the underpayment of wages and other entitlements.

CONCLUSION

R&CA would again like to take the opportunity to stress that it in no way condones or accepts café, restaurant or catering businesses failing to comply with their various legal and regulatory responsibilities and obligations.

As R&CA has previously stated in this submission, as well as in other representations to governments on this issue, the practice of deliberately underpaying staff wages and entitlements and other related aspects of non-compliance with workplace regulations, undermines the integrity of the sector. These practices also destabilise legitimate operators who fully abide by their various legislative and regulatory obligations and, in turn, creates an unfair playing field across the hospitality industry.

R&CA has already taken a proactive approach towards addressing this problem, collaborating extensively with the FWO to help minimise instances of non-compliance. However, we clearly submit to government that criminalisation is not a silver bullet solution, and we have submitted alternative policy approaches to government including better policing of existing law, more educational and promotion campaigns, the inherent conflict embedded in the operation of the FWO, the need for businesses to seek rulings or advice from the FWO (or industry associations) in relation to the law (such as happens with the ATO) and industry being able to partner with the FWO to provide programs and initiatives to assist in increasing compliance across particular industries

