Restaurant & Catering

24 February 2020

By Email: IRconsultation@ag.gov.au

Dear Sir/Madam,

RESPONSE TO DISCUSSION PAPER TITLED 'CO-OPERATIVE WORKPLACES – HOW CAN AUSTRALIA CAPTURE PRODUCTIVITY IMPROVEMENTS FROM MORE HARMONIOUS WORKPLACE RELATIONS'

We refer to the above discussion paper issued by the Attorney General's Department (the "Department"). The Department has requested public submissions on whether and how improved productivity performance might be available to Australian workplaces through more harmonious workplaces.

Restaurant & Catering Australia (the "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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R&CA is pleased to provide a submission in this matter. R&CA has reviewed the discussion paper issued by the Department. R&CA will seek to address how the Australian industrial relations system supports and encourages cooperative workplaces, if at all, together with any measures the Government could take to assist employers build their capacity to engage with employees.

The Anti-Bullying Jurisdiction of the Fair Work Commission

An employee may make an application to the Fair Work Commission (the "Commission") for anti-bullying orders under section 789FD of the Fair Work Act 2009 (Cth) (the "Act"). This provision provides that:

> "(1) A worker is bullied at work if:
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> (a) while the worker is at work in a constitutionally-covered business:
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> (i) an individual; or
>
> (ii) a group of individuals;
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> repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
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> (b) that behaviour creates a risk to health and safety.
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> (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.
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> (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011)* and either:
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> (a) the person is:
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> (i) a constitutional corporation; or
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> (ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business.

Due to its high evidentiary threshold, the scope of the Fair Work Commission is limited when handling Anti-Bullying applications. Firstly, the employee must remain an employee of the employer. If the employee is no longer employed by the employer, the employee is then excluded from making an application under this jurisdiction (although they may seek to rely on other provisions, such as an unfair dismissal). Secondly, the Commission must be satisfied that there is a future bullying risk. If the person(s) allegedly responsible for the bullying behaviour is no longer with the organisation, the Commission may not be able to make an Order to stop the bullying behaviour. Thirdly, the scope of the Commission's Orders are limited, and does not include any form of monetary compensation. Fourthly, the Commission must consider any exceptions to that bullying behaviour does not constitute "reasonable management action," which includes performance appraisals and the provision of warnings. When determining this criterion, the Commission is to consider what would be reasonable and unreasonable in the circumstances. For a jurisdiction that emphasises the importance of ease of accessibility for self-represented litigants, these are exceptionally high hurdles to pass.

Over the 2018-2019 period, the Commission received 751 applications for an anti-bullying order. Of these applications, 734 of these applications were finalised, with only 74 applications (a mere 10%) resolved by way of a Commission Order or a Decision. These figures suggest that a significant proportion of applications were either withdrawn early in the case management process, withdrawn before proceedings, during the proceedings, or after a conference (but before a Decision and/or Order). These figures reveal the difficulty of our current industrial relations system to handle anti-bullying applications effectively. Despite the absence of any clear data, the significant number of applications withdrawn and/or discontinued in the early stages of the

Commission's processes would likely indicate the shortfalls in the Commission's approach when handling of anti-bullying applications.

In addition to the strict evidentiary requirements, the large number of discontinued applications in the early stages of the Commission's process appear to reflect the many difficulties faced by the employee, namely the shame in attending work during the course of a pending application, together with the possibility of returning to work following the resolution of their matter. Further, despite the small number of applications resolved by way of an Order or Decision, the Commission is adversarial in its own approach. When a matter is not resolved by way of a conference, it is the Commission's ordinary approach to then list the matter for a full hearing, where the very nature of such proceedings are adversarial. Even when a Decision or Order is issued, the employer will likely suffer reputational damage by simply being an affected party to the proceedings, even in circumstances where a finding in favour is made. These limitations reveal that the current industrial relations framework, ironically designed to resolve bullying disputes and promote harmonious workplaces, even fail to do just that.

Restaurant Industry Award 2010 – Meal Breaks

Similarly, the complexity of the Award system fosters a workplace environment that is inflexible and impractical, which, as a result, creates adversarial workplaces. Clause 32 of the *Restaurant Industry Award 2010*, for instance, mandates the different and wide-ranging circumstances when an employee is entitled to take a meal and/or rest break. Specifically, an employee who works 5 or more ordinary hours in a day and up to 10 hours per day must be provided with an "unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work …." Any employee who works more than 10 hours per day must be provided with an "unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work …" and "if the employee is rostered to take an unpaid meal break later than 5 hours after starting work, one additional 20 minute paid meal break [is to be] taken after the first 2 hours of work and within the first 5 hours of work." It is the R&CA's view that such Award provisions are inoperative and impractical and instead promotes an adversarial workplace environment.

We thank the Commission for considering our submission. If you wish to discuss R&CA's views further, do not hesitate to contact Victor Song (Senior Adviser – Industrial Relations and Policy) by email on victors@restaurantcater.asn.au

We thank you again for the opportunity to make this submission.

Regards

Wes Lambert CPA FGIA MAICD
Chief Executive Officer
Restaurant and Catering Australia