



Restaurant  
& Catering

29 January 2020

Chambers of Vice President Hatcher, S.C.  
Fair Work Commission  
Level 10, 80 William Street  
EAST SYDNEY NSW 2011

By Email: [chambers.hatcher.vp@fwc.gov.au](mailto:chambers.hatcher.vp@fwc.gov.au)

Dear Associate,

**RE: DECISION OF [2019] FWCFB 8583**

I refer to the above Decision, published by the Fair Work Commission (the “Commission”) on 23 December 2019.

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.

We note that the Commission, at [8], invited parties to make a submission in relation to the draft determinations by 31 January 2020. The Commission, at [2] in the above Decision, noted that submissions would deal with the more substantive issues, in particular, those concerning the “outer limit” numbers of hours that should apply in the *Restaurant Industry Award 2010* (the “Award”), the *Hospitality Industry (General) Award 2010* and the *Marine Towing Award 2010*.

In the above Decision, the Commission provisionally set the outer limit of ordinary-time penalty rate hours and overtime hours as follows:

*“The employee must not be required by the employer in any pay period or roster cycle to work in excess of:*

**RESTAURANT & CATERING INDUSTRY ASSOCIATION**

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- (i) *an average of 16 ordinary hours which would attract a penalty rate under this provisions of this award per week; or*
- (ii) *an average of 10 overtime hours per week without being entitled to an amount in excess of the annualised wage in accordance with clause 28.1(c)."*

R&CA appreciates the opportunity to provide a submission regarding the above. R&CA does not support the outer limits provisionally adopted by the Commission into the Award. The reasons for our position are outlined below.

### ***An average of 16 ordinary hours attracting a penalty rate***

It is our view that this outer limit provisionally set by the Commission is limited, as it fails to take into consideration the financial and operational requirements of the employer who wishes to operate on Sundays and/or public holidays.

According to the Restaurant & Catering Industry Association Benchmark Report 2019 (the "Report"), 57% of employers indicated that they opened on Sundays as well as public holidays. We note that this figure has increased from 51.8% from the previous year. As the results reflect, there is clearly a growing need for businesses to remain open and cater for customers on Sundays, as well as public holidays, especially in the context of a near 24/7 service environment. The Commission's adoption of such low outer limit restricts, or at the very least, makes difficult for employers to operate at greater lengths to meet consumer demands, especially with reduced staff and resources. As a result, employers would be inclined to operate within restricted and/or reduced hours of operation on Sundays and/or public holidays, if at all. If employers were to operate on the affected days, employers would often break even or operate at a loss. This detriment is further aggravated by employer taxation obligations.

Although one may argue that employers may use surcharging as a method to meet the operational requirements of the business, this argument, in our view, is limited and flawed. The percentage of employers who indicated that they charged a surcharge on a public holiday has decreased considerably since the 2018 survey (i.e., 40.3% applied a public holiday surcharge in 2019 whereas 60% of operators applied a surcharge in 2018). Further, only 11.6% of employers applied a surcharge on Sundays. As such, it is our view that it cannot be commercially or operationally viable for employers to solely rely on surcharging to cover the costs of penalty rates.

Employers also cited reduced penalty rates on public holidays, as well as reduced Sunday penalty rates, as key changes in the industry which would make the most difference to operating a business more effectively moving forward. On this basis, it is our recommendation that the average ordinary hours attracting a penalty rate be increased to cater for the operational as well as the financial requirements of many employers.

### ***An average of 10 hours overtime hours per week***

Similarly, it is our position that the provisional outer limits for overtime hours adopted by the Commission in its draft determination is limited.

Again, with reference to the Report, it is noted that employers placed a greater emphasis on “service quality” by nominating a rating of 9.3 (on a scale between 1 and 10, with 10 being the most important). This would be considerably difficult to achieve with the current outer limit set by the Commission. Employers would face significant difficulty providing a quality service to customers, many of whom expect prompt delivery of services in a near 24/7 service delivery environment. With the current outer limit in place, employers would be left with little choice but to limit any overtime performed by staff to save costs. This would be particularly detrimental financially and operationally for small business employers. In turn, employers would also seek to operate through longer operational hours with reduced staff. We note that 39.3% of employers admitted to significantly and regularly underpaying themselves, with 13.7% of employers stating that they “regularly” underpay themselves and 19.6% indicating that they would “sometimes” underpay themselves.

It is our recommendation that the average overtime hours be increased to cater for the operational as well as the financial requirements of businesses, in particular to meet the needs of small business employers.

If you wish to discuss R&CAs views further, do not hesitate to contact Victor Song by email on **victor@rca.asn.au**

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

Regards

A handwritten signature in black ink, appearing to be 'Wes Lambert', written in a cursive style.

**Wes Lambert CPA FGIA MAICD**

Chief Executive Officer

Restaurant and Catering Australia