



Restaurant
& Catering

Submission to Senate Inquiry into Unlawful underpayment of employees' remuneration

R&CA Submission

March 2020

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 establishment of the Select Committee on Wage Theft in South Australia and is pleased to provide the Committee with its submission to the inquiry. 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 similar parliamentary inquiry in Western Australia, Queensland and South Australia.

Many of the points discussed in this submission mirror those provided in R&CA's submission to the Queensland Parliament's Education, Employment and Small Business Committee and referred to in their final report *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* published in November 2018.

R&CA is also continuing to liaise 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 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'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.

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.

BACKGROUND

DEFINITION OF 'THEFT' VS. UNDERPAYMENT

In discussions surrounding the issue of 'wage theft', many other employer groups, peak bodies and industry associations have expressed their frustration with misleading 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'.

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.

Given these inaccuracies, R&CA would contend that use of the term 'non-compliance' is more appropriate to capture certain activities currently associated with the term 'wage theft'.

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.

Clauses of the award relating to meal breaks, classifications, annualisations, additional payments for late and evening work, payment for junior employees, part time employment and training are all common examples of specific sections of the RIA that can lead to accidental non-compliance.

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.

Finally, lack of a complete compliance software solution that correctly integrated time in attendance software with payroll requirements is also a key driver of non-compliance, that leads businesses to invest heavily into these solutions to seek further compliance. The costs of doing so is ultimately

prohibitive for smaller businesses. R&CA would ask the committee review this in their deliberations and evidence gathering.

EDUCATIVE FUNCTION OF R&CA AS INDUSTRY ASSOCIATION

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.

The Association 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.

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 through partnerships with Government.

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 merely criminalising serious incidences of non-compliance 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 and industry being able to better partner with the FWO to provide programs and initiatives to assist in increasing compliance across particular industries.

