



Review of the Fair Work Act

Submission of the Accommodation Association of Australia

EXECUTIVE SUMMARY

- In accordance with the Terms of Reference, this submission does not consider all aspects of the Fair Work Act, but rather just those that are most relevant to Australia's accommodation industry.
- While the Act has met many of the objectives that were stipulated by the Federal Government in the lead-up to its introduction, for operators of accommodation businesses, there are areas of concern, notably a lack of protection from unfair dismissal provisions and a lack of flexibility, which imposes costly restrictions on small businesses which operate in a 24/7 environment, as the overwhelming majority of members of our Association are.

INTRODUCTION

1. The Accommodation Association of Australia (the Accommodation Association) is pleased to provide the following submission to be considered as part of the Review of the Fair Work Act.

ABOUT THE ACCOMMODATION ASSOCIATION

2. The Accommodation Association is the national industry body for the Australian accommodation industry.
3. Members of the Accommodation Association include major hotels, resorts, motels, motor inns, serviced and holiday apartments, bed and breakfasts, guesthouses, backpackers and timeshare establishments in metropolitan, regional and rural Australia across all states and territories.
4. The Association's membership base includes almost 2000 properties and more than 110,000 guest rooms.
5. The Association's members include major hotel chains, including Accor Hotels, Mirvac Hotels and Resorts, Hilton Hotels, Toga Hospitality, Mantra Group, Rydges Hotels, Amora Hotels, InterContinental Hotels Group, 8Hotels and Quest Serviced Apartments

TOURISM AND ACCOMMODATION – OVERVIEW

6. Tourism contributes \$34 billion to Australia's gross domestic product (GDP), a 2.6 per cent share.¹
7. Around 500,000 Australians are employed in the Australian tourism industry – 4.5 per cent of total employment.²
8. Employment within Australia's accommodation sector is 71,500 – 14.3 per cent of the total employment in tourism.³

¹ Tourism Industry Facts & Figures (at a glance), Department of Resources, Energy and Tourism/Tourism Research Australia, May 2011, Page 44

² Ibid, Page 44

³ Ibid, Page 51

9. Tourism is Australia's leading services export and it is the sixth-largest total export earner.⁴
10. Tourism contributes \$23 billion or 9 per cent of Australia's total export earnings for all goods and services.⁵
11. There are 4279 tourism accommodation establishments in Australia.⁶
12. There are 227,320 tourism accommodation rooms within Australia and 640,454 bed spaces.
13. Tourism's share of the Australian economy has been declining.
14. The number of domestic overnight trips taken by Australians has fallen by 1.1 per cent on average each year over the period 2001-2010.⁷
15. The total number of domestic visitor nights fell by 1.2 per cent on average each year between 2001-2010.⁸
16. Tourism has a number of unique characteristics in comparison to other industries. These include:
 - It is highly labour intensive;
 - It requires the input of many service providers into a single "product" to the end consumer;
 - It is dominated by a significant number of small businesses;
 - Tourism competes against all other discretionary expenditures for the "hearts and minds" expenditure of the consumer; and
 - Tourism businesses operate in a highly complex environment requiring significant compliance skills and costs.

ISSUES CONSIDERED IN THIS SUBMISSION

Unfair Dismissal

17. The procedures for dealing with unfair dismissal are failing accommodation businesses, especially small businesses. Section 381 of the Act, *Object of this Part* (Part 3-2) which is to establish a balanced framework for dealing with unfair dismissals, and to establish procedures for dealing with unfair dismissals that are quick, flexible and informal. These objects are only achieved when the business agrees to a financial settlement for the sake of expediency, regardless of the merits of the claim.
18. The experience of the Accommodation Association is that almost all dismissals are finalised at conciliation level with financial settlements. Approximately 30% of all members' enquiries to the Association are related to termination of employment. Of these, about 7% go to conciliation where almost 100% result in a financial settlement.
19. Conciliators have little scope to determine the bona fides of claims and counter claims, especially when there are contested facts, and invariably suggest that the employer negotiates a monetary settlement to circumvent the cost of having the matter dealt with at

⁴ Ibid, Page 45

⁵ Ibid, Page 45

⁶ Ibid, Page 55

⁷ Ibid, Page 26

⁸ Ibid, Page 26

arbitration. As a matter of expediency, employers often agree to a financial settlement, even when they strongly believe claims are baseless or speculative.

20. To the detriment of the business, the industry, the economy and often to fellow work colleagues, members of this Association frequently choose to tolerate unproductive and uncooperative employees rather than face the trauma of the unfair dismissal process and inevitable payment of a financial settlement.

Recommendation:

While the Association agrees with the intentions or objects of the unfair dismissal provisions, it is clear that a greater number of financial settlements need addressing and that there should be a greater onus on unfair dismissal claimants to demonstrate reasonable grounds prior to a matter going to conciliation. That is employers should not feel that the only way to resolve these applications is by making a financial settlement.

Adverse Action

21. Although only a small number of adverse action claims against Association members (or threats of such) have been made since the Act took effect, the number of cases where employees are making adverse action claims in the Federal Court, rather than unfair dismissal applications in Fair Work Australia is increasing. The Accommodation Association believes this is in part because none of the unfair dismissal jurisdictional exemptions apply with adverse action claims – a broader number of employees have access. Also adverse action claims have been made more attractive by the fact that compensation payments for adverse actions are uncapped, unlike unfair dismissal claims and the breadth of definition of “workplace rights” allows for a broad scope of claims.
22. Association members are expressing concerns about the apparent increase in willingness of employees to ‘engineer’ adverse actions and with the ease at which this can be done, especially with the spread of legal firms willing to act for employees on a ‘no win, no fee’ basis.
23. The ability of employers to defend adverse action claims is hindered because of the reverse onus of proof under Section 361 of the Act, *Reason for action to be presumed unless proved otherwise*.

Recommendation:

The Accommodation Association recommends the onus of proof under section 361 of the Act be reversed to fall on the applicant and the definition of “workplace rights” be narrowed.

Further, adverse action claims should be limited to those made to official authorities (e.g. anti-discrimination commissions).

Definition of a *Small Business Employer*

24. A *small business employer* for the purposes of *protection from unfair dismissal* provisions of the Act (Division 2) is a business that employs fewer than 15 employees at the time. The accommodation industry relies on a large pool of casual employees to meet high staffing fluctuations, thereby placing many small accommodation operators outside of the definition of a small business employer.

25. For the purpose of Illustration and to demonstrate that the method of accounting for employees on a headcount basis, as opposed to an FTE, a typical Motel operating in Australia will have staffing as follows:

4 x full-time and part-time administration and reception employees

1 x part-time breakfast cook engaged for 15 hours per week

1 x casual weekend breakfast cook engaged for 6 hours per week

2 x casual kitchen hands engaged on an as is needed basis, usually for an average of 3 hours each per week on busy days.

1 x part-time housekeeper engaged for 30 hours per week

1 x part-time weekend housekeeper engaged for 6 hours per week

4 x casual housekeepers/cleaners engaged on an as needed basis, usually for an average of 5 hours each on busy days.

1 x casual gardener/handyperson who typically works for 5 or 6 hours every second Wednesday.

TOTAL of **15** employees, but equivalent to work of **281** hours, which really equates to **7.4** FTE's (FTE calculated at 38 hours per week)

Under the definition of a small business, this motel is not a small business and is therefore subjected to the same unfair dismissal provisions and processes as larger employers with human resource management departments.

Recommendation:

Under the terms of the Act, a small business should be redefined as one which has a full-time equivalent of 20 employees or less.

Averaging of Hours

26. Under the National Employment Standards (NES), Section 64 of the Act permits award and "agreement-free" employees to average their ordinary hours over 26 weeks.

27. Averaging of hours under the modern award applied to the accommodation industry, the Hospitality Industry (General) Award (HIA), is more restrictive, allowing averaging over four weeks.

28. Operators of accommodation businesses require more flexibility because of the seasonal nature of the accommodation industry, which result in high workloads during peak periods, and in some cases, the geographical isolation of the property.

Recommendation:

The Accommodation Association recommends that Section 64 be amended to allow the averaging of hours over a 52-week period.

Further recommendations about the averaging provisions in the modern award will be dealt with in a separate submission to the modern award review.

Award Flexibility

29. Section 144 of the Act requires modern awards to include a term enabling an employee and employer to agree on an arrangement varying certain award provisions to meet the genuine individual needs of the employer and the individual employee.
30. Generally, Association members are reluctant to use the flexibility provisions provided for under the Hospitality Industry (General) Award for fear of failing to meet the 'better off overall' requirement. The test of 'better off overall' is often considered to be a subjective one.
31. Utilisation of this provision would certainly increase, for the benefit of both parties, if the Act required the Fair Work Ombudsman (FWO) or another relevant authority, to provide more certainty by independently assessing individual flexibility, if requested.

Recommendation:

The FWO or some other body to provide assessments and approval of individual flexibility arrangements at the request of the employer.

Further recommendations about the award flexibility clause in the modern award will be dealt with in a separate submission to the modern award review.

Penalty Rates

32. Weekend and public holidays penalty rates provided for by the modern Hospitality Industry (General) Award are counterproductive for small businesses, especially as the penalties apply equally to small and larger businesses.
33. Penalty rates for casuals attract hourly rates of more than \$40 per hour and have the adverse effect of reducing trading hours worked on weekends and public holidays. Therefore, it is not profitable for many small businesses, restaurants in particular, to trade on weekends and public holidays despite consumer demand and the fact the accommodation sector operates 24 hours per day, seven days per week. Consequently, to the detriment of businesses, employees and the general public, many accommodation providers feel forced to restrict trade on weekends and public holidays.
34. Traditionally, students form a large part of the workforce for accommodation providers and have always been willing and available for casual weekend or public holiday work. Sustainable penalty rates would increase employment opportunities for these people within the sector.

Recommendation:

The Act place limitations on penalty rate applications in awards in industries where such penalties reduce job opportunities and are counterproductive.

Further recommendations about penalty rates will be will be dealt with in a separate submission to the modern award review

Conclusion

The Accommodation Association submits that the above recommendations will go a long way towards improving productivity and efficiency in the accommodation sector, as well as the broader tourism industry.

Date: 17 February 2012