TASMANIAN HOSPITALITY ASSOCIATION

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SUBMISSION TO LEGISLATIVE COUNCIL SELECT COMMITTEE

GROWING TASMANIA'S ECONOMY

FOREWORD:

The Tasmanian Hospitality Association (THA) is the peak industry body for the hospitality sector in Tasmania, representing 450 members across restaurants, cafes, pubs, clubs, hotels and other accommodation venues.

According to Australian Bureau of Statistics data, the hospitality industry in Tasmania is the state's third largest sector by employment, providing direct jobs to 20,000 people, making up more than 10 per cent of Tasmania's workforce.

Tasmania's hospitality sector has an annual wages bill of $445 million, and makes a $576 million contribution to the state's gross value add.

By any measure, hospitality is one of Tasmania's most important industries. It both supports the tourism sector, but also provides services to Tasmanian residents. It is estimated that as much as 70 per cent of the sector's turnover is driven by the local market.

Hospitality businesses in Tasmania employ staff under the following industrial instruments: Hospitality Industry (General) Award 2010 (HIGA), which applies to pubs and accommodation venues, Restaurant Industry Award 2010 (RIA), which applies to stand-alone cafes and restaurants, and Registered Licensed Clubs Award 2010, which applies to clubs.

The THA is prepared have representatives attend hearings to elaborate on the following submission should the committee require.

SUBMISSION:

The THA submits to the committee that the current penalty rate framework that applies to the hospitality sector prohibits growth, employment and investment, and represents a significant economic opportunity lost for the broader Tasmanian economy, and as such inhibits the state's economic growth.

High penalty rate days, such as Sundays and public holidays, are placing pressure on hospitality businesses through an additional cost on trading. As a result, increasing numbers of hospitality businesses trading on such days are reported that it becomes a loss-making exercise, primarily due to the extra cost of labour.

This has seen many hospitality businesses take the decision to not open or reduce service

levels on such days, particularly in regional areas of the state where demand is less than that in major centres.

The following is a breakdown of penalty rate provisions of the two main awards that apply to the hospitality sector.

Hospitality Industry (General) Award 2010

Status	Mon-Fri	Sat	Sun	Pub Hol
	%	%	%	%
Full-time and part-time	100	125	175	250
Casual (inclusive of 25% casual loading)	125	150	175	275

Restaurant Industry Award 2010

Status	Mon-Fri	Sat	Sun	Pub Hol
	%	%	%	%
Full-time and part-time	100	125	150	250
Casual up to Level 2 (inclusive of 25% casual loading)	125	150	150	250
Casual from Level 3 and above (inclusive of 25% casual loading)	125	150	175	250

These tables show the cost of labour required to open on a public holiday increases by at least 150 per cent for any business employing staff under these awards, and on a Sunday by at least 50 per cent.

As an example, employing a casual grade two food and beverage attendant on a public holiday would cost $49.56 an hour (HIGA) or $45.05 an hour (RIA), this would typically apply to an employee waiting tables or serving beverages.

In most instances, businesses do not believe they can pass on the increased labour costs to their customers on such days. Some businesses do charge public holiday and/or Sunday surcharges (usually on dining charges), although these are normally at either 10 or 15 per cent – well below the labour cost increase.

Businesses are increasingly reporting that they are choosing to stay closed on such days due to the impost of penalty rates. This is often done with a knowledge there is demand for services on these days, but working to meet that demand is simply unviable due to the inherent cost.

In a recent survey of business' trading decisions over the Easter period, the THA found that on Good Friday (public holiday penalty rates) out of 62 respondents, 27 closed completely and a further nine closed at least part of their operation. The very next day (normal Saturday penalty rates) 58 opened as usual, with only one completely closing. On Easter Sunday (Sunday penalty rates), 10 businesses closed either partially or completely, and on Easter Monday (public holiday penalty rates) 10 were completely closed and a further 16 were partially closed.

Regardless of what penalty rate applies, a business that is closed is not employing people and is not paying wages. Further, it is restricting economic activity through both non-paid wages and limiting consumers' ability to spend.

THA members frequently report that if the peak penalty rate periods of Sunday and public holidays were moderated thereby reducing the cost of labour, they would trade on these days.

The State Government has a target of increasing visitation to Tasmania to 1.5 million people a year by 2020, and it is the hospitality industry which will be required to ensure quality of services to not only help deliver that target, but cater for the visitors when they arrive. Presenting businesses that are closed due to unviable costs directly threatens and undermines both these objectives.

The THA contends that the hospitality industry essentially should be regarded as a 24/7 industry, and there is a degree of expectation among the public that this is the case. People ought to expect that when they choose to purchase a hospitality service, that it is available. Unfortunately, the premise of the modern award system is very much rooted in 1950s Monday-Friday 9-5 trading practices, setting high rewards for employees on Sundays and public holidays, but in doing so severely limiting the ability for employers to be able to trade profitably.

The THA is frequently contacted by members of the public after public holidays to complain that they were unable to access hospitality services due to businesses being closed. In many cases, these complaints are from locals entertaining interstate or international guests, and they are concerned at the reputational damage the state suffers at having a virtual closed for business sign hanging in the door.

There is undoubtedly a level of demand for hospitality services on Sundays and public holidays – and that it can be greater than other times, but often not to the extent that a trading profit is likely given the added penalty rate cost. Hospitality businesses want to be open on these days; they understand that opening seven days is good for their business brand and regular customers, but also that it enables them to provide their employees with more work.

THA members have reported that staff regularly volunteer to work on either Sundays and/or public holidays for less hourly rates in order to allow a businesses to stay open, and for them to receive additional work. By law, an employer cannot pay under the penalty rate stipulated by the industrial instrument.

Being unable to afford to open seven days can also have a detrimental impact on a business' staff retention. If the hospitality sector is to grow and provide high-quality customer experiences to visitor numbers targeted to grow by 50 per cent in the next five years, being

able to attract, train and retain staff will be critical. To do this, every employment opportunity must be utilised. Businesses restricted to anything less than seven day a week trading cannot maximise their employment potential.

Businesses that are open have the capacity to employ more staff or provide increased hours for existing staff. It is logical that a business currently only trading six days a week would need to employ more staff to be able to open seven days a week. It is the THA's contention that a decrease in high penalty rate periods would create more employment opportunities in the hospitality sector.

The THA believes that the cost of doing business on high penalty rate days places severe capacity limitations on the hospitality sector, forcing increasing numbers of businesses to choose closing over opening and making losses. This represents an economic opportunity lost for the broader economy by not only restricting economic activity on the days in question, but also in lost wages which, in turn, are not available to be spent in the economy.

Against these conditions, Tasmania's hospitality sector is being held back, both in its efforts to provide services that both locals and visitors would reasonably expect to be available in a state with a growing global reputation for quality visitor experiences.

In December 2009 the Tasmanian Parliament passed the Industrial Relations (Commonwealth Powers) Act 2009 (Referral Act) enabling it to refer certain matters relating to workplace relations to the Parliament of the Commonwealth for the purposes of s 51(xxxvii) of the Australian Constitution (Constitution). The Referral Act provides for its termination in which case those employers and employees who moved into the federal industrial relations system by virtue of the operation of the Referral Act, would revert to the State industrial relations jurisdiction.

As a result of the legislation, Tasmania's private sector employers and their employees are now regulated under the Fair Work Act 2009 (Cth) (FWA) since 1 January 2010, the same date that the so-called modern awards came into effect.

There are clearly benefits in having a single national industrial system in terms of clarity, certainty and consistency for employers and employees alike. For example, employers would only need to be concerned with one industrial relations jurisdiction. However, despite the objective of having a uniform single industrial relations system for the private sector, employers still operate under State legislation in respect of 'general employment laws' such as long service leave, public holidays, workers' compensation and occupational health and safety. These laws are 'non-excluded matters' under s 27 of the FWA. This legislative scheme applies equally to trading, financial and overseas corporations (constitutional corporations) and unincorporated private sector employers (sole traders, natural person partnerships, some trusts depending on their structure, and other unincorporated entities and non-trading/not-for-profit organisations).

When the Federal Government in 2006 used the corporations power pursuant to s 51(xx) of the Constitution to bring constitutional corporations within the federal industrial relations jurisdiction, the percentage of private sector employers in the State industrial relations jurisdiction reduced to about 30%. The percentage of employers in the State industrial relations jurisdiction was further reduced with the coming into operation of the Referral Act.

The THA has been critical of the increased labour costs its members must absorb as a result

of the modern awards. It has anecdotal evidence from members that they find some provisions of the Hospitality Industry (General) Award 2010 and the Restaurant Industry Award 2010 prohibitive to trading and the employing of staff. In particular, the penalty rate provisions of the awards have resulted in many businesses incurring considerable trading losses on Sundays and public holidays while others choose not to open on those days at all. The THA contends that the labour costs of unincorporated members would be lower if the Tasmanian government terminated the referral of its industrial relations powers.

Compared to employers generally, a higher proportion of employers in the hospitality industry are defined as a 'small business employer' within the meaning of s 23 of the FWA (fewer than 15 employees including casual employees employed on a regular and systematic basis). Further, an even greater proportion of small businesses are based in regional parts of the State. A not insignificant number of these small business employers would be defined as unincorporated private sector employers and would return to the State industrial relations system if the Referral powers terminated.

The THA's membership has expressed several concerns about the operations of the Federal industrial relations jurisdiction and these include:

1. Limits on workplace flexibility particularly in respect of part-time employment and public holiday provisions in modern awards.

2. Limits on workplace flexibility relating to parental leave entitlements under the FWA.

3. Inability of employers to legally 'contract out' with employees of modern awards by the making of registered individual (or collective) employment contracts.

4. Lack of award flexibility due to lack of clarity about Fair Work's assessment process in applying the 'better off overall test' (BOOT test) in respect of 'individual flexibility agreements' in modern awards resulting in a reluctance of members to use the agreements.

5. Increased labour costs as a result of wage rates and penalty rates in modern awards which adversely affect the productivity and viability of businesses.

6. Unfair dismissal laws and the requirement of employers to often have to pay an applicant 'go-away money' as settlement of the matter even where the applicant's case lacks, or is without, merit.

7. General protections and adverse action provisions of the FWA and the reverse burden of proof.

8. Uncertainty about Fair Work's assessment process in the application of the BOOT Test in evaluating applications for an enterprise agreement.

9. Requirement to pay wage rates and monetary allowances under national modern awards based on the national economy without due consideration of the relative weakness of the Tasmanian economy. For example, the minimum adult award wage in Western Australia (the only state not to have referred its industrial relations powers) set by the Western Australian Industrial Relations Commission last year when their economy was booming is $25 per week per week higher than the National

Minimum Wage. It is arguable that Tasmanian state award rates and allowances should be set below modern award rates relative to the strength of the state's economy.

10. The omission of pre-WorkChoices Tasmanian specific award provisions from the modern awards resulting in an increase in employer labour costs with no offset productivity gain.

While the uniform single industrial relations system has increased certainty for employers and employees and reduced confusion relating to State or federal jurisdictional issues, it appears that unincorporated private sector employers would benefit by reverting to the State industrial relations system.

However, a major disadvantage of any termination of the Referral Act would be difficulties associated with identifying the appropriate industrial relations jurisdiction for employers where it is unclear whether they are a constitutional corporation or not.

RECOMMENDATIONS:

1. **That there be a reduction in the number of public holidays.**

   Statutory public holidays usually apply to Tasmanian hospitality businesses on 11 days in a calendar year. The THA submits that a reduction in the number of public holidays, or a reduction in the number of public holidays that public holiday penalty rates are applied to for the hospitality sector, would be conducive to increased economic activity within the hospitality sector by reducing the potential of businesses closing due to the high cost of penalty rates.

   The THA contends that public holidays ought to be limited to days of particular significance. The Fair Work Act specifies eight public holidays, although permits states to stipulate additional days.

2. **Submit to the Productivity Commission at its industrial relations review and the Federal Government that Tasmania be given special consideration for penalty rate relief within the hospitality sector.**

   As Tasmania's third-largest employment sector, hospitality is not only a critical sector in terms of the state's ability to market itself as a global destination of choice, it plays a key role in the overall economic wellbeing of the state. In recognition of this, a reduction of penalty rates that apply to Sundays and public holidays would enable greater economic activity, increased service levels, and additional employment.

3. **That a full report on the challenges and impacts to businesses associated with the referral of Tasmania's powers under the Referral Act be conducted so that these can be properly considered by the Productivity Commission at its industrial relations review.**

   There is considerable evidence that the referral of Tasmania's powers has caused significant challenges for the hospitality sector, and that this should be properly

accounted for in the Productivity Commission's industrial relations review through the preparation and provision of a government-commissioned report.

Submitted on behalf of the Tasmanian Hospitality Association

Steve Old
General Manager