National Retail Association

FAIR WORK AMENDMENT (RIGHT TO REQUEST CASUAL CONVERSION) BILL 2019

Submission to the Senate Education and Employment Legislation Committee

1 March 2019

National Retail Association

1. Introduction

1.1. The National Retail Association, Union of Employers (**the NRA**) is an industrial organisation representing the interests of employers in the retail, fast food, and associated industries and is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

1.2. The NRA has fulfilled this function, under one name or another, since its formation as a non-corporatised entity in the 1920s and then as a formally registered union of employers since 1931.

1.3. Since that time, the NRA has grown and now represents the interests of over 6,000 retailers, encompassing over 24,000 shop fronts and their associated employees nationwide.

2. The legislation before the Committee

2.1. The *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* (**the Bill**) was introduced into the House of Representatives by the Minister for Jobs and Industrial Relations on 13 February 2019.

2.2. On 13 February 2019 the Senate Selection of Bills Committee met and determined its first report for 2019.

2.3. This report included the recommendation that the Bill be referred to the Senate Education and Employment Legislation Committee (**the Committee**) for inquiry and report by 26 March 2019.

2.4. On the motion of Senator Smith (WA) on 14 February 2019, the report of the Senate Selection of Bills Committee was adopted by the Senate, and the Bill consequently referred to the Committee for inquiry and report.

2.5. The NRA makes these submissions to the Committee in aid of the Committee's inquiry into the provisions of the Bill.

3. Background to the Bill

3.1. In January 2014 the Fair Work Commission, exercising its jurisdiction under the now-repealed Part 2-3, Division 4 of the *Fair Work Act 2009* (Cth) (**the Act**), commenced its first (and now, last) four-yearly review of modern awards.

3.2. As part of this process, the Australian Council of Trade Union (**ACTU**) advanced a claim to insert a standardized "casual conversion clause" in 105 modern award which did not already include such a provision.

3.3. A "casual conversion clause" provides a mechanism by which a person who has been a causal employee can, in some circumstances, request to become a permanent employee (either full-time or part-time).

3.4. Following disputation between peak industry bodies as to how such claims wide-ranging 'common claims' would be progressed through the four-yearly review process, the issue of casual conversion was referred to a separate Full Bench of the Fair Work Commission chaired by Vice President Hatcher (**the Full Bench**) on 1 December 2014.[1]

[1] [2014] FWC 8583

3.5. On 5 July 2017, the Full Bench determined to insert a standardized casual conversion clause into 85 of the modern awards (**the Decision**), and provided a draft of the model clause which was proposed.[2]

3.6. Following further hearings by the Full Bench as to the final form of the casual conversion clause, the majority of outstanding matters were settled by a decision of the Full Bench on 9 August 2018.[3]

3.7. Determinations varying the relevant modern awards were subsequently issued by the Full Bench and took effect from1 October 2018.

3.8. The actions of the Full Bench in this process affect only employees to whom a modern award applies; the changes made to the modern awards by the Full Bench do not affect employees who, for whatever reason, are award-free. They also do not affect the rights of any employee to whom an extant enterprise agreement applies.

3.9. In recognition of this 'gap' resulting from the limitations of the Full Bench's jurisdiction, the Morrison Government announced on 11 December 2018 that it would legislate to insert a casual conversion clause into Part 2-2 of the Act (**the National Employment Standards**).

3.10. By inserting this provision into the National Employment Standards, the right for a casual employee to request permanent employment would be extended to all casual employees, not just those to whom a modern award applies.

3.11. The Bill is the outcome of the Morrison Government's announced policy in this respect.

4. The Bill in summary

4.1. The primary purpose of the Bill is to extend the right for casual employees to request full-time or part-time employment to casual employees who, for whatever reason, are not subject to the provisions of a modern award.

4.2. The subsidiary purpose of the Bill is to clarify the extent to which service as a casual employee, for an employee who has since become full-time or part-time, is to be included for the purposes of calculating that employee's service-based entitlements such as paid leave, notice of termination, and redundancy.

5. Position of the NRA

5.1. Although supporting, in principle, the standardization of rights and obligations of employers and employees across the whole of Australia's industrial relations framework, NRA cannot support the passage of the Bill in its current form.

5.2. The NRA's position in relation to both the main amendments and other amendments proposed to be made by the Bill are set out below.

[2] [2017] FWCFB 3541
[3] [2018] FWCFB 4695

National Retail Association

6. Schedule 1 – Part 1 – Main amendments

6.1 Potential for intention of the Bill to be undermined by its coverage – section 66A

6.1.1. The right to request casual conversion proposed to be inserted into the Act by the Bill is to be affected by the insertion of a new Part 2-2, Division 4A (**Division 4A**) into that Act.

6.1.2. Contained within Division 4A is section 66A, which specifies the employees to whom Division 4A applies.

6.1.3. Pursuant to subsections 66A(1) and (2), Division 4A and the right to request casual conversion in accordance therein does not apply to an employee if:

(a) a modern award applies to that employee; and

(b) the modern award includes a casual conversion term.

6.1.4. The intention of the Bill in this respect, as per the Explanatory Memorandum, is to fill the gap left by the Full Bench's limited jurisdiction rather than to disturb the Full Bench's considered exercise of its powers to vary the modern awards.

6.1.5. Despite the intention of the Bill, this poses a problem at a policy level with respect to the interaction between the National Employment Standards and the modern awards.

6.1.6. It is the policy of the Fair Work Commission to resist the suggestion that the provisions of the modern awards should simply repeat the provisions of the National Employment Standards.

6.1.7. This policy was expressed by the Australian Industrial Relations Commission (as it then was) during the awards modernization process in 2008, and reiterated by the Fair Work Commission in 2019 following the insertion of family and domestic violence leave into the National Employment Standards, this having shortly before been inserted into the modern awards.[4]

6.1.8. The reasoning behind this policy is that it prevents the terms and conditions of employment prescribed in the modern awards from deviating from those prescribed in the National Employment Standards.

6.1.9. To give effect to this policy, where the National Employment Standards change to provide for a matter already provided for in a modern award, the general position of the Fair Work Commission is that the modern award should be altered to refer simply to the National Employment Standards.

6.1.10. This is, for example, the approach that the Fair Work Commission intends to take in relation to family and domestic violence leave.[5]

6.1.11. Because Division 4A is drafted such that it does not apply to employees to whom a modern award applies, it is not possible for the Fair Work Commission to implement this policy in this circumstance.

6.1.12. This therefore means that although at present the provisions of the Bill are modelled after the Fair Work Commission's model casual conversion clause, over time there is a real risk that these provisions will start to diverge, whether by further amendment to the Act or by further revisions to the modern awards.

[4] [2008] AIRCFB 1000 at [34]; [2019] FWCFB 767 at [7]
[5] [2019] FWCFB 767 at [8]

National Retail Association

6.1.13. This therefore means that whilst in the short-term the Bill achieves its intended policy objective of harmonizing, as best as possible, the rights of casual employees both award-covered and award-free, in the medium- to long-term the Bill's limited scope may tend to inhibit the continuing achievement of this policy objective.

6.2 Inconsistent application of terms with technical legal meaning and/or effect – sections 66A, 66B

6.2.1. Various provisions in Division 4A make reference to a particular section or subsection "covering" an employee.

6.2.2. The concern of the NRA is that the effect of an employee being "covered" by a section or subsection varies across those subsections, and is inconsistent with other uses of this term throughout the Act.

Inconsistency with previously defined term

6.2.3. In the first instance, we note that the expression "covers" is defined in section 12 of the Act as follows:

> ***covers***:
>
> (a) in relation to a modern award: see section 48; and
>
> (b) in relation to an enterprise agreement: see section 53; and
>
> (c) in relation to a workplace determination: see section 277; and
>
> (d) in relation to a copied State instrument: see section 768AN.

6.2.4. Section 18A of the *Acts Interpretation Act 1901* (Cth) operates so that this definition of "covers" also defines other grammatical forms, such as "covered".

6.2.5. Whilst the definition of "covers" is limited to the four specific instances contained within that definition, it is the NRA's concern that deviating from the defined meaning is apt to generate confusion among the users of the Act – namely, employers and employees.

6.2.6. The NRA considers that additional amendments to the definition of "covers" in section 12 of the Act need to be made in order to facilitate consistent interpretation of the legislation.

Inconsistency in application of term

6.2.7. In the majority of provisions of the Act, being "covered" by a provision or a fair work instrument is a prerequisite to that same thing "applying". For example, in order for a modern award to "apply" to an employee, the modern award must first "cover" the employee.[6]

6.2.8. This trend continues in the proposed new section 66B, in that an employee can only make a request to convert to permanent employment if they are "covered" by subsection 66B(3).

6.2.9. In this context, the use of the word "covers" in section 66A is incongruous with the other provisions of the Act, whether extant or proposed to be inserted by the Bill.

6.2.10. Subsection 66A(1) provides that if an employee is "covered" by subsections (2) or (3), then Division 4A will **not** apply.

[6] *Fair Work Act 2009* (Cth) s 47

6.2.11. The concern of the NRA is that this anomalous use of a term which otherwise has a consistent technical meaning and implication throughout the legislation is apt to cause confusion and misapprehension among employers and employees with respect to their rights under Division 4A.

6.3 Ambiguity of expression "full-time hours" – paragraph 66B(1)(a)

6.3.1. The NRA has some concerns with the drafting of paragraph 66B(1)(a) as proposed insofar as it refers to "full-time hours".

6.3.2. Whilst "full-time hours" are commonly defined under modern awards or enterprise agreements as being "an average of 38 ordinary hours per week"[7] or similar terms, the expression "full-time hours" has no concrete meaning in the context of an award-free or agreement-free employee.

6.3.3. We note that subsection 66B(4) as proposed allows regard to be had to the hours of work of other full-time employees in equivalent roles, but this will not be in any way determinative.

6.3.4. The NRA notes further that in the absence of a standardized understanding of what is meant by "full-time hours", the legislation runs the risk of diminishing the value and security of full-time employment for award- and agreement-free employees.

6.3.5. The Act provides, at paragraph 62(1)(a), that the maximum weekly hours for a full-time employee is 38 (subject to any reasonable additional hours).

6.3.6. The NRA suggests that paragraph 66B(1)(a) be re-drafted to instead refer to the maximum weekly hours specified for a full-time employee in paragraph 62(1)(a).

6.4 Reference to inapplicable instruments – paragraph 66B(3)(a)

6.4.1. The proposed new subsection 66B(3) sets out the criteria to determine which employees are "covered" by that subsection and therefore able to make a request to convert to permanent employment under subsection 66B(1).

6.4.2. Among these criteria, the employee must be "designated as a casual employee … for the purposes of any fair work instrument that applies to the employee".

6.4.3. The expression "fair work instrument" is defined in section 12 of the Act to mean:

(a) a modern award; or

(b) an enterprise agreement; or

(c) a workplace determination; or

(d) an FWC order

6.4.4. In the overwhelming majority of cases, if a "fair work instrument" as defined applies to an employee, it will be a modern award or an enterprise agreement.

6.4.5. Consequently, subparagraph 66B(3)(a)(i) is largely redundant since if an employee is designated as a casual employee for the purposes of a fair work instrument, in the overwhelming majority of cases this will exclude them from the benefit of any provision in Division 4A due to the operation of subsections 66A(1), (2) and (3).

6.4.6. In practical terms, the only circumstance where this provision has any work to do is in the case of an enterprise agreement which does not include a casual conversion clause and the employee/s in

[7] *General Retail Industry Award 2010*, clause 11

question are not covered by a modern award.[8] The likely incidence of this circumstance is likely to be minimal.

6.4.7. With this in mind, the wording of the legislation in this respect is somewhat inefficient, and if at all possible ought to be streamlined to minimise reference to the broader expression "fair work instrument" when in practical terms the utility of using this expression is highly limited.

6.5 Over-extension of dispute resolution mechanism – section 66G

6.5.1. Section 66G, as proposed by the Bill, inserts a mechanism to allow employers and employees to resolve disputes about the operation of Division 4A.

6.5.2. NRA strongly opposes the inclusion of this provision, as it results in award- or agreement-free employees being provided with a dispute resolution mechanism that is not contemplated by the legislation and goes beyond the scope of the other dispute resolution provisions in the Act.

6.5.3. Modern awards and enterprise agreements are required to contain a clause which provides a mechanism by which disputes arising under the modern award, enterprise agreement, or the National Employment Standards may be resolved.[9]

6.5.4. By virtue of this provision being a requirement of modern awards and enterprise agreements, award- and agreement-free employees have not been able to access the dispute resolution provisions under those instruments to raise disputes with respect to the National Employment Standards.

6.5.5. This is substantially because failing to comply with the National Employment Standards is itself a civil penalty provision by virtue of section 44 of the Act.

6.5.6. The proposed new section 66G represents a radical departure from the pre-existing dispute resolution mechanisms available (as the case may be) to employers and employees, and the NRA is not able to support its inclusion without a proper justification for this departure.

6.6 Inconsistency of dispute resolution clause with similar mechanisms – subsection 66G(3)

6.6.1. The NRA has grave concerns about the inclusion of the dispute resolution mechanism in section 66G as proposed in the Bill as:

(a) it fails to specify the extent of discussions which must be entered into before the facilities of the Fair Work Commission may be accessed; and

(b) it allows a person in a dispute in relation to an employee who is not award- or agreement-covered a far greater degree of access to the facilities of the Fair Work Commission than in a dispute in relation to an employee who is award- or agreement-covered;

(c) failure to exclude the question of whether grounds of refusal of a request under subsection 66D(1) are reasonable from the dispute resolution process; and

(d) it redundantly specifies a particular subsection as a civil penalty provision when such is already the case.

[8] Note that per the proposed subsection 205A(3) an enterprise agreement is taken to include the modern award casual conversion clause in relation to those employees covered by the relevant modern award.

[9] *Fair Work Act 2009* (Cth) ss 146(b) and 186(6)

Failure to specify extent of discussions required

6.6.2. Subsection 66G(3) specifies the first step to be taken by employers and employees in resolving disputes between them with respect to the operation of the new Division 4A.

6.6.3. The first step so-specified is that the parties must first attempt to resolve the dispute at the workplace level by discussion.

6.6.4. This first step is not dissimilar to the dispute resolution clauses appearing in modern awards. As this provision will only apply where a modern award or enterprise agreement does not apply, this is appropriate.

6.6.5. However, the provision departs from the dispute resolution clause provided in modern awards in two very critical respects:

(a) it does not provide for an escalation disputes through internal discussions before referral to the Fair Work Commission; and

(b) it does not require the parties to act reasonably or appropriately.

Failure to provide for escalating internal discussions

6.6.6. Most modern awards provide that parties to a dispute must first attempt to resolve the dispute through discussions between an employee and their direct supervisor, and then escalated to more senior levels on management if the dispute remains unresolved.[10]

6.6.7. If the parties are not able to resolve the dispute at the workplace level, and all reasonable steps to resolve the dispute at the workplace level have been taken, then and only then may the dispute be referred to the Fair Work Commission.

6.6.8. The apparent intention behind this approach is to encourage employers and employees to engage in meaningful discussions between themselves in order to resolve disputes with a minimum of acrimony between them, and to ensure that the Fair Work Commission is not overburdened by disputes which may be more effectively dealt with at the workplace level.

6.6.9. Subsection 66G(3), in its current terms, radically departs from this policy objective and instead allows either party to immediately escalate a dispute to the Fair Work Commission once any attempt, at any level of management, has been made to resolve the dispute.

6.6.10. This therefore means that it is possible for the obligation in subsection 66G(3) to be discharged even if escalation is essential in order for any discussion to have a real prospect of resolving the dispute.

6.6.11. For example, an employee discussing a dispute with a shift supervisor will technically discharge this obligation, even if the employee is fully aware that the shift supervisor is not authorised to deal with the dispute and that the dispute ought properly be taken to a more senior manager possessing the requisite authority.

6.6.12. The lack of an escalating internal process creates a prospect, neither unrealistic nor improbable, that parties to a dispute will undertake the bare minimum to discharge their obligations under subsection 66G(3) with no intention of resolving the dispute, and instead simply as a means of pushing the dispute to the Fair Work Commission as quickly as possible.

6.6.13. This therefore creates the potential for the overburdening of the Fair Work Commission, requiring the provision of additional resources to that body at the expense of the taxpayer.

[10] See, for example, clause 9 of the *General Retail Industry Award 2010*

Failure to require parties to act reasonably or appropriately

6.6.14. In its current terms, subsection 66G(3) requires only that the parties "attempt" to resolve the dispute between them.

6.6.15. There is no requirement that this attempt be genuine, that the parties act reasonably in their attempts to resolve the dispute, or for the parties to take appropriate steps to attempt to resolve the dispute.

6.6.16. This is in contrast to the dispute resolution provisions in most modern awards, which generally at a minimum require that the parties to take "appropriate" steps before the dispute can be properly referred to the Fair Work Commission.

6.6.17. In its current terms, subsection 66G(3) includes no such words of limitation.

6.6.18. As such, a party may discharge their obligation under subsection 66G(3) by making only spurious or ineffectual attempts to resolve the dispute. Even a party acting wholly unreasonably will have technically discharged their obligations under the subsection.

6.6.19. As discussed above, this creates the neither unrealistic nor improbable prospect of parties failing to engage in genuine efforts to resolve the dispute, instead doing the bare minimum to allow them to access the jurisdiction of the Fair Work Commission, and this in turn leads to a risk of an administrative and financial over-burden on the Fair Work Commission.

Discrimination against those covered by an industrial instrument

6.6.20. Because of the lesser obligations provided for in subsection 66G(3) in its current terms, Parliament is effectively providing for preferential treatment of those who are not covered by an industrial instrument.

6.6.21. At present, those covered by a modern award or an enterprise agreement need to pass through several stages of dispute resolution before they can access the facilities of the Fair Work Commission.

6.6.22. These stages of dispute resolution are founded on the sound public policy of allowing the parties to access the facilities of the Fair Work Commission only when necessary to resolve the dispute, and not as a matter of convenience.

6.6.23. The provisions of subsection 66G(3) at present do not reflect this sound public policy, and as a consequence allow those parties not covered by an award or enterprise agreement to more readily access the facilities of the Fair Work Commission.

6.6.24. Particularly in the case of award-covered employees, whom the Fair Work Commission have expressly acknowledged as more likely to be low paid,[11] this creates a situation where:

(a) employees who are not award-covered and less likely to be low paid have an easier and faster pathway to the Fair Work Commission; but

(b) those who are award-covered and more likely to be low paid have a longer and more procedurally-intense pathway to the Fair Work Commission.

6.6.25. It is antithetical to the operation of the National Employment Standards as part of a "fair" safety net of minimum entitlements that they favour once class of persons (those not award- or agreement-covered) over another class of persons (those who are award- or agreement-covered).

[11] [2017] FWCFB 1001 at paragraphs [84], [128], [165], [173], [180], [817], [818], [823], [1136], [1357[, [1358], [1656], [1660], [1826], [1927], [1928], [1929], [1998], [2003], [2028] and [2040]

Failure to exclude question of 'reasonableness' of grounds of refusal from dispute resolution

6.6.26. Subsection 66G, in its current form, allows all elements of Division 4A to be disputed by any party.

6.6.27. This includes an employee disputing that the grounds relied on by an employer to refuse a request under subsection 66D(1) are not reasonable.

6.6.28. Other provisions of the National Employment Standards allow an employer to refuse a request from an employee on "reasonable grounds" or "reasonable business grounds".

6.6.29. Specifically, these provisions relate to the employer's right to refuse, on reasonable grounds, a request for flexible working arrangements (subsection 65(5)) or a request to extend parental leave beyond the original 12-month period (subsection 76(4)).

6.6.30. In each of these cases, where the Fair Work Commission has the power to engage in dispute resolution between the parties, subsection 739(2) of the Act prohibits the Fair Work Commission from dealing with a dispute to the extent that the dispute is about whether the employer had reasonable grounds for refusal.

6.6.31. This is based on the principle that it is not for any executive or judicial body to dictate how any particular enterprise is to operate, due to the multitude of factors that inform these decisions which may not necessarily be apt for consideration in a public forum, including commercially sensitive information.

6.6.32. At present, there is no provision in the Bill which includes an amendment to subsection 739(2) to exclude the grounds of refusal under subsection 66D(1)(b) from the purview of the Fair Work Commission in the dispute resolution process.

6.6.33. In order for these provisions to accord with other, similar provisions and as a matter of good policy to not compel the disclosure of potentially sensitive information, an additional amendment ought to be made to subsection 739(2) of the Act to exclude matters under subsection 66D(1)(b) from the dispute resolution process.

Redundant specification of subsection as civil penalty provision

6.6.34. The note to subsection 66G(3) specifies that the subsection is a civil remedy provision.

6.6.35. We note that this is redundant, as the subsection is proposed to be inserted into the National Employment Standards with necessary other amendments for the whole of the new Division 4A to be recognised as one of the National Employment Standards.

6.6.36. Section 44 of the Act provides that the contravention of any provision of the National Employment Standards renders the contravener liable to a civil remedy under Part 4-1 of the Act.

6.6.37. This necessarily means that contravening any provision of Division 4A, including subsection 66G(3), already exposes the contravener to liability for a civil remedy under Part 4-1 of the Act.

6.6.38. As such the note specifying that subsection 66G(3) is a civil remedy provision is redundant, and ought properly be removed.

6.7 Inclusion of modern award terms in enterprise agreements contrary to the nature of enterprise bargaining

6.7.1. Item 3 of Schedule 1 to the Bill proposes amending Part 2-4, Division 5 of the Act by inserting an additional section at the end of the Division, section 205A.

6.7.2. In its terms, subsection 205A(1) will require enterprise agreements to include a casual conversion provision.

6.7.3. Subsection 205A(2) requires that this clause be either in the same or substantially the same terms as the relevant modern award or the terms of the new section 66G.

6.7.4. Subsection 205A(3) operates so that where an enterprise agreement does not include a casual conversion clause, or does include such a clause but is in different terms to what is included in the relevant modern award, then the clause in the modern award shall apply instead.

6.7.5. The NRA does not oppose the proposition that if an enterprise agreement does not contain a casual conversion clause, the proposed section 66G will apply if no modern award covers the relevant employer and employees.

6.7.6. The NRA does, however, oppose the proposition that, if an enterprise agreement does not contain a casual conversion clause, or includes such a clause in terms different to those in the applicable modern award, the casual conversion clause in the modern award will be 'read in' to the enterprise agreement, as this provision:

(a) undermines the integrity of the bargaining process with respect to existing enterprise agreements with respect to which the relevant modern award already included a casual conversion clause prior to the Decision; and consequently

(b) undermines the stated objective of the Act in promoting enterprise-level bargaining.

Undermining the integrity of existing agreements

6.7.7. The NRA's primary opposition to subsection 205A(3) is that it fails to account for the scenario of an enterprise agreement, assessed against a modern award containing a casual conversion clause, being previously determined as valid and enforceable by the Fair Work Commission.

6.7.8. It must be remembered that the Decision of the Full Bench inserted casual conversion provisions into 85 of the modern awards. The remaining modern awards (approximately 20) already included casual conversion provisions.

6.7.9. Of these 20 excluded modern awards, it is entirely possible that enterprise agreements exist under which employees agreed to waive or vary their rights to casual conversion in exchange for other benefits.

6.7.10. As a case in point, the *Manufacturing and Associated Industries Award 2010* has included a casual conversion clause since it came into effect in 2010. In 2017, the Fair Work Commission approved the *Engineering Resources National Manufacturing and Associated Industries Enterprise Agreement 2017*[12]. That Agreement does not include a casual conversion clause or anything similar, and this was agreed to by employer and employees.

6.7.11. Subsection 205A(3) disregards this bargain between employer and employee, and undermines the bargaining process as a means of allowing employers and employees to agree to mutually acceptable measures to promote efficiencies.

Undermining the fundamental principles of enterprise bargaining

6.7.12. The Act has, since its inception, allowed for employers and employees to bargain in relation to the provisions of modern awards, allowing 'give and take' on these terms and conditions of employment in order to achieve a mutually acceptable arrangement.

[12] [2017] FWCA 1651

6.7.13. In this paradigm, the only "non-negotiable" aspects of the bargaining process were that an enterprise agreement could not provide for lesser entitlements than the National Employment Standards.

6.7.14. A provision of an enterprise agreement could, however, be lesser than provided for in a modern award so long as this was off-set by a greater benefit elsewhere.

6.7.15. Subsection 205A(3) changes this paradigm by effectively according a particular provision of a modern award the same status as the National Employment Standards insofar as the enterprise agreement must provide for at least the same, or better, as that provision in the modern award.

6.7.16. In so doing, the Bill if passed would set a dangerous precedent for Parliamentary interference in the enterprise bargaining process, in which businesses must suffer the risk that previously bargained-away provisions of the modern award will be re-imposed upon them for political expedience.

6.7.17. This is likely to have a negative effect on business confidence resulting in a slow-down in investment, with a consequential slow-down in the creation of new jobs.

7. Schedule 1 – Part 2 – Other amendments

7.1 Amendments consequential to Schedule 1 – Part 1

7.1.1. Items 4 to 7 (inclusive) and Item 15 to Schedule 1, Part 2 of the Bill provides for necessary consequential amendments to the Act in the event that the provisions of Schedule 1, Part 1 of the Bill are passed without amendment.

7.1.2. The NRA considers that these provisions are appropriate in the circumstance that the Bill is passed without amendment, however notes that if the Bill is amended in the course of the Parliamentary process that consequential amendments may need to occur.

7.2 Amendments clarifying the relevance of service as a casual

7.2.1. Items 8 to 14 (inclusive) to Schedule 1, Part 2 of the Bill seek to provide clarity to the question of whether an employee's service as a casual employee is counted as service for the purposes of calculating service-based entitlements.

7.2.2. This clarity is necessary due to the conflicting decisions of the Fair Work Commission in the cases of *AMWU v Donau Pty Ltd*[13] and *Unilever Australia Trading Limited v AMWU*[14].

7.2.3. The amendments to the Act proposed in Items 8 to 14 to Schedule 1, Part 2 of the Bill are congruent with the decision of the Fair Work Commission in *Unilever Australia Trading Limited v AMWU*, and in the view of the NRA is the correct approach to take.

7.3 Amendments consequential to specification of civil penalty provision

7.3.1. Item 16 to Schedule 1, Part 2 of the Bill provides for amendments to section 539(2) of the Act consequential to the specification of subsection 66G(3) as a civil remedy provision.

7.3.2. As discussed above, the NRA does not consider it appropriate to specify this subsection as a civil remedy provision, as subsection 44(1) as currently appears in the Act has the same effect.

7.3.3. As such, consistent with our position in relation to subsection 66G(3), the NRA recommends that this item be removed.

[13] [2016] FWCFB 3075
[14] [2018] FWCFB 4463

7.4 Amendments to facilitate transitional arrangements

7.4.1. Item 17 to Schedule 1, Part 2 of the Bill inserts a new Part 9 to Schedule 1 of the Act to allow, *inter alia*, the Fair Work Commission to vary enterprise agreements to resolve uncertainties or difficulties as to the application of Division 4A or section 205A by the insertion of a new Item 41 to Schedule 1, Part 9 of the Act.

7.4.2. In principle, the NRA accepts that these are necessary if Division 4A and section 205A are passed in their current form.

7.4.3. However, the NRA recommends that Item 17 be amended so that the proposed Item 41(2) prohibits the Fair Work Commission back-dating the effect of a determination varying an enterprise agreement to a date before the commencement of the provisions of the Bill.

8. Response to public statements of other interested parties

8.1 "Over-exposure" of employees to prosecution

8.1.1. We note the publically-stated concerns of the ACTU that this provision being a civil remedy provision "allows employers to sue people who go to the Fair Work Commission to enforce their rights without first attempting to negotiate with their employer directly for conversion."[15]

8.1.2. We respectfully disagree with this proposition, noting that section 45 of the Act already provides that a contravention of a term of a modern award, including the dispute resolution term, renders the contravener liable to a civil remedy under Part 4-1 of the Act. Section 50 of the Act similarly provides in respect of enterprise agreements.

8.1.3. Notwithstanding that employers or employees may prosecute a claim for a civil remedy because of a contravention of the dispute resolution clause in a modern award or enterprise agreement, the NRA has not been able to identify a single instance where an employer has prosecuted an employee for such a contravention.

8.1.4. This is substantially because the cost of prosecuting such a claim through the Federal Circuit Court over the extended timeframe required for cases in that forum far outweighs any benefit which may be obtained by any party in the process.

8.1.5. It is therefore our view that the concerns of the ACTU are unfounded.

8.2 "Defining" casual employment

8.2.1. The ACTU has also stated that the provisions proposed by the Bill "allow employers to arbitrarily determine who is or is not a casual, rather than applying an objective test of casual work".

8.2.2. The NRA again respectfully disagrees, noting that whilst Division 4A only applies to employees who are "designated as a casual employee by the employer" for the purposes of an applicable fair work instrument or the employee's contract of employment, this designation is relevant to the question of whether the employee is covered by subsection 66B(3).

8.2.3. This designation is not in any way expressed to define casual employment for any other provision of the Act, and consequently the objective test of casual employment as espoused by the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene*[16] continues to apply to all other provisions of the Act.

---

[15] Workplace Express [13 February 2019] *Casual conversion laws introduced, but ACTU remains leery* [online] Available from: https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=57548&hlc=2&hlw=

[16] [2018] FCAFC 131

8.2.4. This requirement of the employer "designating" the employee as a casual employee is a practical necessity in order for the proposed provisions to operate effectively.

8.2.5. Whilst the Fair Work Commission is empowered (by subsection 66G) to assist parties in resolving disputes about the operation of Division 4A, it is not empowered to provide declaratory relief as to the application of Division 4A. This relief remains the purview of the Federal Circuit Court and Federal Court.

8.2.6. If, as the ACTU suggests, an objective test of casual employment must be applied, this would in effect require the parties to seek a declaration from the courts that the employee is a casual employee and eligible to access the provisions of Division 4A, as only the court may definitively apply this objective test.

8.2.7. We further note that employers are already required by section 535 of the Act and regulation 3.32 of the *Fair Work Regulations 2009* (Cth) to specify whether an employee is full-time, part-time or casual.

8.2.8. The 'designation; referred to in subsection 66B(3) therefore refers to something which a compliant employer ought to have already done in accordance with those provisions, and in no way displaces the application of the objective test of casual employment to other provisions of the Act.

9. Recommendation

9.1. The NRA recommends that:

(a) Items 8 to 14 (inclusive) to Schedule 1 of the Bill be passed without amendment;

(b) Items 2 to 7 (inclusive) and items 15 to 17 (inclusive) to Schedule 1 of the Bill not be passed.

9.2. It is the view of the NRA that Items 2 to 7 (inclusive) and 15 to 17 (inclusive) to Schedule 1 of the Bill are so beset with disparate policy and drafting issues that they cannot be passed without amendments so significant that those items ought properly be returned to the Minister for re-consideration and re-drafting.

Phone 1800 RETAIL (1800 738 245)
Visit www.nra.net.au
Email info@nra.net.au
Level 3, 33 Park Rd, Milton 4064

National Retail Association