National Retail Association Limited

Union of Employers

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Submissions

5 February 2021

1. ABOUT THE NATIONAL RETAIL ASSOCIATION

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

1.2. The NRA is the voice of modern retail, representing a substantial network of traditional, omni-channel and digital retailers, from small "mum and dad" businesses to major international corporate groups.

1.3. As an industrial association, the NRA has been a voice for its members since approximately 1921, and has grown and developed alongside the retail and quick service industries bringing with it the voice of almost 100 years' solidarity with these industries.

1.4. The NRA is a member of the Australian Chamber of Commerce and Industry (**ACCI**) and supports ACCI's submissions unless otherwise stated in these submissions.

2. INTENDED OUTCOMES OF THE BILL

2.1. The Explanatory Memorandum to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) (**Bill**) states that it:

> *"... aims to improve the operation and usability of the national industrial relations system. By providing greater certainty and flexibility to employers and employees the Bill aims to support productivity, employment and economic growth and ensure that employees also receive their share of benefits that flow from economic recovery."*

2.2. This statement is predicated on an underlying assumption that Australia's current industrial relations system does not provide the certainty, flexibility or usability that it ought to do, and the NRA respectfully submits that this is an accurate assumption.

2.3. The process adopted during the creation of the modern awards by the Australian Industrial Relations Commission (**AIRC**) was one in which that body "*... generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation.*"[1]

2.4. The pre-existing awards adapted by the AIRC in the creation of the current modern award system are commonly referred to as "*pre-modern awards*", and this moniker is much more apt than many realise.

2.5. In the retail industry, these pre-modern awards were largely based on operations which were almost exclusively of the brick-and-mortar variety, with shops observing the Sabbath and remaining closed on Sundays. Indeed, several pre-modern awards presumed that shops would not open after lunchtime on Saturdays. These pre-modern awards were also, in many respects, only just starting to implement measures to accommodate families in which both parents worked.

2.6. Looking at the retail industry in 2021, we see a vastly different landscape to that which was contemplated in 2008. Retailers now have extensive omni-channel operations, with a growing number

[1] *Award modernisation – Stage 2 modern awards* [2009] AIRCFB 800 at [4] (2 September 2009).

of retail businesses operating exclusively online. Trading on weekends has become the norm rather than the exception, as has retail trade after 5:00PM.

2.7. The modern awards, and the pre-modern awards from which they were adapted, are ill-suited to deal with this altered paradigm, particularly in the retail sector and predominantly in relation to the need for flexibility to meet operational efficiencies to remain competitive. The COVID-19 pandemic has thrown the need for flexibility into stark relief, with many businesses in the retail industry hamstrung by the requirements of their industrial instruments from adapting to changing circumstances and an evolved retail landscape.

2.8. When the *Fair Work Act 2009* (Cth) (**FW Act**) was introduced, it was acknowledged that the modern awards would not be suitable for all businesses. The solution to this was intended to be enterprise bargaining. However, over the last ten years and particularly over the last five years the bargaining process has become increasingly burdensome, until even some of the nation's largest businesses no longer see the value in it.

2.9. With this in mind, the intention of the Bill is to introduce measures which will, at least in part, alleviate some of these issues in the current industrial relations system, key among which are provisions to:

(a) clarify the legal status of casual employees following the cases of *Workpac Pty Ltd v Skene* (***Skene***) and *Workpac Pty Ltd v Rossato* (***Rossato***);

(b) remove restrictions on part-time employment in certain modern awards in industries particularly affected by the COVID-19 pandemic;

(c) streamline the process of enterprise bargaining to allow for the system to be more accessible as was originally intended by the FW Act; and

(d) create a criminal offence in relation to the deliberate and systematic underpayment or non-payment of entitlements to employees.

2.10. Although the Bill does not propose to remedy every ill perceived by retailers in the current industrial relations system, and requires further refinement in order to be truly effective, the NRA supports the measures proposed in the Bill.

3. ECONOMIC SITUATION AND THE IMPACT OF THE COVID-19 PANDEMIC

3.1. The twelve months from January 2020 have been a period of significant volatility for the Australian retail industry, with retail turnover figures breaking records in both the positive and the negative sense.

3.2. While retail trade has long been subject to seasonal demand drivers, such as Christmas, the year of 2020 saw out-of-cycle demand peaks brought on by panic buying and troughs created by government restrictions to the movement of people.

3.3. In March 2020, for example, the seasonally adjusted month-on-month change to retail turnover peaked at 8.5%; at the time, a record high. This was driven by a surge in the turnover of food retailing (24.1%) and 'other' retailing (16.6%). Specifically, food retailing was led by an increase in purchases of non-

perishable products (39.0%), while 'other' retailing was led by a sharp increase in toiletry products (22.3%), with sales of toilet paper increasing by 114.3%.[2]

3.4. By April 2020, however, the situation was vastly different. The seasonally adjusted month-on-month change to retail turnover plummeted to a record low of -17.7% as the nation entered what would be the first of several government-ordered lockdowns in response to the COVID-19 pandemic. Food retailing dipped by 17.4%, while 'other' retailing fell by 14.4%, led by a 28.3% decline in toiletry turnover. Clothing retailing and departments stores continued the downwards trajectory started in March 2020, falling by 53.6% and 14.9% respectively in April.[3]

3.5. By May 2020, as the nation came out of its first lockdown, retail turnover reached a new peak hitting a 16.9% seasonally adjusted increase to month-on-month turnover. However, given the record low experienced in April 2020, this increase did not mean a return to pre-COVID levels for many businesses. For example, clothing and footwear retailing rose by 129% in May 2020 compared to April 2020, but in real terms turnover for this subsector was still $370 million less than it was in February 2020. Cafes, restaurants and take away services saw a 30.3% increase, but again in real terms this was still only a total turnover of $2.5497 billion compared to $3.9312 billion in February 2020.[4]

3.6. In the period between May and October 2020, retail turnover remained at the mercy of the vagaries of the COVID-19 response, peaking again in July 2020 before dipping in response to second waves in Victoria and New South Wales. By November 2020, retail turnover had for the most part, returned to February 2020 levels or higher with the notable exception of cafes, restaurants and takeaway food services (still some $210 million below February 2020).[5] However, this rise in November 2020 appears to be the result primarily of significant retail sales events such as Click Frenzy and Black Friday, with preliminary estimates showing an overall decline in retail turnover of over $1 billion in December 2020.[6] It is clear that uncertainty and doubt will continue to plague the retail sector in the absence of any real and sustained stability.

3.7. Although the retail sector managed to retain most of its payrolled jobs during the period from March 2020 to January 2021, with an overall growth of 0.4%, this is in stark contrast to other industries such as accommodation, telecommunications and education, which each lost over one-tenth of their payrolled jobs during this period. Overall, 4.3% of payrolled jobs were lost during this period.[7] Although employment increased from November to December 2020, it was still 0.5% down from the previous year, and 26 million fewer hours were worked in December 2020 compared to the previous year.[8] Evidently, although the economy and employment is recovering, both require further assistance to restore their trajectory.

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[2] Australian Bureau of Statistics (March 2020) *Retail Trade, Australia – March 2020*, ABS Website, accessed 27 January 2021.
[3] Australian Bureau of Statistics (April 2020) *Retail Trade, Australia – April 2020*, ABS website, accessed 27 January 2021.
[4] Australian Bureau of Statistics (July 2020) *Retail Trade, Australia – May 2020*, ABS website, accessed 27 January 2021.
[5] Australian Bureau of Statistics (January 2021) *Retail Trade, Australia – November 2020*, ABS website, accessed 27 January 2021.
[6] Australian Bureau of Statistics (January 2021) *Retail Trade, Australia, Preliminary – December 2020*, ABS website, accessed 27 January 2021.
[7] Australian Bureau of Statistics (February 2021) *Weekly Payroll Jobs and Wages in Australia*, ABS website, accessed 2 February 2021.
[8] Australian Bureau of Statistics (January 2021) *Labour Force, Australia – December 2020*, ABS website, accessed 2 February 2021.

4. CASUAL EMPLOYMENT

4.1. The Bill achieves a balance by providing greater certainty in employment engagement decisions by giving paramountcy to the intention of the contracting parties in forming the employment relationship, while at the same time establishing a mechanism to support the creation of permanent jobs.

4.2. The retail industry has long relied on casual employment to meet seasonal demand for labour and create pathways for young Australians entering into the workforce. Many of the nation's most prominent business and political leaders first experienced working life as a 'Christmas casual' in a retail business.

4.3. The *General Retail Industry Award 2020* (**GRIA**) defines a casual employee at clause 11.1 as "*an employee engaged as such*". Historically, it was well understood that the single determining factor in characterising whether a person was a casual employee was the intention of the employee and the employer in forming the employment relationship. This intention, assessed objectively, would usually be expressly stated in the terms of a contract of employment.

4.4. The Federal Court's decisions in *Skene* and *Rossato* did not expressly consider this definition of casual employment derived from various modern awards, however left open the possibility for a future court to consider 'post-contractual' conduct to determine whether the employment relationship was correctly characterised by the employee and the employer. In other words, it was no longer a matter for the contracting parties to determine the nature of their relationship. This may be distinguished from cases involving employees engaged as independent contractors as the FW Act contains 'anti-avoidance' mechanisms at Division 6 of Part 3-1.

4.5. For this reason, the NRA supports the definition for 'casual employee' introduced in the new section 15A, and agrees with ACCI's recommendations in respect of revisions to the drafting. As made clear at the new subsections 15A(2) and 15A(4), the Bill goes no further than ensuring the understanding of the employee and the employer in forming a casual employment relationship, and giving effect to that contract on and from the date it was entered into.

4.6. This does not inherently disadvantage employers or employees, however the existing ambiguity left open the possibility for 'rolling claims' to be made against employers after any change to an unlimited number of possible indicia.

4.7. Conversely, the Bill introduces a new obligation placed on employers to give to consideration to converting a casual employee into permanent employment. It is relevant to note that casual conversion has existed at clause 11.7 of GRIA since 1 October 2018 on application by an employee who has obtained at least 12 months' service with their employer.

4.8. Anecdotally, the NRA is aware through discussions with its members that the number of conversion requests made by casual retail workers is exceptionally low. Overwhelmingly, the vast majority of casual employees prefer to retain the comparatively higher rates of pay attributable to the payment of a casual loading.

4.9. In any event, the Bill extends the application of this entitlement to all national system employees, and places an additional obligation on employers to identify and make an offer of permanent employment to employees who meet the requirements under the new subsection 66B(1).

4.10. The expansion of the right to request to convert employment resolves any remaining concerns from the cases of *Skene* and *Rossato* as it provides an effective mechanism, accessible to all national system

employees, to convert their employment in circumstances where certain post-contractual conduct arises without eroding the new definition of 'casual employee'.

4.11. However, in the NRA's respectful view, the Bill should follow a similar process to the existing modern award provisions, and allow for casual conversion to occur on application by an eligible employee to their employer. The new Subdivision C of Division 4A would already allow for this to occur, and this may therefore be achieved by omitting the new Subdivision B.

4.12. Even with this omission, the Bill is still more advantageous to employees than the existing modern award entitlement. The new subsection 66F(1)(b) provides that the reference period for assessing an employee's regular pattern of hours is the previous 6 months, whereas GRIA requires the employee to have worked a regular pattern of hours over 12 months.

4.13. The omission of Subdivision B is necessary to ensure some level of consistency with the existing modern award provisions, as well as ensure that a significant, and largely unnecessary, regulatory burden is placed on businesses.

4.14. Many retail businesses do not possess the sophisticated processes needed to determine whether a casual employee, let alone every casual employee, has worked "*a regular pattern of hours on an ongoing basis*". As such, this will largely be a manual exercise involving consideration of at least 6 months' worth of timesheets for an employee.

4.15. In contrast, it is apposite for a casual employee who seeks to convert to permanent employment to review their hours of work, and make a request to their employer which will then necessarily cause the employer's consideration of the above matters. This is because, as stated, the NRA's experience suggests that there will not be a significant uptake of casual conversion, resulting in dozens, if not hundreds, of person-hours being lost before making a request that is ultimately not accepted, or indeed desired, by an employee.

4.16. It is simply more efficient, and achieves greater consistency with the existing modern award entitlement, for an employee wanting to convert their employment to ask their employer to assess their eligibility, than it is for an employer to assess their eligibility and only then ask if the employee seeks to convert their employment. To do otherwise would be to put the cart before the horse.

4.17. It is also unnecessary and undesirable to create a separate cause of action under the new subsection 66L(1) where an employee's hours of work are varied or their employment is terminated to avoid this new entitlement, notwithstanding that similar words also appear in the existing modern award provisions. Such a contravention would fall squarely within the general protections provisions under Part 3-1, and would not accord with other National Employment Standard (**NES**) entitlements. For instance, perhaps the most similar existing NES entitlement is Division 4 of Part 2-2 relating to requests for flexible working arrangements. This division follows a substantially similar structure to the new Division 4A setting out requirements as to eligibility and form.

4.18. However, Division 4 does not contain an express prohibition as contemplated by the new Division 4A, and as such may have the unintended consequence of suggesting that it is permissible to vary hours of work or terminate employment to avoid an entitlement arising under Division 4. In practice however, Division 4 has been relied on for years in the context of general protections claims without the need for a section similar to that of the new subsection 66L(1). In order to ensure greater consistency within the NES, the NRA recommends that this subsection be deleted.

4.19. With respect to the introduction of a new Casual Employment Information Statement containing, *inter alia*, information regarding the new casual conversion requirements, section 124 already requires the Fair Work Ombudsman (**FWO**) to make and publish a Fair Work Information Statement (**FWIS**).

4.20. The existing FWIS published by the FWO contains information specific to casual employees, and is likely to have a substantial amount of duplication to any Casual Employment Information Statement.

4.21. To better achieve the objectives of the Bill, the NRA recommends that the requirements of section 124(2) could be amended to incorporate the terms of the new subsection 125A(2) without the need for an entirely separate statement to be introduced, and two statements nearly identical statements needing to be issued to casual employees.

5. AWARD FLEXIBILITY

5.1. Additional hours for part-time employees

5.1.1. For the reasons set out at paragraph 3.7, the NRA commends the Committee on the inclusion of GRIA for the purposes of Schedule 2 of the Bill. However, certain of the NRA's members are also covered by the *Amusement, Events and Recreation Award 2020*. In one instance, a member of the NRA covered by that modern award has reported a decline in turnover of approximately 70 per cent and estimates that this will remain the case until the resumption of international travel. The NRA recommends that the new section 168M(3) be expanded to include the *Amusement, Events and Recreation Award 2020*.

5.1.2. GRIA, along with various other modern awards that apply to the NRA's members including the *Fast Food Industry Award 2010* (**FFIA**), require part-time employees to be rostered in accordance with a "*regular* pattern *of work*" that must be agreed in writing on commencement of employment and may only be varied by agreement in writing. Currently, each of these agreements must expressly provide the employee's start and finish times, and time and duration of any meal breaks.

5.1.3. These existing provisions are unnecessarily inflexible, and make part-time employment undesirable in all but the most regimented of workplaces. In service industries, this is rarely ever achievable, however GRIA and FFIA are two of only a few modern awards applying to the customer service sector with such rigid restrictions on part-time employment.

5.1.4. The new Division 9 of Part 2-3 of the Bill provides a simplified mechanism for part-time employees to be offered additional shifts. The NRA's members are highly supportive of changes to part-time employment under GRIA and FFIA, however, respectfully, the practical impact of the Bill to reduce complexity does not significantly differ from current arrangements.

5.1.5. It is important to note that the need for greater flexibility for part-time employees will benefit both employees and employers. Importantly, the Bill does not contemplate a situation where a part-time employee will be rostered to work without the consent of the employee. Nor does the Bill contemplate a situation whereby a part-time employee will not be paid for all hours worked inclusive of any penalties, loadings or allowances.

5.1.6. It is difficult to conceptualise a situation where an employee would be somehow worse off without the benefit of the requirements of form in GRIA and FFIA. Conversely, providing greater ability to roster part-time employees for additional hours by agreement resolves long-standing concerns about the lack of flexibility for part-time employment providing a disincentive to engage new employees on that basis.

5.1.7. The NRA submits, however, that the Bill does not necessarily achieve this objective in the most effective manner.

5.1.8. The new section 168N which establishes the process for entering into simplified additional hours agreements (**SAHAs**) contains a number of technical requirements as to form. For instance, the new subsection 168N(2)(a) requires an employee to be specifically informed that the agreement to work additional hours is a SAHA.

5.1.9. This means that even if all other requirements are met, unless an employer specifically uses words to the effect that "*this is a simplified additional hours agreement*", the SAHA will be invalid.

5.1.10. The Explanatory Memorandum to the Bill provides that the purpose of this is to distinguish a SAHA from other forms of agreements that exist under some modern awards. What is not clear however, is why there is a practical necessity for this distinction to be made.

5.1.11. An employee requesting casual conversion under the new Division 4A of the Part 2-2 is not required to be so specific as to state that they have made a request for casual conversion under the NES, despite the fact that GRIA provides a separate mechanism for casual conversion. It is therefore unclear why such a requirement is necessary in the context of SAHAs.

5.1.12. The NRA recommends that subsection 168N(2)(a) be omitted so as not to undermine the intention of the Bill to remove barriers to part-time employment. If an employee has an enterprise agreement that applies to their employment with more flexible part-time employment provisions, and the employer wishes to avoid confusion that they are exercising a right under that agreement and not the FW Act, this is much better served by the employer identifying the agreement to the employee on a case-by-case basis.

5.1.13. The NRA also notes that the ability to enter into a SAHA is limited to employees who work a minimum of 16 hours per week. With respect, there exist within the retail, fast food and quick-service industries cohorts of part-time employees who work fewer than 16 hours a week, and the Bill in its current form prohibits these employees from working additional hours, and thereby deriving additional income, when they are ready, willing, and able to do so, in a manner which is cost effective. As such, the NRA would support any amendment which reduces the minimum threshold for entering into a SAHA.

5.2. Flexible work directions

5.2.1. Part 2 of Schedule 2 of the Bill seeks to extend the operation for a period of two years of certain flexibilities first introduced by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* which were available to employers in respect of those employees enrolled in the JobKeeper Payment Scheme.

5.2.2. These flexibilities in turn were replaced with the introduction of the *Coronavirus Economic* Response *Package (Jobkeeper Payments) Amendment Act 2020* (**Amendment Act**) which introduced the concept of "*legacy employers*" still able to issue limited forms of JobKeeper enabling directions. The Explanatory Memorandum to the Amendment Act provides at paragraph 2.5 that while these employers would no longer qualify for the JobKeeper Payment scheme, "*many remain in distress and recovering from the impact of Coronavirus*".

5.2.3. For this reason, the NRA is supportive of the extension of the flexibilities proposed in the Bill.

5.2.4. The changes introduced in the Bill are a natural progression from the flexibilities first introduced almost 12 months ago. Whereas previous emanations of flexible work directions provided the ability for employers to issue directions which had the effect of impacting an employee's wages or entitlements, for example requesting the employee to take annual leave, the new sections 789GZG and 789GZH are limited only to performing alternative duties or working from a different location.

6. ENTERPRISE AGREEMENTS

6.1. Pre-approval and voting requirements

6.1.1. Part 3 of Schedule 3 of the Bill reconceptualises the requirement for employees to be able to make an informed decision prior to voting to approve an enterprise agreement. The NRA is supportive of the changes to the pre-approval and voting requirements introduced by the Bill.

6.1.2. The omission of the words "*all* reasonable *steps*" from the existing subsections 180(2), (3) and (5) resolves an issue associated with pre-approval requirements whereby employers are required, for reasons of technical compliance alone, to undertake an extensive range of activities such that the Fair Work Commission (**FWC**) would be satisfied that "*all reasonable steps*" have been taken as required by those provisions.

6.1.3. The omission of the word *"all"* from the substituted subsection 180(2) provides the FWC with the ability to be satisfied of the pre-approval requirements without having to give consideration to whether a hypothetical step not taken would cause the pre-approval requirements to not have been met. At the same time, the inclusion of the words "*fair and reasonable opportunity*" provides the necessary context to value and weigh the reasonableness of the steps that were actually taken, and as such the Bill does not operate to erode the protections provided by the pre-approval requirements.

6.1.4. Part 4 of Schedule 3 of the Bill includes a relatively minor amendment to clarify whether casual employees will be eligible to vote to approve an enterprise agreement. This new subsection goes no further than to confirm the existing state of the law arising from recent decisions of the FWC.

6.1.5. The changes to the pre-approval and voting requirements in no way obviate the requirement that a proposed enterprise agreement must still be approved by the majority of employees.

6.2. NES interaction terms

6.2.1. The Bill proposes to introduce a new "*model NES interaction term*" in a manner similar to the existing model flexibility term in accordance with section 202 and model consultation term in accordance with section 205.

6.2.2. Unlike those terms however, as a matter of law the NES will take precedence to the extent that it is inconsistent with the terms of an enterprise agreement notwithstanding the inclusion of a NES interaction term. This is commonly the case for "*pre-reform*" agreements made prior to the introduction of the NES. The existing section 55 separately prevents the exclusion of the NES in an enterprise agreement.

6.2.3. The NRA supports the inclusion of a model NES interaction term.

6.2.4. In circumstances where a proposed enterprise agreement may be seen to exclude the NES, or part thereof, the FWC commonly seeks an undertaking from an employer in a form similar to that of the proposed model NES interaction term. The inclusion of such a term as a matter of course is therefore likely to reduce the need for undertakings to be provided, while at the same time not otherwise impacting the rights of the parties to the agreement.

6.3. Variations to cover franchises

6.3.1. Part 7 of Schedule 3 creates a new mechanism for employers within the same franchise network to enter into an enterprise agreement with their respective employees without bargaining for a multi-enterprise agreement.

6.3.2. The NRA's members, in particular small businesses who are more commonly members of franchise networks, strongly support the proposed amendments.

6.3.3. The issue with multi-enterprise agreements is that any variations to such an agreement after its approval, such as to add a new employer, requires the agreement of all other parties to the agreement despite the change not otherwise affecting their rights or obligations.

6.3.4. Employers within the same franchise network are likely to have the same or similar operational requirements capable of modification under an enterprise agreement. Rather than requiring each individual employer to enter into a single-enterprise agreement, all of which would be separately subject to the enterprise agreement approval process, or a multi-enterprise agreement noting the abovementioned limitations on that process, the Bill creates a pathway to extend the coverage of an existing enterprise agreement on application by an eligible employer.

6.3.5. Simplifying the process for entering into an enterprise agreement, particularly the same enterprise agreement already entered into by other employers, provides a strong incentive for small businesses to engage in the enterprise bargaining process, the promotion of which is a key objective of the Act as originally enacted by the Rudd-Gillard government.

6.3.6. It is also likely to result in more consistency in the industrial instruments that apply across a franchise network. This allows the franchisor, or the FWO, to better monitor and maintain compliance among franchisees, as well as administrative efficiencies such as consistent payroll practices being applied.

6.3.7. The new subsection 216A(6) substantially replicates the pre-approval requirements set at part 6.1 as amended under the Bill, such that the approval of such a variation is subject to the informed consent of the majority of employees.

6.3.8. The enterprise agreement for which a variation application has been made must have already been approved by the FWC, and therefore must have necessarily satisfied all other requirements imposed under Division 4 of Part 2-4. This operates no differently than if two identical enterprise agreements, but for the name of the employer, were lodged for approval on the same day.

6.4. Time limits for deciding applications

6.4.1. The new section 255AA requires the FWC to determine applications to approve enterprise agreements within 21 working days. In the event that the FWC is unable to determine an application within this timeframe, the new subsection 255AA(2) requires the FWC to provide reasons to the parties of the proposed agreement explaining the delay.

6.4.2. The existing case management practices of the FWC in dealing with applications to approve enterprise agreement regrettably rarely accord with the commercial realities of retail businesses. Under section 54 of the FW Act, after an enterprise agreement is approved by the FWC it will commence operation from seven days after the agreement is approved unless expressly stated in the agreement itself.

6.4.3. As identified by ACCI, there is a relatively high degree of variability in the time needed for an application to be determined, with the FWC providing guidance that the process may take anywhere between 3 and 16 weeks depending on whether undertakings are required. At any time during this period, an employer may be expected to update payroll systems, introduce changes to rostering guidelines, and undertake any other steps necessary to comply with the terms of the enterprise agreement with seven days' notice. To remedy this, the proposed new subsection 255AA(1) read alongside section 54 should provide a relatively high degree of certainty to employers that an enterprise agreement will commence operation approximately four weeks after lodgement with the FWC.

6.4.4. The NRA supports the intended purpose of this amendment, which will alleviate much of the frustration with the current approval process.

6.4.5. However, it is relevant to note that the Bill includes a broad and unlimited power for the FWC to unilaterally extend this timeframe, which would have the effect of nullifying any benefit of the new subsection 255AA(1).

6.4.6. For these reasons, the NRA recommends that should the FWC be required to provide notice under the new subsection 255AA(2), such notice should also include the time in which the FWC reasonably believes it will take to determine the application.

6.5. Giving effect to the agreement between the parties

6.5.1. The new subsection 189(1A)(iv) would give the FWC the power for a period of 2 years to approve an enterprise agreement where the FWC considers it does not pass the 'better off overall test' (**BOOT**), in circumstances where it receives overwhelming support from the majority of employees.

6.5.2. Furthermore, in determining whether a proposed agreement would pass the BOOT, the FWC would be required under the new subsection 193(8)(c) to give "*significant weight*" to the views of the parties covered by the proposed agreement.

6.5.3. The NRA supports the introduction of these amendments.

6.5.4. As identified by ACCI, the present approach taken by the FWC in applying the BOOT places hypothetical situations which may not conceivably arise during the life of the agreement ahead of the bipartisan support of the parties.

6.5.5. In effect, the FWC stands in the shoes of the employees to be covered by the proposed agreement and makes a number of assumptions as to the employer's enterprise, rather than acknowledging that employees will generally only vote to approve an enterprise agreement that operates in their own interest.

6.5.6. In recent years, the FWC has seen an increase in interventionist action by non-parties, or by parties who seek to intervene at a late stage in the agreement-making process despite failing to participate in earlier stages. Such actions not only undermine the integrity of the bargaining process as a whole, but delay or overturn the approval process. Indeed, such activities have seen agreements which would

otherwise have resulted in increased benefits to tens of thousands of workers denied because of the belated opposition of an extremely marginal minority.

6.5.7. Indeed, the first major case to involve such a situation, *Hart v Coles Supermarkets Pty* Ltd [2015] FWCFB 7090 and its successor cases, involved an appeal by an employee who, although fully aware of the bargaining process, declined to participate in it until he sought to overturn the approval of the agreement.

6.5.8. Such actions effectively invalidate the democratic process by which an enterprise agreement is made, as it opens the door for any employee who voted against the approval of an enterprise agreement to overturn, or at least impede, the will of the majority.

6.5.9. By affirming that the views of the parties, as demonstrated by the process of bargaining and voting, are to be given paramountcy in such applications, the amendments assist to close a 'loop hole' of the enterprise bargaining system being used for improper purposes.

6.6. Transfers of business

6.6.1. The new subsection 311(1A) provides an exception that where an employee applies for a position with an associated entity of their current employer, if they were successful in that application, this would not result in a transfer of business.

6.6.2. This change will result in productivity benefits for many of the NRA's members who are often part of large corporate groups and have independently entered into enterprise agreements. In the case of one member of the NRA, the existing requirements have resulted in a policy whereby transfers between entities will generally not be approved except in exceptional circumstances, thereby limiting the opportunity for career progression within businesses.

6.6.3. For these reasons, the NRA supports this amendment.

6.7. Cessation of instruments

6.7.1. It is relevant to note that every employee to whom a pre-reform agreement applies has the right under section 225 to seek to terminate that agreement. In determining whether to terminate an agreement, the FWC will consider whether it is contrary to the public interest, the views of the parties covered by the agreement, and the impact that the termination will have on them. Importantly, an application made under section 225 does not require the consent of the employer.

6.7.2. As such, there exists already an effective mechanism should an employee no longer wish to be covered by a pre-reform agreement. As a matter of policy, Parliament should be hesitant when seeking to set aside an agreement freely entered into between two parties, in circumstances where there exists an effective mechanism for the parties to do so themselves. For this reason, the NRA respectfully does not support the unilateral termination of such agreements by the Federal Government as proposed under Part 13 of Schedule 3 of the Bill.

7. COMPLIANCE AND ENFORCEMENT

7.1. Small claims jurisdiction

7.1.1. Part 2 of Schedule 5 of the Bill creates the ability for a Court to refer a "*small claims proceeding*" seeking an amount of not more than $50,000 to the FWC for conciliation. In addition, under the new subsection 548D(1) the FWC may arbitrate the dispute with the consent of the parties.

7.1.2. The NRA broadly supports the limited use of the FWC to assist in the resolution of disputes involving wages and entitlements. While such disputes do not ordinarily fall within the jurisdiction of the FWC, unless dealt with tangentially in the context of disputes arising under modern awards or enterprise agreements, Members of the FWC often have expertise in such matters.

7.1.3. The FWO, in responding to requests for assistance, commonly convenes voluntarily mediations between the parties as a form of alternative dispute resolution. However, as a regulator, there may be reluctance from employers to participate in a mediation facilitated by the FWO out of concern for enforcement action being taken, notwithstanding whether such mediations are carried out on a without prejudice basis.

7.1.4. It should be noted, however that under subsection 596(1), a party to a proceeding before the FWC requires permission of the FWC to be represented by a lawyer or paid agent. A similar requirement also applies in respect of the small claims procedure before the Court under subsection 548(5).

7.1.5. While this will rarely be problematic in the conciliation of a matter before the FWC, increasing the compensation cap of the small claims jurisdiction to $50,000 without representation as of right in neither the FWC nor the Court is a largely unprecedented proposition, and one which may be particularly prone to injustices otherwise mitigated by the involvement of representatives.

7.1.6. The extent to which the Explanatory Memorandum deals with the increase to the compensation cap is to say that it "*broadens access to this simpler enforcement process*". It does not, however indicate why the current compensation cap of $20,000 is insufficient. Indeed, if merely broadening access to the small claims jurisdiction provides sufficient justification for this change, an increase of the cap to $50,000 would be as defensible as an increase to $500,000.

7.1.7. In other words, there is no identifiable need for the compensation cap to be doubled to $50,000, and should therefore remain unchanged at $20,000.

7.2. Criminal penalties

7.2.1. The NRA is the only industry association in Australia to have participated in every State and Federal 'wage theft' inquiry.

7.2.2. In the NRA's view, the substantial driver of non-compliance is the complexity inherent in the system of modern awards, which also has flow-on effects into the space of enterprise agreements. For this reason, any criminalisation of non-compliance must be tempered by the very issues of complexity which the Bill aims to address.

7.2.3. In most cases, the threat of significant penalties and a compliance system geared towards employee self-representation generally act as a suitable deterrent against deliberate non-compliance. Further,

once systematic wage non-compliance is identified in a business or business network, significant flow-on effects can be immediately identified. The value of the business decreases significantly as the value of goodwill declines drastically and additional liabilities become known. Speculation also arises with respect to listed companies as to the accuracy of reported profits, reducing the likelihood of future investment.

7.2.4. Conversely, if one retailer is engaging in wage non-compliance, it provides that business with a significant cost saving compared to compliant businesses. This in turn allows that non-compliant business to undercut compliant businesses on price. In this circumstance, wage non-compliance has the potential to generate an illegitimate competitive advantage for the non-compliant business.

7.2.5. For this reason, the NRA has consistently supported recommendations made in previous inquiries for the criminalisation of wage non-compliance but only in circumstances where there is sufficient proof of deliberate or reckless intent. In the NRA's submissions filed in the Senate Standing Committee on Economics – References' 2019 inquiry into unlawful underpayment of employees' remuneration, it was submitted:

> *"12.4. The NRA views deliberate wage non-compliance as an anti-competitive practice, and as such is prepared to accept that the criminalization of wage non-compliance may appropriate, but only in circumstances in which there is clear and deliberate malice aforethought. Wage non-compliance resulting from mistake or misapprehension should not be subject to criminal sanction.*
>
> *12.5. As such, any criminal offence in relation to wage non-compliance ought to require the following elements to be proved by the prosecution:*
>
> > *(a) that the person had actual knowledge of how the relevant law alleged to have been contravened ought properly be applied;*
> >
> > *(b) that the person had this knowledge before the contravention/s occurred;*
> >
> > *(c) that the person deliberately elected to engage in a course of conduct which they knew, or ought reasonably to have known, was contrary to law; and*
> >
> > *(d) for the purposes of proving actual knowledge, it will be sufficient for the prosecution to demonstrate that the accused had been informed of the relevant law and its proper application to their circumstances by the FWO."*

7.2.6. In this regard, the NRA is not opposed to the new section 324B which includes the element of "*dishonesty*". The new definition of "*dishonest*" to be inserted at section 12 requires that the conduct to be "*known by the defendant to be dishonest according to the standards of ordinary people*". In accordance with the new section 324B(1), to be found guilty of an offence, the act of underpaying an employee must have been dishonestly engaged in. This, in effect, establishes the element of intent sought by the NRA.

7.2.7. The inclusion of the word "*systematic*" in the new section 324B(1) also resolves the NRA's concerns that genuine mistakes or accidents are distinguished from incorporated business practices.

8. POWERS OF THE FAIR WORK COMMISSION

8.1. Lastly, the new section 587 expands the FWC's general power to dismiss applications to include the new grounds of the application being misconceived, lacking in substance, or an abuse of the FWC's processes.

8.2. In many other jurisdictions, a significant disincentive against commencing unmeritorious proceedings exists in the form of costs orders. As a 'no cost' jurisdiction however, respondents to proceedings commenced in the FWC are required to suffer the consequences for an applicant's failure to adequately plead their case in a manner capable of response. It is unfortunately not an uncommon experience of members of the NRA to be required under the FWC's rules to file a response to a claim that does no more than state the applicant's name.

8.3. The existing subsections 587(b) and (c) contain substantially the same considerations in determining an application for costs made under section 611. It follows that should an application warrant dismissal because, for instance, it amounts to an abuse of the FWC's processes, it should be open to the respondent to apply for an order that the applicant pay its costs in defending the application.

8.4. The NRA supports this amendment, however recommends that section 611 be expanded to include these additional grounds contemplated under the section 587.

8.5. In relation to all other measures introduced under the Bill not dealt with in these submissions, the NRA agrees with the submissions of ACCI.

National Retail Association Limited

5 February 2021