Senate Committee Inquiry – Fair Work Amendment Bill 2013

Submission of the National Retail Association

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National Retail Association Ltd
ABN: 44 009 664 073

6 Overend Street, East Brisbane Qld 4169
PO Box 1544, Coorparoo DC Qld 4151

Phone: 07 3240 0100
Free call: 1800 738 245
Fax: 07 3240 0152

Email: info@nra.net.au
Web: www.nra.net.au

Executive Summary

The National Retail Association (NRA) is a not-for-profit industry organisation that provides professional services and critical information and advice to the retail, fast food and broader service industry throughout Australia.

The NRA is Australia's largest and most representative retail industry organisation, representing the majority of national retail chains, as well as independent retailers, franchisees and other service sector employers. The NRA represents over 19 000 store members. The Association has represented the interests of retailers and the broader service sector for almost 100 years. NRA aims to help Australian retail and fast food businesses grow.

This submission from the NRA is made in relation to the Senate, Education, Employment and Workplace Relations Committees inquiry in relation to the *Fair Work Amendment Bill 2013* (Cth) ('the Bill') introduced to the House of Representatives on 21 March 2013.

The NRA is opposed to a number of changes to the *Fair Work Act 2009* (Cth) ('the Act') that is proposed by the Bill as outlined in detail below.

Modern Awards Objectives

1. The Bill proposes to amend the Act to amend the modern awards objectives to provide for additional remuneration for:
    a. Employees working overtime;
    b. Employee's working unsocial, irregular or unpredictable hours;
    c. Employees working on weekends or public holidays; and
    d. Employees working shifts.

2. Currently, in making or varying a modern award, the Fair Work Commission ('FWC') must take into account the modern awards objectives which act as a minimum safety net for employees. Part 3 of the Bill provides that these amendments would apply in relation to a modern award that is made or varied after the commencement of this schedule.

3. The effect of this proposed change is to enshrine penalty rates into the awards. The NRA opposes the enshrining of penalty rates as proposed, for the following reasons.

4. The NRA submits that this legislative amendment of the modern award objectives makes a mockery of the award review process, including the interim review currently underway and the award review scheduled to take place in 2014. Many organisations, including the NRA, unions, other industry groups and indeed the Federal Government, have dedicated significant resources to the award review process. The Federal Government and other entities could have utilised the existing review process to argue for change, whereas the Bill seeks to bypass the review process entirely.

5. The lack of prior consultation before announcing these proposals, the inability of interested groups to consider and provide feedback on the proposals, and the undermining of the statutory review process, have all been very disappointing in terms of government process. Without consultation and proper process, these frequent proposals to change the Fair Work Act make it more difficult for businesses to make decisions about the future with any certainty, leading to diminished business confidence and detracting from investment and employment in the retail sector.

6. The NRA also opposes this proposal because there has been no detail released as to how the changes will impact on other, potentially conflicting, objectives already contained within the modern awards objectives. One of the modern awards objectives is for the FWC to take into account the likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden[1]. It is unclear how the FWC can have any consideration for the impact on business if it must also take into account the need for awards to provide for additional remuneration for employees working the days and hours outlined in the Bill.

7. The enshrining of penalty rates on weekends, public holidays and other loadings means that businesses will have little or no hope in reversing some of the adverse impact caused by the unprecedented labour increases as a result of the implementation of the modern awards. This would have been the realm of the 2014 award review process but with these proposed changes, businesses will have no meaningful opportunity to explain the impact of the modern award changes on their operations. Any ability for the FWC to provide some relief will be lost in these circumstances if it considers this is warranted.

[1] s134 (f), *Fair Work Act 2009* (Cth)

8. Not only are all retailers and fast food operators already paying additional labour costs due to recent changes to the compulsory rate of superannuation, they are also paying an annual wage increase as a consequence of decisions of the Minimum Wages Panel. Further most retailers and fast food operators are required to pay a second increase to wages because of the operation of the transitional provisions included in the *General Retail Industry Award 2010* ('the Retail Award') and the *Fast Food Industry Award 2010* ('Fast Food Award').

9. The impact of the Retail Award will vary from retailer to retailer and from State to State. For a national chain with stores in all States and Territories, the NRA estimates that the implementation of the Modern Award will add 7% to 10% to retailer's labour costs noting that this outcome will be influenced by the distribution of the retailer's stores across the various jurisdictions. For independent retailers or smaller chains that operate only in NSW and Queensland, the additional labour costs is expected to be higher.

10. In general terms, the operation of the transitional provisions will mean that many retailers will pay two increases in wages from July 1 each year from 2010 to 2014. The increase attributable to the transitional provisions will range from 1% to 2% over the five year period.

11. It is important to note that the phasing in of these particular increases does not diminish from the fact that award modernisation is adding to, and will add in perpetuity, between 5% and 10% to labour costs in the retail sector.

12. The position is even worse for many in the fast food industry with employers reporting increases of between 16% and 34.5% in labour costs. For some fast food operators in Queensland, the net increase by 2014, taking into account wage increases, will be more in the vicinity of a 54% increase.

13. These labour cost increases are not limited to those operating under the modern awards. The implementation of a higher penalty structure, higher casual rates and other changes including the recent changes to the compulsory rate of superannuation, in conjunction with the operation of the Better Off Overall Test, has meant that retailers and fast food operators operating under enterprise agreements have also been confronted with substantial labour cost increases as well.

14. Substantial unbudgeted and unbalanced increases in wages and conditions for employees engaged in an industry in which price competitiveness is keen and in which there is limited or no capacity to obtain compensation for such increases in terms of cost cutting or price increases, must inevitably lead to significant reductions in the capacity of employers in the industry to employ substantial numbers of young people and low paid workers.

15. These concerns would have been put to the FWC as part of the 2014 award review but if these changes are implemented then employer's efforts in attempting to draw the commission's attention to the plight of the industry and the effect that the modern awards are having on their businesses may be futile and therefore a wasted exercise. The NRA submits that the modern awards objectives should not be varied on this basis so that industry's legitimate concerns can be considered in the scheduled review process.

16. Lastly, the NRA is concerned that if the objectives are varied then modern awards that don't currently contain a remuneration structure for weekends, overtime etc in line with the proposed change would be subject to review to include such provisions.

Consultation about changes to rosters

17. The Bill proposes to amend the Act to provide that modern awards must include a consultation provision about changes to rosters or hours of work. The Bill provides that this will also apply to enterprise agreements that are made after the commencement of this schedule.

18. The Bill requires that the consultation clause will require employers to consult with employees about a change to their regular roster to ordinary hours of work and allows for representation of those employees for the purposes of that consultation. The term would require the employer to:

    a. Provide information to the employee about the change; and

    b. Invite the employees to give their views about the impact of the change (including any impact in relation to family or caring responsibilities); and

    c. Consider any views about the impact of the change that are given by the employee.

19. The Bill also provides that a dispute in relation to the consultation provisions is subject to the dispute resolution procedures contained in an award or agreement. The impact these changes would have on retail and fast food cannot be underestimated. The NRA is particularly concerned that the explanatory memorandum to the Bill makes it clear that the Bill applies equally to permanent employees as it does to casual employees where arrangements are regular and systematic. This proposed amendment is disturbing because in effect it would mean that casual employees who work a regular roster cannot be treated as casual employees any longer. The very nature of casual work is such that a casual employee's roster may be changed with a moment's notice. This level of flexibility is often crucial to the successful operation of a store as it allows the labour costs to fluctuate as the needs of the business do. Employers pay a premium for this flexibility by way of a higher loaded hourly rate of pay.

20. In practical terms, this proposed onerous consultation requirement will have the effect of adding to a business's administration costs and would be a major burden on resources. It is impractical for many employers (large or small) to meet with employees to such an extent before they amend a roster. Most awards and agreements already provide for 7 to 14 days notice to be provided. and include protections for employees if they are unable to comply for reasons such as parental responsibilities by way of the flexible work arrangement provisions.

21. There is also great concern that subjecting these provisions to the dispute resolution procedures under the award or agreement will once again see an increase in administration costs in order to deal with disputes that may arise under this provision.

Workers bullied at work

22. The Bill proposes to implement new federal anti-bullying legislation. The provisions allow a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

23. While the NRA recognises that bullying behaviour cannot be tolerated in the workplace, we consider there is adequate protection against bullying via the State and Territory Work, Health and Safety laws.

24. The Bill's proposed changes will mean that employers may have to deal with the same complaint of bullying in two jurisdictions, if an employee so elects.

25. The NRA submits that the definition of when a worker is considered to be bullied is too broad and may encourage unmeritorious claims. In the many bullying complaints the NRA has investigated for its members, almost all claims were not substantiated. In fact, in most cases the bullying complaint was made usually as a result of a performance management discussion and ultimately the action by the employer was found to be reasonable management action taken in a reasonable way.

26. The NRA submits that these proposed changes are likely to lead to an increase in vexatious or unmeritorious claims. This will result in additional costs to the employer in defending these claims. The fact that these claims are proposed to be heard by the FWC within 14 days means that these matters will be given priority over all other Commission matters. The NRA also submits that the orders the FWC can make, are too broad and there needs to be further prescription about what can in fact be ordered. Overall, the NRA considers these changes unnecessary in light of the existing State and Territory protections.

Right of Entry – Location of Interviews and discussions

27. The Bill proposes to introduce new provisions whereby occupiers of premises and permit holders must agree where permit holders may conduct interviews or hold discussions on site. If the parties cannot agree then the permit holder as of right may conduct the interview or hold discussions in the place where employees take their meals or breaks.

28. This is a change from the current provisions of the Act that provides a permit holder must comply with the occupier of the premises' reasonable request to conduct interviews or hold discussions in a particular room[2].

29. The NRA submits that the current provisions are more than sufficient and employees who choose not to be a member of the union should not be subjected to discussions where their quiet enjoyment of their meal and rest breaks is compromised.

ENDS

[2] s492, *Fair Work Act 2009* (Cth)