

ARA SUBMISSION

SENATE INQUIRY INTO THE FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL

05 OCTOBER 2023

The Australian Retailers Association (ARA) welcomes the opportunity to make this submission to the Senate Standing Committees on Education and Employment regarding the Senate's inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*.

The ARA is the oldest, largest and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

EXECUTIVE SUMMARY

The ARA supports an equitable workplace relations system that balances the needs of employees against the needs of employers while driving productivity, job creation, secure work and wages growth.

Given this position, the ARA does not oppose the following six provisions in the legislation:

Protection against discrimination

Registered organisation amalgamation withdrawals

Intentional underpayment compliance

Workplace Health and Safety changes

Enterprise bargaining changes

Small business redundancy exemption

However, the ARA does not support the following provisions in their current form:

Redefinition of casual work

Union right of entry and delegate rights

Employee-like gig economy workers

Establishing the Road Transport Advisory Group

Labour hire arrangements

If passed in their current form, these provisions will drive uncertainty, increase costs, and create a more complex regulatory environment for our members, without any material uplift in productivity, wages growth or job creation.

All this at a time when our sector is already under significant pressure, given the impact of softer consumer spending, higher costs of doing business and higher levels of debt - particularly for small businesses.

We are also concerned that some provisions will be determined through regulation-making, rather than being included in the legislation, which may lead to a significant increase in workload for the Fair Work Commission (FWC) and create avoidable compliance risks for business.

These provisions also seem to be at odds with the Employment White Paper, which positions productivity growth and full employment as key objectives. It seems counterintuitive to push for a more inclusive and flexible labour market through the White Paper whilst simultaneously introducing legislation that will increase complexity for employers and make it harder to improve productivity, create jobs or deliver wages growth.

For the sake of this submission, we will focus on those aspects of the Bill that we do not support in their current form, as they are the most prominent issues for our sector. Our recommendations - summarised below and outlined herein - could inform potential amendments to the legislation or support their removal from the Bill entirely.

- Seek to have provisions in relation to union access removed from the legislation.
- Seek amendments in relation to the redefinition of casual work and proposed conversion processes.
- Seek amendments to the definition of 'employee-like' workers in the gig economy.
- Seek amendments in relation to the short-term arrangement exemptions for labour hire and to explicitly exclude service contracting from the definition of labour hire.
- Seek amendments in relation to the establishment of the Road Transport Advisory Group.

However, there are other provisions that we do not oppose - for example, the proposed reforms in relation to intentional underpayment compliance, enterprise bargaining changes and protections against discrimination. To ensure passage of these and other uncontested reforms, the ARA welcomes calls by Senator Pocock and Senator Lambie to split this legislation into multiple bills. This would avoid those measures that enjoy bi-partisan support from being held up by the due diligence that is necessary on the contested elements of this legislation.

RECOMMENDATIONS AND RATIONALE

As a member of the Australian Chamber of Commerce and Industry (ACCI) the ARA broadly supports the ACCI submission. However, we have made some specific recommendations in this submission, from a retail perspective.

Intentional underpayment compliance

Recommendation 1

Support the provisions in relation to intentional underpayment compliance in their current form

The ARA does not oppose this section of the Bill as the government has amended the wording to ensure it only captures 'intentional' and 'deliberate' underpayment. We also note the concession for small business through the proposed Voluntary Small Business Wage Compliance Code which, if complied with by the small business, will mean they cannot be the subject of criminal action for underpayments.

We welcome the concessions that the government has made through the consultation process, so that only deliberate underpayment of workers will be deemed a criminal offence.

Under this change, employers would have to demonstrate that any underpayment of wages was not intentional. As most instances of underpayment are honest mistakes, due to the complexity of the workplace relations system, we strongly encourage the government to reduce complexity of awards to minimise unintentional underpayment.

Union right of entry and delegate rights

Recommendation 2

Seek to have provisions in relation to union access removed from the legislation

The ARA does not support this provision and recommends it be rejected by the Senate in its entirety. There is no justification for unions being granted access to a workplace without notice where there is no threat of destruction, concealment, or alteration of evidence in relation to the suspected underpayment of wages.

Unions already have the right to enter an employer's premises to inspect payroll records. This proposed provision would give unions additional rights to enter a workplace and inspect records without notice, which would create significant business disruption.

In those instances where wage underpayment has been self-reported by the retailer, or identified by unions, our members have acted with integrity and engaged positively with regulators to resolve any issues, which (as noted) are largely due to honest mistakes given the complex nature of Australia's workplace relations systems.

We also note that these provisions were not subject to consultation prior to the Bill's introduction into the parliament. In addition to recommending that these provisions be removed from the Bill, we also recommend that these reforms be subject to thorough consultation with all relevant stakeholders.

Redefinition of casual work

Recommendation 3

Seek amendments in relation to the redefinition of casual work and proposed conversion process

The ARA does not support the proposed reforms in relation the definition of casual work and we urge the Senate not to pass the legislation if these provisions remain in the Bill. However, if the Senate does pursue amendments to this provision, then we make the following subsequent recommendations:

- That the trigger for any conversion process is 12 months of casual employment rather than six months, as proposed. Since retailers employ casuals for periods of six months or more, for the mutual benefit of employers and employees, this proposal would not be suitable for our sector as it stands. We note that the government has already recognised that six months is too short a period to trigger a conversion process for small business, and we believe that a 12-month trigger would be more appropriate for all businesses, regardless of size.
- That the requirement for employers to initiate a conversion process after 12 months should be removed. Under the proposed legislation, an employee would have the ability to issue their employer with a request to convert to permanent employment, potentially duplicating the conversion process. Removing this duplication would assist retailers, especially small businesses, in reducing the administrative burden, complexity and compliance risk around the current casual conversion process, which currently yields low levels of conversion.

The ARA does not support the change in the definition of casual work because it will inhibit flexibility for both employees and employers, and lead to uncertainty for businesses who operate on the basis that if an employee is

engaged as a casual employee under the terms of their contract, they will be treated as a casual employee for the purposes of the Fair Work Act (FWA), as is currently the case.

Nor do we support the proposal that the employment status of a casual employee should be determined by their historic work patterns because:

- A regular pattern of work may not be reflective of an employer's future workforce planning requirements. Retailers have a genuine business need to flex-up their workforce over the peak trading period in November, December, and January. This flexibility is currently provided by casuals but the provision of regular shifts over this period does not represent intent for a casual employee to be offered permanent employment.
- A regular pattern of work may be reflective of an employees' preferences. In some cases, a casual employee will fall into a regular pattern of work over an extended period of time due to reasons outside the control of the employer, to suit the employees' commitments outside of work including caring and study responsibilities.

These changes could create a disincentive for retailers to engage seasonal casuals on short-term, fixed work patterns during peak trading periods, which are often to the mutual benefit of both employer and employee.

There is also a risk that this new definition of casual employment would discourage employers from offering regular patterns of work to casual employees who may prefer certainty in terms of their working hours, without any intention of ever converting to a permanent role.

In respect of casual conversion, data and insights from our members suggest that most casuals working in the retail sector do not want to convert to permanent employment.

While the current process to offer conversion at 12 months results in low levels of uptake from eligible employees, it is workable from the perspective of employers. However, if an employee-initiated conversion process were to be legislated, then we would recommend that the current employer-initiated process be removed from the legislation to avoid unnecessary duplication and compliance risk.

Employee-like gig economy workers

Recommendation 4

Seek amendments to the definition of 'employee-like' workers in the gig economy

The ARA does not support the proposed reforms in relation to the broad definition of 'employee-like' and we urge the Senate not to pass the legislation if these provisions remain in the Bill. However, if the Senate does pursue amendments to this provision, then we make the following subsequent recommendations:

- That the definition of 'employee-like' be amended because the proposed definition is too broad.
- That independent contractors should only fall within the definition of 'employee-like' if they meet all three of the proposed requirements outlined in the legislation, not one of the three requirements as currently proposed.
- That the legislation specifies which types of standards the FWC is authorised to set for independent contractors engaged through digital labour platforms, rather than specifying the types of standards the FWC cannot set.

Currently, contractors working in the gig economy are free to work when they like, to suit their circumstances. Under this proposed legislation, contractors engaged by the likes of food delivery drivers would fall under the jurisdiction of the FWC who would set minimum standards for 'employee-like' workers in the gig economy.

We also believe the scope of the proposed legislation is too broad and will capture many independent contracting arrangements in industries where government has not made a case for the need for minimum standards to be set, going beyond the government's election commitment to set minimum standards for the rideshare and food delivery sectors.

This proposal would change the nature of gig economy work and serve as a significant intervention into the commercial arrangements of self-employed independent contractors, inhibiting their ability to set their own rates and maintain flexibility in their work arrangements.

Concerningly, the government has also conceded that the new rules would push up prices for consumers, at a time when households are already facing the financial stresses of a sustained cost-of-living crisis. We believe this is an unacceptable outcome for businesses and consumers.

Labour hire arrangements

Recommendation 5

Seek amendments in relation to the short-term arrangement exemptions for labour hire and to explicitly exclude service contracting from the definition of labour hire.

The ARA does not support the proposed reforms in relation to labour hire arrangements and we urge the Senate not to pass the legislation if these provisions remain in the Bill. However, if the Senate does pursue amendments to this provision, then we make the following subsequent recommendations:

- That service contracting be explicitly excluded from the broad definition of labour hire.
- That the short-term arrangement exemption clause be amended and expanded to six months to ensure genuine retail peak trade surge labour requirements are not inadvertently impacted by this provision.

Labour hire firms play a role in the retail sector by providing a temporary or surge workforce in periods of peak demand, or providing a skilled and experienced workforce for areas that are not core business, like warehousing and logistics.

There is no evidence to suggest that retailers use labour hire for illegitimate purposes, like underpaying workers or circumventing award conditions.

While we note that the government has excluded small businesses and training arrangements, and that they have agreed to limit the operation of the provisions to where the union makes an application, amendments are necessary to put beyond all doubt the exclusion of service contracting from the broad definition of labour.

Establishing the Road Transport Advisory Group

Recommendation 6

Seek amendments in relation to the establishment of the Road Transport Advisory Group

The ARA strongly does not support the proposed reforms in relation to establishment of the Road Transport Advisory Group (RTAG) and we urge the Senate not to pass the legislation if these provisions remain in the Bill. However, if the Senate does pursue amendments to this provision, then we make the following subsequent recommendations:

- That all parties are allowed to freely exit collective agreements
- That the legislation specifies which types of standards the FWC is authorised to set for independent contractors in the road transport industry. This would maintain alignment with modern awards and parliament's direction that modern awards "must only include" certain matters. There is no justification for giving greater breadth to the FWC in respect of road transport industry participants.
- The road transport minimum standard orders should only be allowed to include terms about payment terms, record keeping and insurance.
- That the legislation be amended so that the scope and content of the "road transport industry contractual chain orders" are made clear and not left to the Minister via regulation. This will ensure that the intent behind the parliament passing this legislation is kept intact and not manipulated by any Minister, now or in the future.

Under this proposed legislation, the FWC would be given new powers relating to the road transport industry. They would be able to make "road transport industry contractual chain orders" that confer rights and obligations on participants in the road transport industry supply chain.

This is of concern to the ARA as retailers rely heavily on an efficient supply chain to ensure that the sector can continue to operate and support local communities, especially during times of disruption. This issue is likely to lead to substantially higher transport costs which will then be passed on to retailers, hurting small businesses and jobs.

Equally concerning, these provisions would relate to drivers in the road transport industry as well as anyone who is "connected with the road transport industry" or meets requirements prescribed in regulation by the Minister. This definition is too broad and has the potential for unforeseen consequences on costs and productivity.

The RTAG would effectively re-establish the Road Safety and Remuneration Tribunal, which was abolished after being found by the Australian Small Business and Family Enterprise Ombudsman to have had grave social consequences for small businesses and assessed to be unable to increase road safety by two independent reports.

CONCLUSION

As noted, there are several elements in the proposed legislation that the ARA does not oppose and enjoy bi-partisan support. We therefore support the legislation being split into multiple bills to ensure the swift passage of the non-contested elements. This would allow time for the scrutiny needed on those aspects of the Bill that the ARA does not support, as outlined in this submission.

The ARA and its members thank the Committee for the opportunity to engage in this consultation. We encourage the Senate to continue engaging with the business community to ensure that these legislative changes are fit-for-purpose, do not detrimentally impact productivity, and can be implemented with minimal cost and complexity.

For any queries in relation to this submission, please contact policy@retail.org.au