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Committee Secretary
Senate Education and Employment Committees
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ARA SUBMISSION REGARDING INQUIRY INTO FAIR WORK LEGISLATION AMENDMENT (SECURE JOBS, BETTER PAY) BILL 2022

The Australian Retailers Association (ARA) welcomes the opportunity to provide comment to the Education and Employment Legislation Committee on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill).

The ARA is the oldest, largest and most diverse national retail body, representing a $400 billion sector that employs 1.3 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 across all categories - from food to fashion, hairdressing to hardware, and computers to cosmetics.

OVERVIEW

As an active participant in the recent Jobs and Skills Summit, the ARA supports sustainable wage growth, more secure work for the retail workforce and mutually beneficial enterprise bargaining.

Sound workplace relations policy is critical in delivering these three goals and underpins our sector's ability to remain resilient in the face of significant economic headwinds while retaining the flexibility needed to drive productivity and respond to changing trading conditions.

The retail sector also continues to be challenged by labour and skills shortages that predate the pandemic. Increased diversification in the labour market, improved equality and greater flexibility in workplace arrangements are key factors in addressing this crisis.

The ARA therefore supports many of the elements of the Bill.

In particular, the proposed changes to the Better Off Overall Test (BOOT) will remove existing barriers and disincentives to enterprise bargaining and increase the number of enterprise agreements.

However, we are concerned about the proposed changes to extend access to multi-employer bargaining. While we recognise that reforms are needed, enterprise-level bargaining agreements have the potential to provide flexibility for employers and employees in negotiating agreements tailored to specific workplace needs, to the benefit of both employers and employees.

We believe multi-employer bargaining will create confusion, add cost and complexity, and result in more disputes and fewer enterprise agreements being reached. While we are particularly concerned about the impact on our small and medium-sized members, we also hold that these changes are not fit-for-

purpose for larger businesses. Nor do we believe multi-employer bargaining will drive wages growth in our sector, where a war for talent is already driving healthy competitive tension in pay and conditions.

Our guiding principle is that enterprise-level bargaining should be retained as the preferred method of bargaining, with reforms delivered to increase the number of enterprise bargaining agreements and protections put in place to ensure good faith bargaining through.

Our comments and recommendations are reflected in the table below.

These comments and recommendations have been informed by consultation with the ARA's Advisory Committee for Workplace Relations.

RECOMMENDATIONS

PART OF THE BILL		ARA COMMENTS AND RECOMMENDATIONS
Part 1	Abolition of the Registered Organisations Commission (ROC)	The ARA is a registered organisation that falls under the auspices of the ROC. We understand the Government's purpose and rationale in abolishing the ROC. However, we note that the ROC does serve an important function in regulating registered organisations and providing invaluable education, assistance and support to this cohort. Given many registered organisations are non-profit, this type of support is necessary and appreciated. We therefore support the proposed transfer of ROC's functions to the Fair Work Commission. We recommend a seamless transfer of those responsibilities and functions, including the role of providing education support and assistance to registered organisations in meeting their compliance obligations.
Part 2	Additional Registered Organisations Enforcement Options	As noted above, the ROC's approach on compliance and enforcement has been, in the first instance, to emphasise education and assistance to organisations. The ARA recommends that such an approach continues. We have no objections to the proposed amendments to align with the *Regulatory Powers Act* and enable the ability to issue infringement notices and enforceable undertakings.
Part 3	Abolition of the Australian Building and Construction Commission	No comment.
Part 4	Objects of the Fair Work Act	The ARA notes that the concept of "job security' is undefined in the Bill and so remains subjective, potentially creating uncertainty for employers and employees.
Part 5	Equal Remuneration	In-line with the ARA's Position Statement on Gender Equality, the ARA supports measures to address the gender pay gap. For frontline retail roles, the Workplace Gender Equality Agency (WGEA) reports a 4.2 - 4.8% gender pay gap for sales roles. Given that women make up 56% of the retail workforce, pay equity is a priority for the retail industry.

		While further improvement is required, we note that retail compares favourably to the 10.0 - 13.7% pay gap for sales professionals across the broader economy.
Part 6	Expert Panels	No comment.
Part 7	Prohibiting Pay Secrecy	While the ARA is supportive of proposed measures to address the gender pay gap, we don't think pay secrecy is critical in addressing pay equity. The ARA therefore recommends that employers retain the ability to require confidentiality around pay in employment contracts. We believe in the confidentiality of discussions about an individual's pay and we think Australian's are generally conservative by nature when it comes to this type of discussion. Our view is that we need more sophisticated solutions to addressing the gender pay gap, rather than relying on employees to share information they may be unwilling to share. From a business perspective, we are concerned that this change could tie up human resources teams managing complex and highly personal disputes between employees, and drive division in the workplace. We should be encouraging businesses to make data-driven decisions about addressing any pay gaps in a way that makes sense for their business. We note that most large employers already have a reporting requirement to the WGEA on gender pay gap data, so this information is already in the public domain. We note the intention to expand WGEA reporting requirements to more businesses.
Part 8	Prohibiting sexual harassment in connection with work	The ARA supports these amendments, which are consistent with our position in relation to the Respect@Work report and Position Statement on Gender Equality.
Part 9	Anti-discrimination and special measures	The ARA supports these amendments.
Part 10	Fixed-term contracts	The ARA understands the policy intent of these provisions but recommends that consideration be given to instances where exemptions may be required. For example, where a contracted role is offered by an employer due to funding for that role being provided under a government grant or program. In this instance, the ARA recommends an exemption to the proposed prohibition on fixed term contracts. In such cases, the funding may be subject to regular renewals and so a fixed term contract may be offered to an employee several times based on the renewal of funding. These concerns extend to employees working under visa arrangements that either require a longer fixed term as a pathway to permanent residency or might be subject to multiple extensions based on evolving circumstances of the visa holder.
Part 11	Flexible Work	Flexible working arrangements are desirable for employers and employees. In the retail sector, there are inherent limits to flexibility for customer-facing roles, so we suggest there must be some limitations surrounding flexible work arrangements based on the core functions of the role.

		The ARA also notes that the FWC is being given the power to make a decision that involves evaluation of 'valid' business reasons. We are concerned that the FWC may not have access to the necessary expertise to properly evaluate what would be a valid business reason for the industry concerned, as this will vary considerably across sectors and businesses. So, while the ARA broadly supports these amendments, we have some concerns that employers may be forced into arrangements that are not practical and inhibit the employee's ability to complete their work.
Part 12	Termination of enterprise agreements after nominal expiry date	No comment.
Part 13	Sunsetting of Zombie agreements	No comment.
Part 14	Enterprise Agreement Approval	No comment.
Part 15	Initiating Bargaining	We firmly believe that enterprise bargaining can only work effectively when parties ready and willing to negotiate, acting in their own interests and participating voluntarily, not because they have been drawn into the process by another party, alongside other employers (who may also be competitors). The ARA is therefore opposed to these changes and recommends that those provisions be removed from the Bill.
Part 16	Better Off Overall Test (BOOT)	The ARA supports the proposed changes to the BOOT. Enterprise-level bargaining agreements provide flexibility for employers and employees to negotiate agreements tailored to specific workplace needs, to the benefit of both employers and employees. While enterprise-level agreements have the potential to drive wages growth and productivity gains, all parties seem to recognise the current system is not delivering these benefits. The ARA believes the amendments to the BOOT will enable employers and employees to negotiate agreements that lift wages and productivity, as they did when enterprise agreements were at their peak. However, we are concerned about changes that will give the FWC the ability to amend an enterprise-level agreement without the involvement of the parties to the agreement. While we acknowledge that the FWC is required to consider the views of the parties, we note that it is not required to accept those views. We also note that currently the FWC seeks an undertaking from an employer, before an agreement is changed, whereas this change has the potential to impose an agreement on parties that does not work for them operationally.
Part 17	Dealing with errors in enterprise agreements	ARA supports these amendments.
Part 18	Bargaining disputes	The ARA notes the introduction of an 'intractable bargaining determination' which can be made by the FWC.

		While we understand the policy intent, we are concerned that this change creates an opportunity for parties involved in bargaining to use delaying tactics to trigger arbitration. The ARA does not support these proposed changes and notes that the existing provisions in the Act are sufficient to ensure bargaining takes place in good faith. However, we believe that the amendments passed by the House of Representatives - that require a prescribed period of good faith bargaining to have elapsed before the intractable bargaining regime is enlivened - partially address some of the ARA's concerns.
Part 19	Industrial action	The ARA notes that under the Bill, employers can be subject to Protected Industrial Action even if most of the employees of a business do not want to take industrial action as part of a multi-employer bargaining agreement. This would a highly undesirable outcome. Similar to our comments on Part 21, we recommend that this is amended to ensure a majority vote of employees at each workplace would be required.
Part 20	Supported bargaining	The ARA does not support multi-employer bargaining where parties are not willing and ready to be part of such an arrangement. We note that multi-employer bargaining would seem to undermine the modern awards system. Our understanding is that these provisions are intended to cover low-paid employees in sectors such as community services, cleaning and early childhood sector. However, we believe that these provisions have the potential to result in scope creep and could potentially apply to any sector. The ARA recommends that a ballot of employees is required before supported bargaining is initiated as bargaining works best when both employer and employees are ready and willing to enter into an agreement. We are also concerned that employers will be drawn into other employers' disputes and bargaining processes, without any real benefit to employees.
Part 21	Single interest employer authorisations	While the ARA's position is that single interest authorisations should be voluntary for all employers, we note that small businesses with fewer than 15 employees will be exempt from single interest authorisations. We support an exemption for small business. However, the ARA has significant concerns about the proposed changes related to single interest authorisations and how they will apply to small businesses above the threshold. We note debate about what size of employer constitutes a small business and we would welcome any increase in this threshold. While we are concerned about this threshold, or larger concern relates to the introduction of multi-employer bargaining, which we do not support. As noted, our guiding principle is that single-enterprise bargaining should be retained as the preferred method of bargaining. We also believe the immediate opportunity is to deliver award modernisation, which has the potential to deliver wages growth and secure work within the existing industrial relations system.

		More specifically, we have the following concerns around how these provisions will work, as outlined below. **1. Majority of employees** While we understand that employers will need to have clearly identifiable common interests and FWC needs to be satisfied that an authorisation is in the public interest, we note that a business may be captured where none of its employees want to be covered by an agreement, due to the way the majority of employees will be calculated across businesses. We strongly recommend that this is amended to ensure that it is a majority of employees in each business opt into a claim, before an employer can be added to a single interest authorisation. **2. Corporate groups** We are concerned that single interest authorisations will be possible to obtain for multiple entities within a corporate group, where existing arrangements were already in place based on separate single enterprise agreements. The flexibility and value of enterprise agreements lies in the ability to tailor an agreement to the needs of a specific workplace, and broadening this scope, will not, in most cases, be useful or result in outcomes that benefit either employees or employers. **3. Multi-site operations** Similarly, we are concerned about how single interest authorisations could be applied to businesses operating across multiple sites, including those businesses operating within a franchise network. For example, a retail or hospitality business with sites across a number of shopping centres or precincts could be compelled to participate in a number of multi-employer bargaining agreements. Beyond the cost and complexity of managing multiple agreements (potentially with individual employees engaged under a number of agreements, if they work across multiple locations) we are concerned about the compliance risk for employers. We therefore recommend that an employer cannot be covered by more than one agreement. **4. Scope of the common interest test** We also note that the scope of the common interest test has been broadened and the ARA is concerned that it is now too broad. For example, competitors could be compelled to participate in the same agreement which is likely to prove counterproductive. While recent statements from the Government have indicated that this is not the intention of the Bill, we assert that the Bill should be amended to reflect this. Similarly, geographic location, which could be a useful common interest in some cases, in other instances could be too broad. For example, how would geographic location apply, in an equitable and reasonable way, to an online retailer with an extended geographic reach.

		The ARA recommends that the scope of the test needs to be re-considered and more than one factor should apply to avoid counter-productive, unintended consequences of its application.
Part 22	Varying enterprise agreements to remove employers and their employees	The ARA supports these amendments.
Part 23	Cooperative workplaces	The ARA supports these amendments.
Part 24	Enhancing the small claims processes	The ARA notes that increasing the threshold for small claims from $20,000 to $100,000 has the potential to result in more cases being sent to mediation, rather than court. While this change will make it easier for more small business to access cost-effective mediation on pay disputes instead of lengthy and costly court proceedings, the ARA recommends that there is also a mechanism whereby small businesses can retain the ability to rely on court processes where appropriate.
Part 25	Prohibiting employment advertisements with pay rate that would contravene the act	The ARA supports these amendments.
Part 26	Application, saving, transitional and miscellaneous consequential provisions	No comment.
Part 27	Amendment of the Safety, Rehabilitation and Compensation Act 1988	No comment

Thank you again for the opportunity to provide a submission to the Education and Employment Legislation Committee. We look forward to making an appearance in front of committee members on Monday, 14 November 2022.

In the interim, any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.

Yours sincerely,

Paul Zahra
Chief Executive Officer