IN THE SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

INQUIRY INTO PENALTY RATES AND RELATED MATTERS

Submissions to the Committee

National Retail Association

25 July 2017

National Retail Association

CONTENTS

1. Background

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

The NRA is built on strong relationships with its members and for almost 100 years have been helping businesses navigate and comply with a complex and evolving regulatory environment.

The NRA works actively with government to ensure the interests and needs of the retail and services sectors are protected and promoted.

The NRA's committees and engagement programs help to identify issues of concern for business and industry and direct NRA's policy and lobbying strategies on behalf of its members.

The NRA also undertakes its own industry research aimed to inform policy and practice in the retail, fast food and broader service sectors.

Additionally, NRA, as a nationally registered training organisation (RTO), provides an important advisory service to government regarding skilling, training and workforce development issues and needs.

2. Overview

On 16 June 2017, the Senate referred the following matters to the Senate Education and Employment References Committee for inquiry and report by 16 October 2017:

a. claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates;

b. the operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the *Fair Work Act 2009*;

c. the desirability of amending the *Fair Work Act 2009* to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award;

d. the provisions of the *Fair Work Amendment (Pay Protection) Bill 2017*; and

e. any other related matter related to penalty rates in the retail, hospitality and fast-food sectors.

The *Fair Work Amendment (Pay Protection) Bill 2017* was referred to the Senate Education and Employment Legislation Committee (the **Legislation Committee**) on 30 March 2017, with a report from this committee due on 4 September 2017.

NRA made submissions to the Legislation Committee on 1 May 2017, and continues to rely on these submissions with respect to the *Fair Work Amendment (Pay Protection) Bill 2017*. These are attached to these submissions as Annexure A and supplement the submissions made herein.

These submissions will therefore address items **a** – **c** and **e** of the terms of reference. The submissions made in Annexure A will address item **d** of the terms of reference

3. Structural versus individual issues

Given the significance of the area the subject of this inquiry, NRA asks this honourable Committee to consider that when evaluating a significant area of the industrial relations system, individual accounts are not necessarily determinative of the state of the systems under review.

When evaluating individual accounts, NRA asks the Committee to query whether any apparent disadvantage done to the individual was the result of failings in the industrial relations system, or a result of individuals failing to comply with legislative requirements.

Whilst the unscrupulous may defend themselves by arguing that their actions are permitted by an enterprise agreement or other instrument, this is usually incorrect and used simply against those unfamiliar with the industrial relations system.

It will therefore be necessary for this Committee to critically evaluate all submissions which purport to render a single individual experience as indicative of the industrial relations system as a whole.

4. Enterprise agreements and small businesses

4.1. Enterprise agreements and the incidence of penalty rates

It is substantially accurate that employees under enterprise agreements receive lower penalty rates than award-covered employees.

However, such agreements typically also provide a higher base wage on which these penalty rates are based.

As such, whilst on a day which attracts a penalty rate, such as a Sunday, the agreement-covered employee may earn less than the award-covered employee, over a roster period the higher base wage means that the agreement-covered employee earns more than the award-covered employee.

4.2. Enterprise agreements and competitive advantage

It is the position of NRA that enterprise agreements do not inherently offer an overall competitive advantage to any particular business or type of business.

Enterprise agreements offer flexibility, certainty, and reduced complexity to businesses that choose to enter into such arrangements.

Whilst an enterprise agreement may allow a business to pay its employees lower penalty rates, this is typically off-set by a higher base rate of pay which applies across all hours worked.

As such, whilst employers under enterprise agreements may save on wage costs over the two days of the weekend, those employers not operating under an enterprise agreement typically save on wage costs across the remaining five days of the week.

Tellingly, employers do not cite competitive advantage as one of the primary reasons for entering into an enterprise agreement. The Fair Work Commission's surveys as part of the Australian Workplace Relations Study produced the following data[1]:

[1] As produced in *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth) 2012 – 2015*, Fair Work Commission, November 2015, p. 9

Table 2.1: Reasons why enterprises use an enterprise agreement by predominant gender of enterprise, per cent of enterprises with an enterprise agreement

	Predominant gender of enterprise		
	Male (%)	Female (%)	Total (%)
Employee organisation/employee association demands/log of claims	23.6	12.3	22.9
Want to reward employees with higher wage than award rates	19.7	23.9	22.0
Award terms and conditions not suitable or flexible enough (e.g. allowances, penalty rates, hours of work, overtime rates, etc.)	23.6	26.9	20.9
To reduce complexity – would otherwise be using multiple awards	24.9	14.8	17.7
Prefer to negotiate directly with our employees than follow amounts determined by the Fair Work Commission	16.0	5.5	13.7
Applicable award wages are not competitive for attracting and retaining workers	14.2	7.5	13.3
Predictability of wage increases	9.5	9.0	8.0
For payroll and/or rostering convenience	9.8	7.2	7.7
Head office/franchisor requirement (i.e., no choice of wage-setting practice)	5.0	11.1	7.4
Some employees/jobs performed are not covered by an award ('award-free')	3.5	1.4	3.0
Other	27.5	30.2	26.8

Note: Data on the predominant gender of the enterprise is based on a smaller sample than the total. Respondents could select multiple responses and therefore proportions may not add up to 100. Enterprises were classified as predominantly male/female if more than half of their workforce is male/female. All data are weighted using an enterprise weight.

Source: Fair Work Commission, Employer survey, *Australian Workplace Relations Study 2014*.

As seen from the above table, the competitive advantage sought by businesses entering into enterprise agreements relates to attracting and retaining workers rather than competing for the consumer dollar, and in this regard only 13.3% of businesses considered this their primary reason for entering into an enterprise agreement.

Indeed, the single most common reason cited by businesses for entering into enterprise agreements is pressure from unions and similar entities, with 22.9% of respondents citing this as the main reason behind their enterprise agreement. This is followed by wanting to give employees higher base wages (22%). Flexibility around penalty rates is only the third most-cited individual reason (20.9%).

Consequently, whilst enterprise agreements may give the appearance of providing a competitive advantage, NRA considers that this perception does not have a solid factual basis.

4.3. Incidence of enterprise agreements across small businesses

While it is a common view that enterprise agreements are a tool of 'big business', this is an incorrect impression generated by the wide impact of the enterprise agreements entered into by these businesses.

Whilst a dispute around an enterprise agreement entered into by a major supermarket with thousands of employees may draw significant media attention, matters around enterprise agreements which affect only a relative handful of individuals receive far less exposure.

That said, it is true that businesses with a large number of employees are more likely to enter into enterprise agreements, as per the table below[2]:

Table 5.8: Proportion of enterprises using an enterprise agreement by business size

	Small (5–19 employees)	Medium (20–199 employees)	Large (200+ employees)	Overall
Yes	8.8	27.0	72.0	14.0
No	91.2	73.0	28.0	86.0
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: Fair Work Commission, *Australian Workplace Relations Study 2014.*

What is also clear from the data is that whilst large businesses are the most likely to enter into enterprise agreements, such agreements are not limited to those businesses. Over a quarter of medium-sized businesses also entered into or maintained enterprise agreements, and nearly one-tenth of small businesses maintained enterprise agreements.

NRA's understanding is that it is commonly perceived that small businesses do not enter into enterprise agreements because they believe them to be too expensive or fraught with too much 'red tape' to be of any use, however we maintain that this is an incorrect understanding of the true reasons behind this disparity.

As the table of the following page shows[3], the single most significant reason as to why a business does not enter into an enterprise agreement is that they don't feel such an agreement is needed, as the award conditions are adequate for the needs of their business.

This contradicts in raw terms the notion that the award terms and conditions are somehow anti-competitive.

With respect to the perception that enterprise agreements are too difficult for small businesses to implement, only 12.7% of businesses reported this as their main reason for not entering into an enterprise agreement.

As for the notion that enterprise agreements are too expensive to negotiate, only 3.8% of businesses reported this as their main reason for not entering into an enterprise agreement.

[2] As produced in *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth) 2012 – 2015*, Fair Work Commission, November 2015, p. 35
[3] As produced in *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth) 2012 – 2015*, Fair Work Commission, November 2015, p. 10

Table 2.2: Reasons why enterprises do not use an enterprise agreement by predominant gender of enterprise, per cent of enterprises without an enterprise agreement

	Predominant gender of enterprise		
	Male (%)	Female (%)	Total (%)
Award rates and conditions are adequate	30.6	30.6	31.8
Prefer to negotiate with individual employees than a collection of employees	19.6	16.9	19.2
Too difficult to implement (i.e., too much red tape and legal work)	12.9	16.5	12.7
The diversity of operations and roles across the business/organisation would require more than one enterprise agreement	6.1	7.1	6.9
The financial cost of negotiating an enterprise agreement would outweigh any performance/productivity benefits	4.7	4.9	3.8
Do not have the management resources to initiate negotiations with employees (e.g. do not have the legal and/or facilitation expertise within the business/organisation)	2.5	2.0	2.3
Concern about negative effects of negotiations on employee relations (i.e., potential to disrupt stability and lead to industrial action)	2.4	np	1.6
Concern about the financial cost of meeting employee demands/expectations	1.3	np	1.1
Wages and conditions pre-set by controlling/owning company or franchisor	1.2	0.7	1.1
Other	19.6	19.8	19.9

Note: Data on the predominant gender of the enterprise is based on a smaller sample than the total.

Respondents could select multiple responses and therefore, proportions may not add up to 100. Enterprises were classified as predominantly male/female if more than half of their workforce is male/female. Missing or 'don't know' responses are excluded. np = not published due to the estimate having a relative standard error of greater than 50 per cent. All data are weighted using an enterprise weight.

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

As such NRA submits that whilst there may be a perception that enterprise agreements provide a competitive advantage to those businesses covered by such arrangements as against those businesses covered by a modern award, this perception is not accurately founded.

5. Operation, application and effectiveness of the better off overall test (BOOT)

NRA understands and strongly supports the need to protect workers' rights in the enterprise bargaining process, but takes the view that the Better Off Overall Test (BOOT) currently provides too high a standard to allow for meaningful agreements that enhance business productivity while also protecting workers' rights.

Under the *Workplace Relations Act 1996*, agreements were required to meet the 'no disadvantage' test – that is, the agreement was valid so long as it was at least equal to any relevant award.

Under the BOOT, agreements are only valid if the benefits provided to employees are better, overall, than what those employees would otherwise receive under the relevant award[4].

The Fair Work Commission has a solid record, particularly in recent years, of applying the BOOT rigorously to ensure that the requirements under this test are met.

Most notably in *Hart & Anor v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd t/a Coles and Bi Lo* [2016] FWCFB 2887 (**Coles Decision**) the Full Bench of the Fair Work Commission rigorously applied the BOOT to determine that the proposed agreement, although offering a higher base wage and various contingent benefits, did not pass muster.

Where the Commission has concerns about whether an enterprise agreement satisfies the BOOT, it may require the employer to enter into undertakings which supplement the agreement in order to address these concerns.

Being a negotiated document, enterprise agreements typically come to the Fair Work Commission with the parties already agreeing that employees are better off under the terms of the agreement. Notwithstanding this, the Commission scrutinises the agreement and where necessary, seeks undertakings from the employer.

As such the BOOT is by no means a 'tick and flick' exercise by which the parties to an agreement are able to obtain any terms they desire, but must genuinely provide that employees are better off overall.

The Coles Decision demonstrates this quite effectively, as the Commission (albeit on appeal) determined that despite agreement between the employer and the union, the agreement failed the BOOT as not **all** employees were better off overall.

It is the view of NRA that the application of the BOOT as it currently stands, and as interpreted by the Fair Work Commission in the Coles Decision, is counter-intuitive to the concept of 'collective bargaining' by elevating individual concerns above the collective.

Indeed, it stands to reason that if every worker in every situation will be financially better off overall under an EBA, then the employer is undoubtedly better off continuing to operate under the award. The very literal application of the BOOT will be a significant deterrent to any employers seeking EBAs, and – in the view of the NRA – threatens the very process itself. The flexibility that was provided to the system by the No Disadvantage Test allowed employees and employers to share the benefits of flexible workplace arrangements. The NRA holds that the previous test is far more conducive to negotiating effective and sensible workplace agreements.

6. Desirability of prohibiting below-award penalty rates

NRA submits that such an amendment, taken with the prohibition on below-award base wages, would all but eliminate any incentive for employers to enter into enterprise agreements.

The primary areas of concern to all parties when engaging in enterprise bargaining are base wage, penalty rates, and rostering.

Typically, employers seek lower penalty rates in exchange for higher base wages so that labour costs are more simply and efficiently managed.

[4] *ALDI Foods Pty Ltd re ALDI Minchinbury Agreement 2012, ALDI Stapylton Agreement 2012 and ALDI Derrimut Agreement 2012* [2013] FWC 3495.

Indeed, certain awards such as the *General Retail Industry Award 2010* include so many varied permutations of circumstances which give rise to penalty rates or other loadings that mistakes in payroll administration are bound to trip up all but the most adroit employer.

Part of the appeal of enterprise agreements for employers is the ability to cut through this regulatory minefield and swap the complexity for a simpler penalty rate structure, or do away with penalties altogether, in exchange for a higher base rate (20.9% of employers cited this as the primary reason, as per above tables).

In the absence of this, there is little incentive for employers to enter into the bargaining process.

Consequently, if this option is removed from employers, then it is unlikely that any enterprise agreement thereafter would offer employees a higher base wage. This can only be to the detriment of workers who may otherwise have taken home pay packets which were larger overall.

7. Penalty rates in the hospitality, retail and fast food sectors

Whilst unpopular, the decision of the Fair Work Commission with respect to penalty rates in the hospitality, retail and fast food sectors is a sensible one.

The modern award system is underpinned by the modern awards objective, which requires that award provisions be 'fair and relevant'.

In its decision, the Commission found that given the nature of the retail, hospitality and fast food sectors, Sunday penalty rates were no long 'relevant'.

This is because in those industries, weekends are considered to be just another trading day. Indeed, they are perhaps more important trading days than weekdays. Times have changed such that these businesses opening on a weekend is now an expectation, rather than the exception it was when Sunday penalty rates were first introduced.

It is worth considering how the notion of relevance is applied to other awards with respect to penalty rates.

The *Real Estate Industry Award 2010*, for example, does not include penalty rates for weekend work. This is because it is an industry in which the days of the weekend are regular working days, being when prospective buyers or renters are likely to be able to attend appointments and inspections.

Similarly, the *Seagoing Industry Award 2010* makes no provision for penalty rates, as all crew of a vessel are expected to work on whatever days the operations of the vessel require. This will include being at sea on weekends, even if the voyage commenced on a weekday.

The *Travelling Shows Award 2010* specifies that work performed on Sundays and Public holidays (except specific public holidays) is to be paid at the ordinary weekday rate, as again, these are days when a travelling show would typically operate.

In each of these cases, work on weekends and public holidays forms part of the '9-to-5' hours of work – they are inherently a time when the business is expected to be in operation. As such any 'incentive' to work on these days is not 'relevant'.

NRA considers that whilst the decision of the Fair Work Commission in this regard could have gone further to give effect to the notion of 'relevance', the decision and its attendant changes was appropriate.

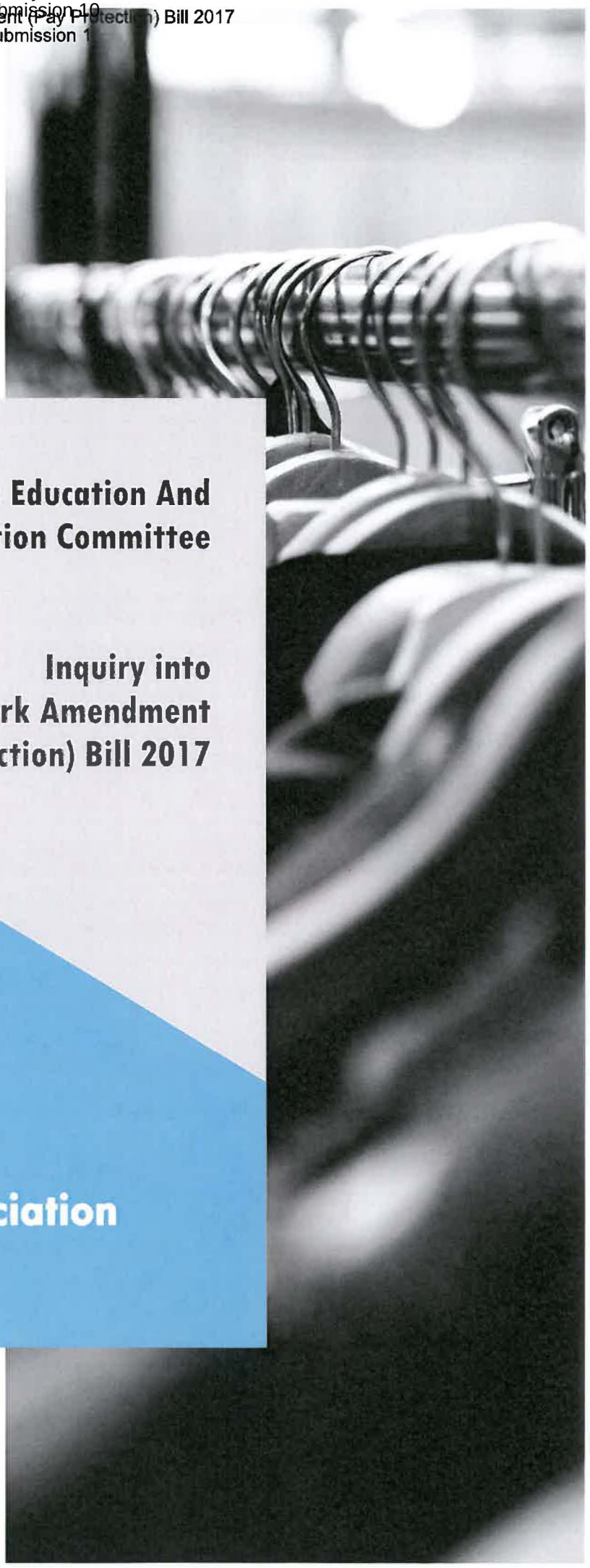
Dominique Lamb

National Retail Association

ANNEXURE A

Submissions to the Committee with respect to the *Fair Work Amendment (Pay Protection) Bill 2017*, 1 May 2017

National Retail Association



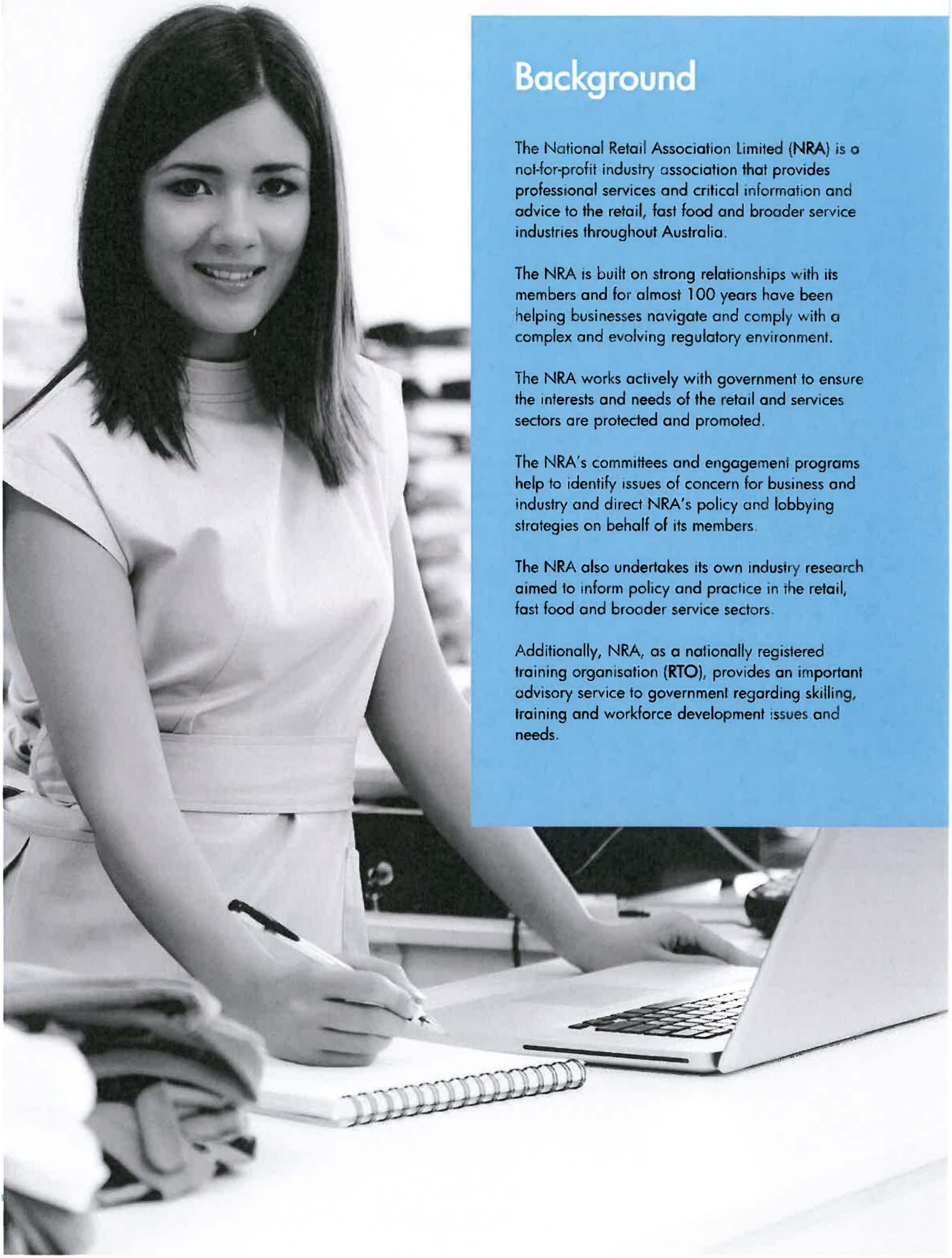
In The Senate Education And Employment Legislation Committee

Inquiry into The Fair Work Amendment (Pay Protection) Bill 2017

SUBMISSION

Prepared by
National Retail Association
1 May 2017

Contents



Background

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

The NRA is built on strong relationships with its members and for almost 100 years have been helping businesses navigate and comply with a complex and evolving regulatory environment.

The NRA works actively with government to ensure the interests and needs of the retail and services sectors are protected and promoted.

The NRA's committees and engagement programs help to identify issues of concern for business and industry and direct NRA's policy and lobbying strategies on behalf of its members.

The NRA also undertakes its own industry research aimed to inform policy and practice in the retail, fast food and broader service sectors.

Additionally, NRA, as a nationally registered training organisation (**RTO**), provides an important advisory service to government regarding skilling, training and workforce development issues and needs.

Overview

On 29 March 2017, the Fair Work Amendment (Pay Protection) Bill 2017 (Bill) was introduced to the Senate by Senator Rihannon. The Bill proposes to change references within the Fair Work Act 2009 (Cth) (FW Act) from "base rate of pay" to "full rate of pay" with respect to enterprise agreements (EA).

The effect of this change is such that an employee's full rate of pay under an EA can no longer fall below their minimum entitlements under a relevant modern award.

Since the Bill's release, the NRA has communicated extensively with its members to collect their thoughts on the proposed changes and how they will impact their business.

This submission details the NRA's response to the Bill for the Senate Education and Employment Legislation Committee's inquiry.

The NRA acknowledges and supports the need to protect vulnerable workers, including the need to hold those persons who seek to exploit vulnerable workers accountable. However, the NRA is opposed to the numerous amendments to the FW Act contained within this Bill and takes the view that the Bill should not be passed.

NRA relies upon the following in support of its position:

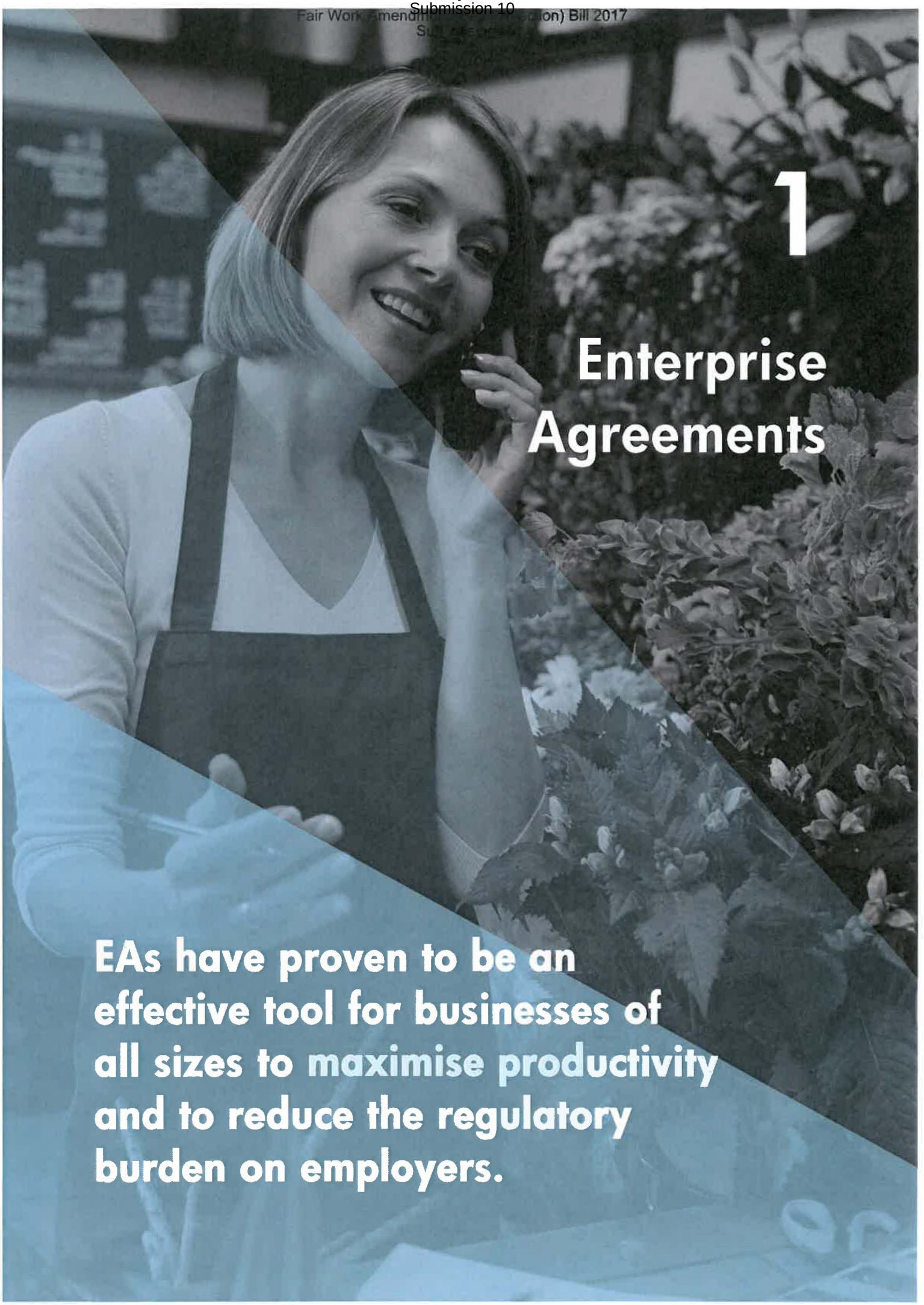
1. There are already sufficient protections in place to ensure that EAs are fairly bargained for between both parties;

2. The better off overall test (BOOT) and other FW Act requirements already set a high standard for approval by the FWC;

3. There are significant onerous implications of the Bill on our members, including, most significantly, a lack of certainty in their business going forward and increased regulatory burdens;

4. The Bill is in contrast to the recommendations from the Productivity Commission (PC) in 2015 to reduce regulatory burdens surround EAs by the use of a no-disadvantage test (NDT) as opposed to BOOT and the use of 'enterprise contracts';

5. Enterprise bargaining is on the decline as reported by the Commonwealth Department of Employment.



1

Enterprise Agreements

EAs have proven to be an effective tool for businesses of all sizes to maximise productivity and to reduce the regulatory burden on employers.

Enterprise Agreements

EAs have long been used to create terms and conditions of employment that are tailored to the individual needs of the enterprise. They are vital, in the sense that they allow employers to bargain for changes to the modern award which are more practical to their business.

Whilst modern awards provide a safety net of minimum conditions within a particular industry, EAs have allowed employers more freedom to address the differences of their business, including terms in relation to:

- Rates of pay;
- Employment conditions (such as hours of work, break entitlements, overtime);
- Consultative mechanisms;
- Dispute resolution procedures;
- Authorised deductions from wages.

That is not to say that employers have complete discretion when determining their EA. There are extensive protections in place to ensure employees are not at a disadvantage during the bargaining process, namely the requirement for employers to:

- Give notice to their employees of their right to representation during the bargaining process;
- Provide a copy of the proposed EA and any other relevant materials to all employees;
- Explain the terms of the proposed EA and their effects on all employees;
- Seek approval from the majority of employees by conducting a vote;
- Comply with the time limits in relation to these obligations;
- Ensure that their employees are better off overall, up until the nominal expiry date of an agreement, when compared to an applicable modern award;
- Apply for final approval from the Fair Work Commission (**FWC**).

The purpose of these requirements is to prevent employers from misleading their employees. As demonstrated in *Peabody Moorvale Pty Ltd*[1], a failure to follow these obligations will result in having to recommence the agreement process, highlighting the burden that rests on employers.

Employees also have the right to apply to terminate an EA once it has passed its nominal expiry date.

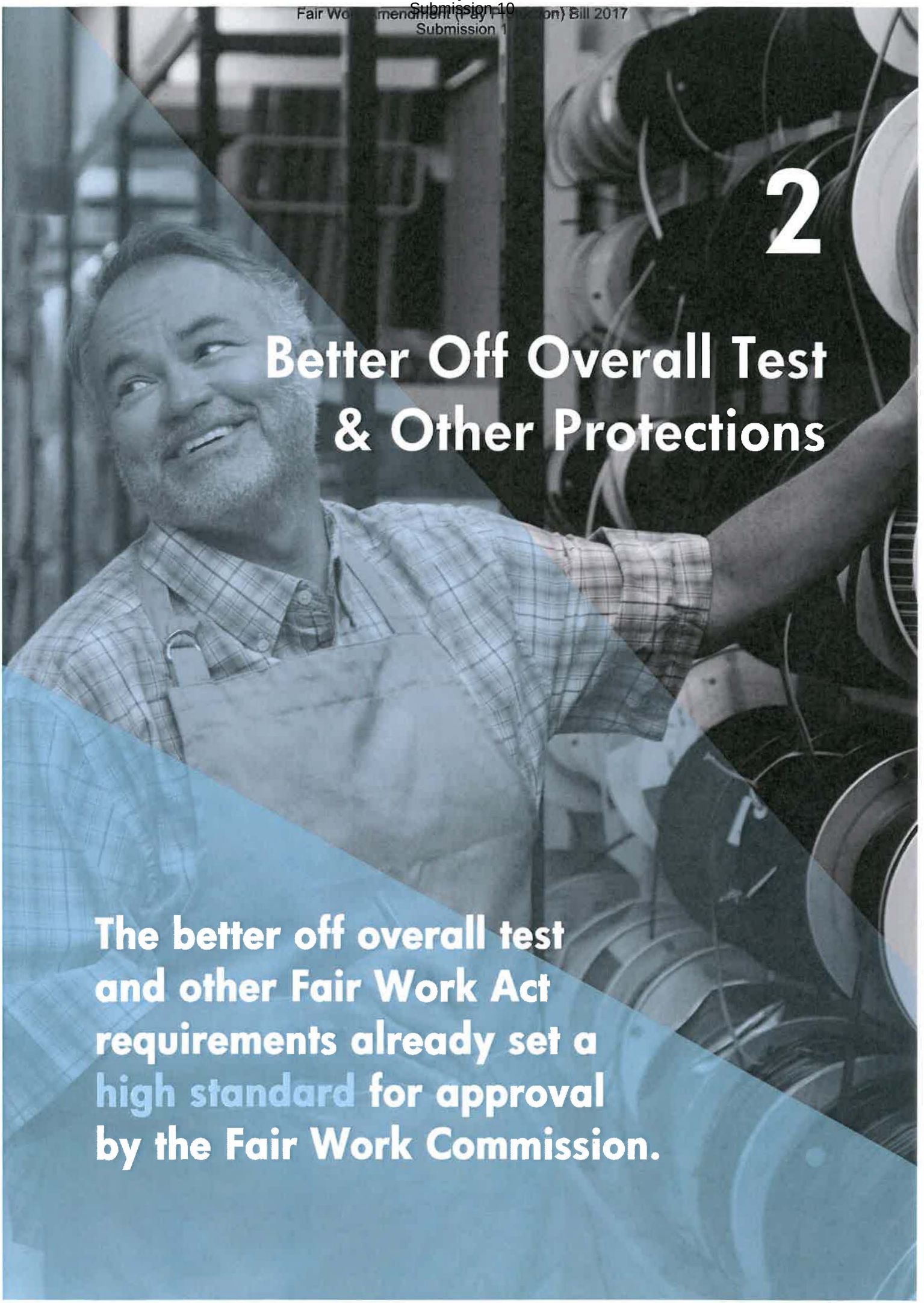
EAs have proven to be an effective tool for businesses of all sizes. They have been used to maximize productivity within the business and to reduce the regulatory burden on employers imposed by the modern awards.

This has been achieved by, for example:

- Reduced minimum shift engagement for casual and part-time employees;
- Altered break entitlements;
- Altered rostering requirements;
- Arrangements which provide administrative flexibility for employers;
- Arrangements which provide flexibility for employees; and
- Cashing out annual leave entitlements.

Furthermore, whilst it is only one incentive to bargain, the ability to "freeze" penalty rates is a major draw card for employers, particularly small businesses who are just starting within the retail, fast food or quick service sectors.

[1] Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FWCFB 2042.



2

Better Off Overall Test & Other Protections

The better off overall test and other Fair Work Act requirements already set a high standard for approval by the Fair Work Commission.

Better Off Overall Test & Other Protections

Enterprise agreements must satisfy the better off overall test (BOOT) before they can be approved by the FWC.

Section 193(1) of the FW Act provides:

> "An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee."

Although this requires the FWC to consider *each* of the employees affected, s 193(7) of the FW Act provides:

> "For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee."

This provision suggests that the FWC does not need to enquire into each employee's individual circumstances as the FWC can examine a class of employees and apply the BOOT generally.

Nevertheless, where a small minority of employees are found not to be better off overall when compared to a relevant modern award, the FWC will not approve the EA. This position was reiterated in the recent high profile case *Hart & Anor v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd t/a Coles and Bi Lo* [2016] FWCFB 2887 (**Coles Decision**) discussed below.

Furthermore, the BOOT is a global test, meaning any reduction in terms and conditions under the modern award must be remedied, in an overall sense, by more beneficial provisions in the EA.[2]

[2] ALDI Foods Pty Ltd re ALDI Minchinbury Agreement 2012, ALDI Stapylton Agreement 2012 and ALDI Derrimut Agreement 2012 [2013] FWC 3495.

Coles Decision

In the Coles Decision, the hourly rate within the EA was higher than the applicable modern award. However, certain penalty rates were lower, which had a significant impact on those working primarily at night, on weekends or on public holidays.

Coles argued that there were sufficient contingent entitlements, namely additional penalty rates, more rest and meal breaks and other leave benefits. However, the Full Bench of the FWC held that some of these benefits were not quantifiable and were likely to have only a minor impact on the benefits to the relevant employees. As such, the EA did not pass the BOOT and was not approved by the FWC.

This decision does not alter the previous position under the FW Act. Employers must still ensure that each employee will be better off overall when compared to the applicable award.

However, this decision demonstrates that contingent entitlements (being dependent on other things occurring) will rarely offset any deficiencies in monetary entitlements. Although they will be considered by the FWC, it will be hard to argue that such benefits leave the employee better off overall.

As such, the NRA submits that employees are adequately protected from an imbalanced or unfair bargaining process. In its current form, the FW Act already sets a high standard for achieving approval from the FWC by establishing the BOOT. Furthermore, this process as a whole is not easy and one where employers and EAs face heavy scrutiny.

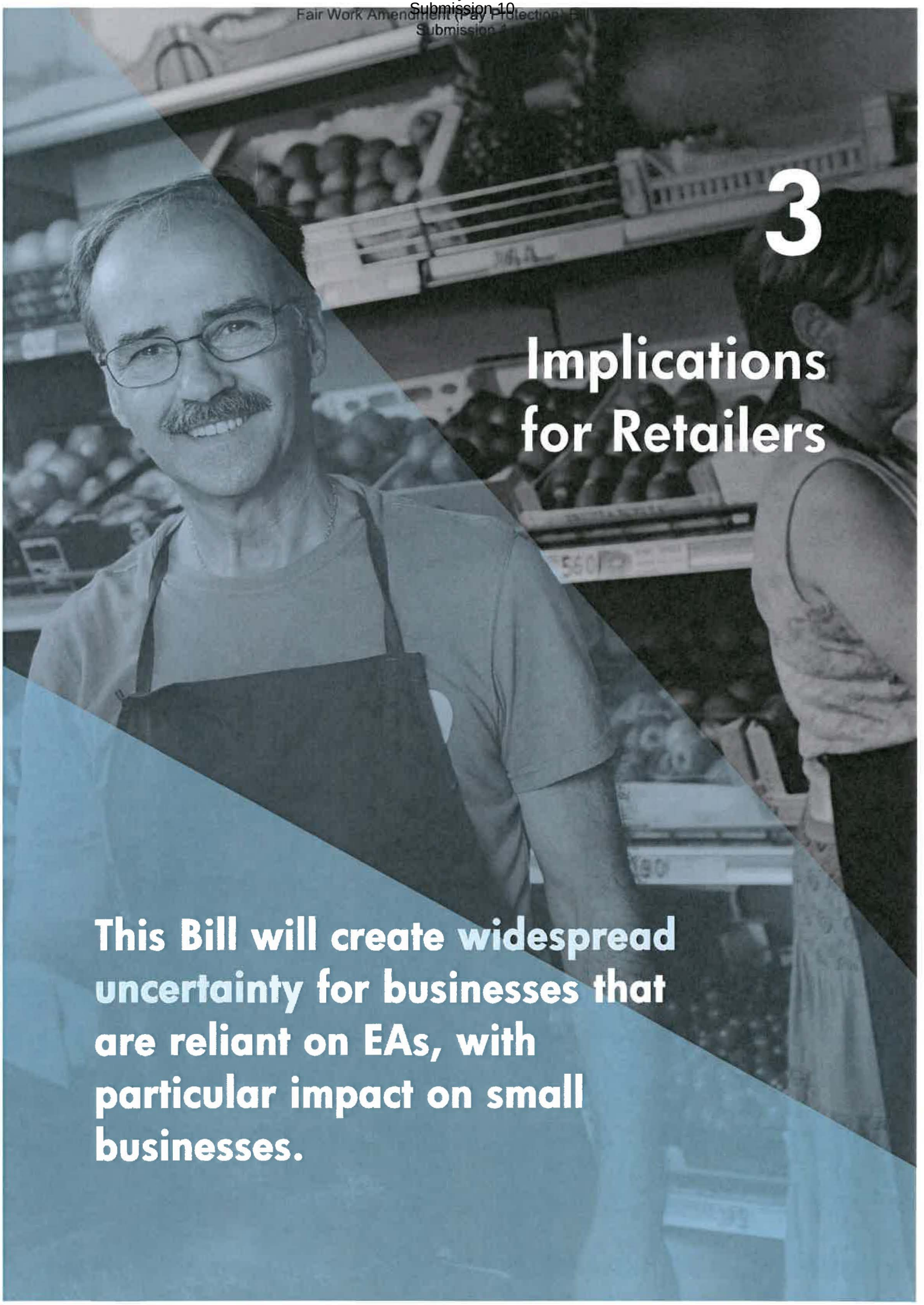
Undertakings

Under section 190(2) of the FW Act, the FWC may approve agreements which would otherwise fail the BOOT if employers have provided a written undertaking to address any outstanding concerns.

The FWC will only accept an undertaking if it is:

- satisfied that it will not cause any financial detriment to an employee;
- satisfied that it is not likely to result in substantial changes to the agreement; and
- has sought the views of each known bargaining representative.

This further supports the argument that there are already sufficient safeguards within the FW Act to ensure that enterprise bargaining is fair for employees. The NRA submits that these provisions provide adequate protections and ensure that any deficiencies within an EA are addressed prior to being approved.



3

Implications for Retailers

This Bill will create widespread uncertainty for businesses that are reliant on EAs, with particular impact on small businesses.

Implications for Retailers

The NRA has consulted with its members to gather their views on the proposed Bill. Our members were given the opportunity to voice their opinion and past experiences with EAs via an online survey comprising twelve questions. The results have been analysed to determine key areas of concern and the implications of this Bill to the retail, fast food and quick service sectors.

Lack of Certainty

It is understood that the changes proposed will apply to existing agreements and those that are yet to come into effect.

This is a major concern for our members, with the majority of respondents to our survey expressing that they are unsure whether they will be able continue to operate under an EA should the Bill come into effect.

This response to our survey demonstrates that this Bill will create widespread uncertainty for businesses that are reliant on EAs.

In the NRA's view, the Bill restricts the desirable uptake of EAs, which are likely to become futile and archaic due to the need to meet all minimum conditions prescribed by a modern award.

Increased Regulatory Burden

This Bill will also require additional labour and administration for employers who rely on an EA.

The majority (84%) of respondents to our survey indicated that their EA includes absorbed base rates of pay with incorporated weekend penalty rates.

As a result, businesses currently operating under an EA and which have been approved within recent years, are likely to be hit the worst by this Bill. Despite their time, effort and expense in obtaining approval for their EA to create some certainty for their business long term, they will be required to make adjustments that have already been bargained for and some will be unable to terminate without approval from their employees.

For some this is a major concern, with one member (respondent #10) stating, "we would not bother [introducing] another EA as the labour for the business could not be managed smartly." Respondent #33 said these changes will result in "more red tape and much more time in preparing pay runs."

The NRA submits that the Bill will increase the regulatory burden that the employer sought to reduce in the first place and act as an unfair penalty to those who currently benefit from an EA.

Reduced Hours of Work & Take-home Pay

Crucially, around 68% of survey respondents revealed that they believe that their employees are better off under their agreement than the modern award, as their EA is set up in a way that provides greater flexibility with ordinary hours of work and therefore, greater take home pay.

According to respondent #15, "[employees] get hours on days that we would otherwise have to close or have reduced staff [on] to cover [the] wages costs under a modern award." They go on to say, "these changes would in fact lead to our store offering less hours. The cost of staff has risen significantly over the past 10 years as we are required to be open more often. However, this has not lead to an equal increase in our turnover. Without EA protection, we couldn't justify all the additional hours or the staffing levels."

This was a recurring theme in our survey responses: that employees are likely to receive significantly less hours and therefore less take home pay, due to the business closing on weekends and public holidays, or business owners needing to work to reduce overheads.

Additionally, respondent #29 revealed that they would only employ junior staff on weekends, in an effort to reduce labour costs. This response suggests that the Bill will not achieve its purpose. It will not offer protection to the most vulnerable workers, who are arguably the lowest paid employees with responsibilities, bills and loans to repay.

Reduced Flexibility

EAs allow employers to hire more staff due to their increased administrative flexibility and stable and predictable labour costs. Where employers are able to hire more staff, they are then able to provide employees within the business with more flexibility.

This is true for 84% of our survey respondents, who confirmed that their EA provides greater flexibility for their employees.

The NRA submits that the proposed Bill would eliminate this advantage and reduce the ability of the employers to offer flexibility within an EA.

With the majority of our respondents unsure as to whether they will continue with their current EAs, there is a concern that this Bill will impact their existing flexibility arrangements. For example, respondent #36 states regarding her EA, "flexibility is much preferred for parents with childcare costs. These changes would take away from their lifestyle and impose additional stress on families."

Small Businesses

Based on our survey responses, it is likely that large employers will continue to operate under an EA., however, small businesses are unlikely to bother negotiating an EA with the ongoing costs and labour required to implement an EA, should these changes come into effect.

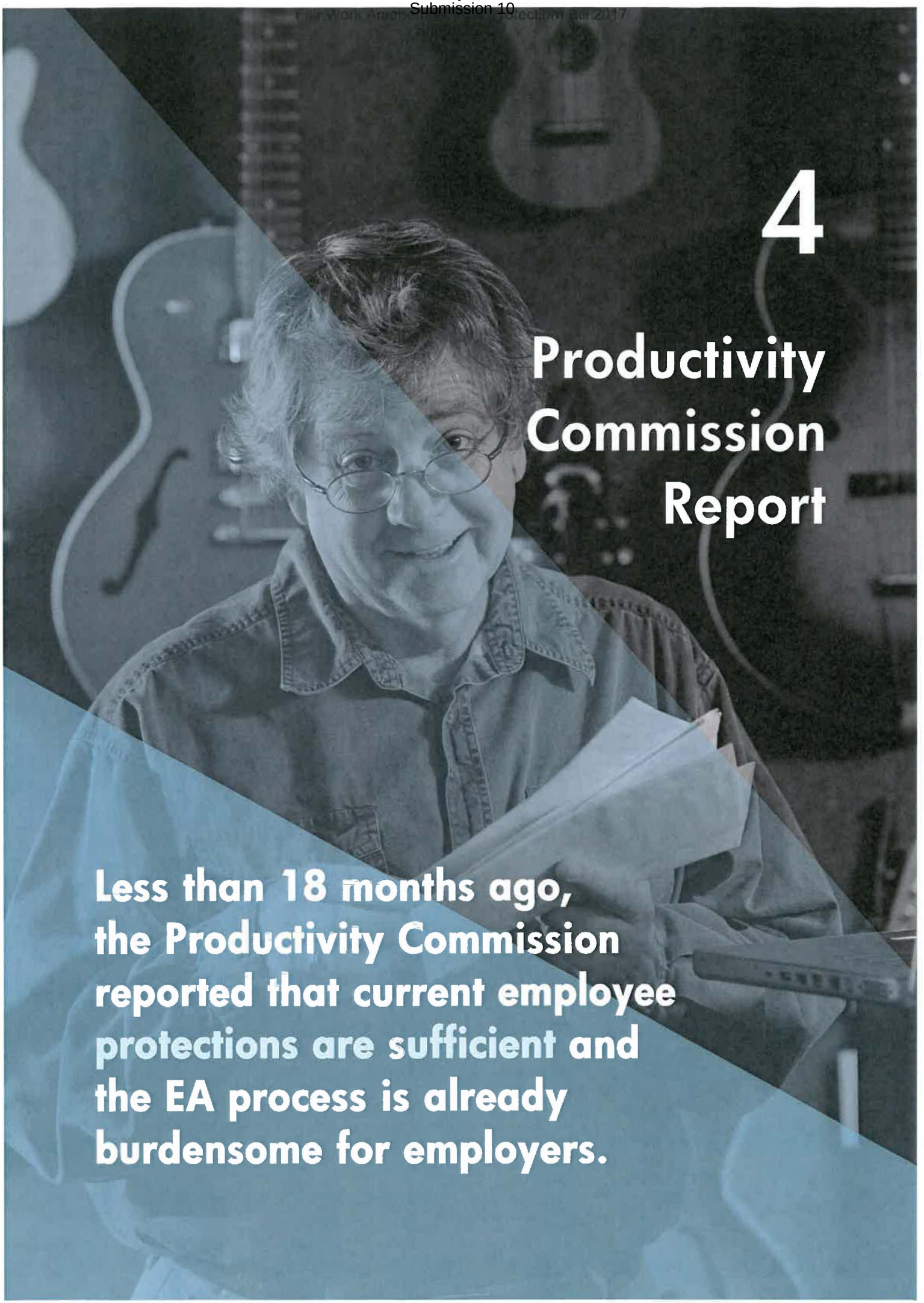
As a result, this Bill is most likely to impact small businesses and those which are just beginning within the retail environment.

New and small businesses benefit exponentially from the ability to have a stable and predictable labour outlay and often attribute the viability of their business to their EA.

For example, respondent #14 is a small business employer and states, "we would be financially unable to operate and forced to close our business, which would mean the loss of approximately 14 employees in our small town."

Similarly, respondent #24 mentions that "operating a small business is becoming increasingly difficult. Profitability is reducing every year. We would consider walking away from our business as being a real option."

Given the vital contribution that small businesses provide to the Australian economy, the NRA submits that the Bill should not be introduced as it likely to have a devastating impact on small businesses.



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Productivity Commission Report

Less than 18 months ago, the Productivity Commission reported that current employee protections are sufficient and the EA process is already burdensome for employers.

Productivity Commission Report

On 30 November 2015, the PC delivered its report and recommendations on the Australian workplace relations framework, indicating that the protections currently in place regarding EAs are sufficient, however. the EA making process is already burdensome enough for employers. The PC recommended changes to ease some of these burdens. Their recommendations include:

No Disadvantage Test

With respect to enterprise bargaining, the PC argued that the NDT is more suitable as a test for approving an EA than the BOOT and achieves the same outcomes more efficiently. They state:

> "The BOOT requires the FWC to be positively satisfied that an agreement will make all employees better off than the relevant award. This provides a wider scope for the FWC to reject agreements at the approval stage when compared with a NDT, because it changes the onus of proof. Under an NDT, the FWC would need to identify how an agreement makes employees worse off overall in order to reject an agreement."

Enterprise Contracts & Individual Flexibility Arrangements

Another suggestion from the PC, in an effort to create better certainty and business efficiency for employers, was the idea of introducing enterprise contracts to compliment the use of Individual Flexibility Arrangements (IFA).

Enterprise contracts would allow employers to vary a modern award for classes of employees (such as night shift employees or weekend workers etc).

The intention was not to undermine collective enterprise bargaining, but to act as a more flexible firm-specific arrangement.

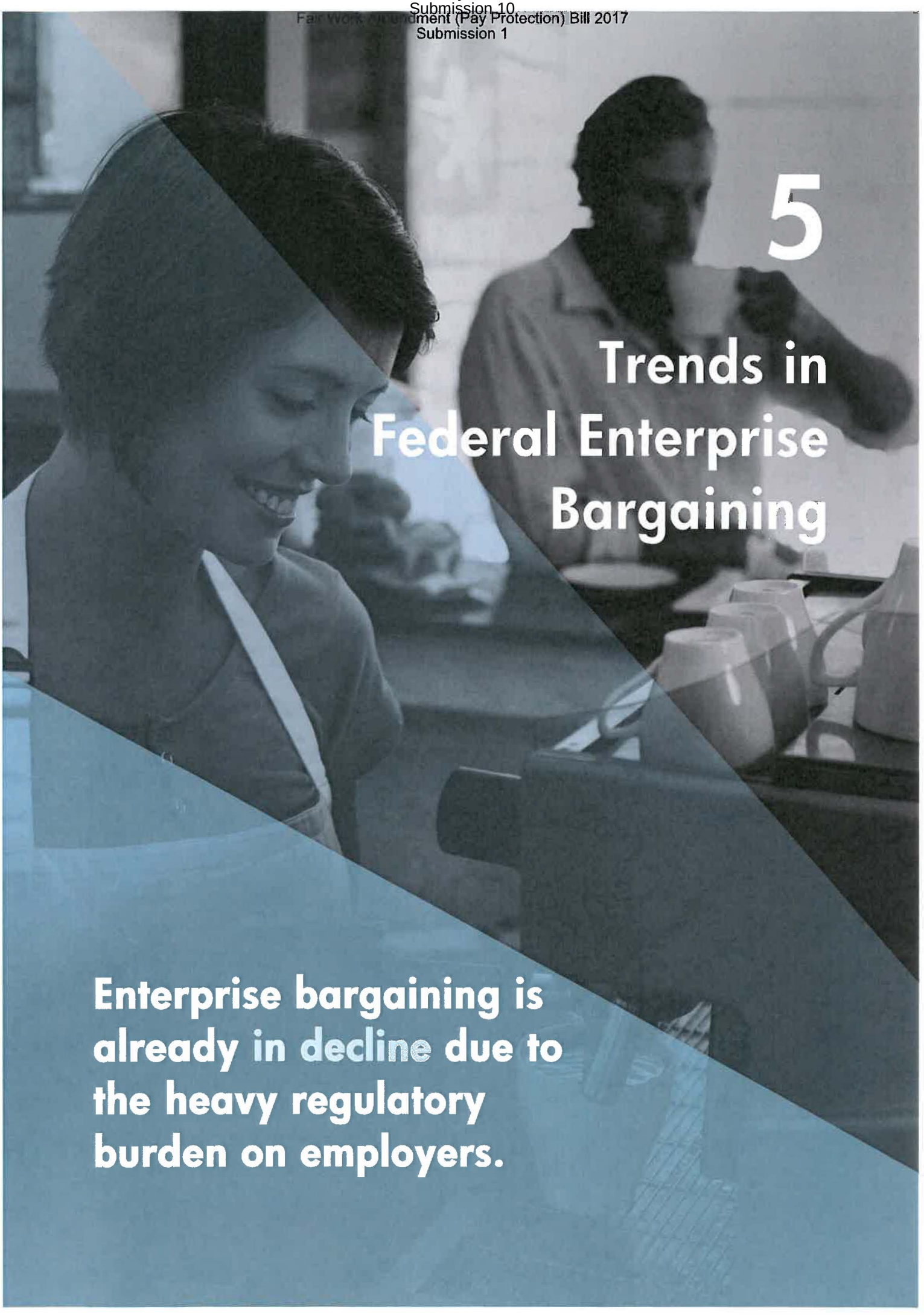
The PC recommended that, as with an EAs and IFAs, these contracts would be subject to a test that ensures the employee is not disadvantaged when compared to the relevant award.

As a way of ensuring certainty, however, employers would be able to seek approval from the FWC of the enterprise contracts and IFAs.

Further, the PC recommended that the enterprise contracts would operate for a nominal term of three years, however as a protection, the contracts would not roll over automatically after the period and employees should be able to opt out after 12 months.

More information on enterprise contracts can be found in the PC Inquiry Report No. 76, 30 November 2015 at page 41.

The NRA submits that this Bill does the opposite of what was recommended by the PC and adds regulatory burdens on employers, reducing certainty of arrangements and reducing flexibility between employers and employees.



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Trends in Federal Enterprise Bargaining

Enterprise bargaining is already in decline due to the heavy regulatory burden on employers.

Trends in Federal Enterprise Bargaining

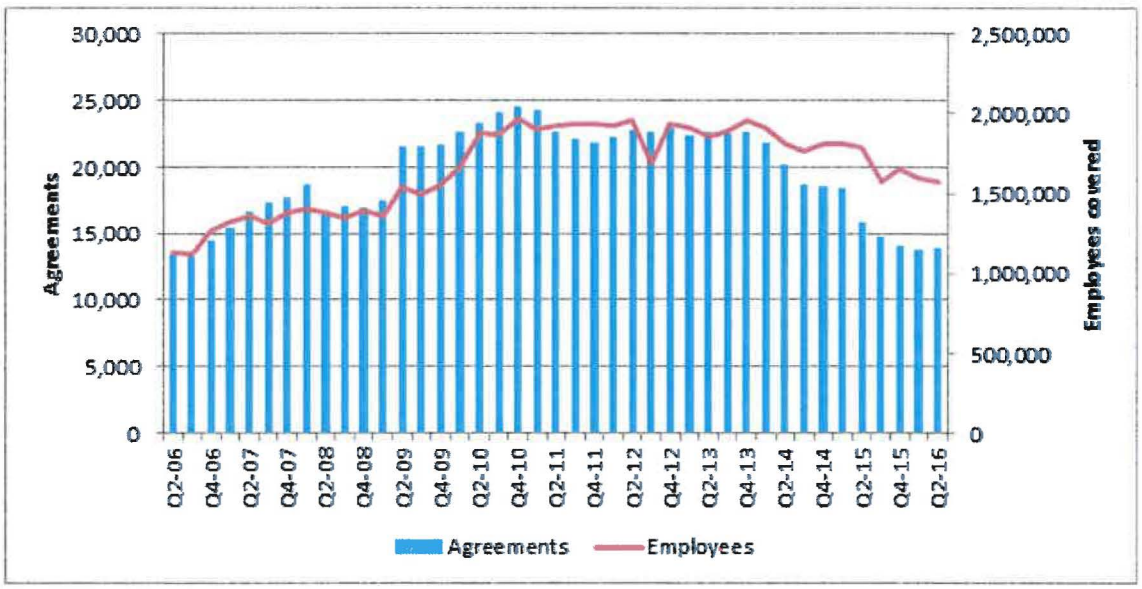
The trends reported in recent data on agreement making indicate that enterprise bargaining is already facing a decline.

Per the Commonwealth Department of Employment, the number of EAs being made is falling, including the number of workers covered by an EA.[3]

The data suggests that fears surrounding the further decline of enterprise bargaining in Australia are substantiated or, in the very least, likely to be realised.

The NRA submits that enterprise bargaining should not be discouraged by creating more uncertainty and regulatory burden for employers whose business may benefit from an EA.

Chart 1: Current private sector agreements and employees covered by these agreements, 2006-2016



Source: Trends in Federal Enterprise Bargaining, Commonwealth Department of Employment, 13 December 2016. https://docs.employment.gov.au/system/files/doc/other/report_on_enterprise_bargaining_2017_final.pdf

[3] *Trends in Federal Enterprise Bargaining*, Commonwealth Department of Employment, 13 December 2016. Available at: http://employment.gov.au/trends-federal-enterprise-bargaining

Conclusion

In summary, the Bill does not offer any further protection for the most vulnerable workers and should not be passed.

The NRA makes its submissions on the basis that there are already sufficient protections in place to ensure that employees are not unfairly disadvantaged during the bargaining process, including the onerous BOOT.

Additionally, the Bill is likely to have serious implications on our members, including a lack of certainty moving forward and increased regulatory burdens. Currently, EAs provide considerable flexibility to employees and allow employers to provide more ordinary hours of work.

Finally, the Bill is in contrast to the recommendations suggested in the PC Report on workplace relations as it seeks to increase the regulatory burden on employers in relation to EAs.

For these reasons, the NRA believes that this Bill will have a significant negative impact on our members that are heavily reliant on EAs and should not be passed.

National Retail Association