

THE AUSTRALIAN RETAILERS ASSOCIATION



INQUIRY: FAIR WORK BILL 2008

SUBMISSION TO

SENATE

**STANDING COMMITTEE ON EDUCATION,
EMPLOYMENT AND WORKPLACE RELATIONS**

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Submission by:

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Australian Retailers Association

- Voice of the Retail Industry

The Australian Retailers' Association (ARA) is the peak national retail association representing the interests of the largest employing industry in Australia. We provide leadership and solutions to improve the long-term viability, productivity and visibility of the retail industry by proactively dealing with government, media and other regulatory bodies on behalf of our members.

ARA members comprise a diversity of sizes and types of retailers reflecting the profile of the retail industry, ranging from large national chain retailers to one-person operators throughout the nation.

The ARA provides a range of comprehensive services, advice and representation suited to both small and large retailers in the areas of employment relations, occupational health and safety, tenancy, consumer law and retail business solutions. This includes a range of retail specific training that supports best practice in retail.

Senate Inquiry: Fair Work Bill 2008

The purpose of the IR Bill is to create a new framework for workplace relations to commence on 1 July 2009. It will:

- establish a guaranteed safety net of minimum terms and conditions;
- ensure that the safety net cannot be undermined by the making of statutory individual agreements;
- provide for flexible working arrangements;
- recognise the right to freedom of association and the right to be represented in the workplace;
- provide procedures to resolve grievances and disputes;
- provide effective compliance mechanisms;
- deliver protections from unfair dismissal for all employees;
- emphasise enterprise level bargaining underpinned by good faith bargaining obligations and rules governing industrial action; and
- establish a new institutional framework to administer the new system comprising Fair Work Australia and the Fair Work Ombudsman.

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1. Executive Summary

1. The Australian Retailers Association (ARA) fully acknowledges that the Federal Government following the release of the Forward with Fairness policy and its subsequent election is legitimately positioned to re-write the industrial relations landscape, in keeping with its policy objectives.
2. Considerable consultation between the federal government, the department of Employment and Workplace Relations and the business community has taken place in 2007 – as evidenced by the DEWR submission to the Senate inquiry on December 11, 2008. However the ARA is concerned that the views of the small business community have not been fully taken into account in the final drafting of the Fair Work Bill.
3. The ARA is very concerned that SME's are not well equipped, resourced or informed enough to be able to cope with the new expectations and obligations imposed upon them as a result of the constant changes in workplace laws. The lack of financial assistance to employer and employee groups to educate and prepare the workplace for the changes will further impede the ability of SME's to adapt with confidence.
4. We request that all Senators fully investigate the combined effect that the Fair Work Bill (the Bill) together with other industrial relations changes will have on employers, labour force affordability and productivity levels. When we consider the combined effect of the National Employment Standards, the new modern Retail Award, this Bill, employers already battling a crisis of confidence will be confronted with an industrial relations environment which; pays lip service to employer' rights, provides unprecedented power to unions who have no union members in a retail establishment and will drive up direct and indirect labour costs.
5. This proposed Bill discriminates heavily against small business - the engine room of Australia's economy. The one size fits all approach to industrial relations is old-world thinking and fails to take into account the needs of the modern workplace. The Bill is heavily skewed towards the practices of large employers and ignores the need for flexibility within a small business struggling to survive such as in retail.

6. The ARA fully respects the fact that employees have rights, but so too do employers. Small business development and consequent productivity improvements, important to the Federal Government will be negatively affected by the Bill's rigorous increase of union power and intrusion into previously union-free environments.

7. The Bill gives unions the power to enter retail premises and garner support from employees, potentially forcing employers operating under the Award to enter into workplace agreements with more substantial conditions.

8. Under the Bill, unions have right of entry provisions allowing them to expose members and non-members alike to union activity. Retailers will pay heavily for these union provisions by being forced to demonstrate good faith bargaining and participate in agreements even though they are operating legally under the Award.

9. This Bill has the potential to lead to collective bargaining and multi-enterprise bargaining for low-paid employees while offering no definition for low-paid. At the very least, we are calling for clarity around low-paid bargaining and whether it extends to employees currently being paid their award entitlements – if this is the case retailers could once again be burdened with increased overheads.

10. Proposed changes to unfair dismissal laws would see that genuine redundancies would not be considered unfair. The Bill fails to define the term “operational requirements” nor does it clarify the extent of obligations employers have regarding redeployment. The proposition that casuals are no longer excluded from bringing about claims is of serious concern given the prevalence of casual employment within retail.

11. The ARA anticipates a real increase in wage bills brought about by the new modern Awards (average of 14% nationally) and a wages breakout as a result of this Bill. Smaller retailers with limited knowledge of industrial relations laws may be additionally burdened by the time and training costs required during the agreement making process, (not assisted by the cost of compulsory arbitration of agreements for the low paid sector).

12. Fair Work Australia's ultimate ability to determine the terms and conditions of employment is a costly load for SME retailers who are already expecting to have higher wage bills and payroll obligations with the new Modern Retail Award.

2. Recommendations

Recommendation 1:

Workplace agreements should only be subject to "no disadvantage" test when compared to the instrument(s) that would otherwise govern employment terms.

Recommendation 2:

Employers should be free to choose whether they wish to negotiate workplace agreements. Good Faith Bargaining (GFB) provisions should be removed from the Bill. Should this not occur, the Bill must provide clarity on when bargaining is considered to have occurred. GFB provisions should only apply once it is established that the parties have agreed to negotiate.

Recommendation 3:

The right of permit holders to inspect and copy documents should be confined to employee records only. Unions should not have access to non-member records or any other non employment related data.

Recommendation 4:

The Bill must define the term "operational requirements" in the context of genuine redundancy. Clarity is required regarding the extent to which an employer is required to consider redeployment. Due to the high number of casuals in the retail sector, number of employees needs to be calculated as Full time Equivalents and not as individual head counts.

Recommendation 5:

The federal government to provide the necessary financial and departmental resources to assist employer and employee representatives to educate employers and employees on their rights and responsibilities under the new industrial relations as a consequence of the various new industrial instruments.

Recommendation 6:

The Bill must clearly distinguish the low paid sector from those who are being lawfully employed and receiving award entitlements. Employers who are meeting their legal requirements under relevant Awards are to be excluded from being roped into the low paid provisions.

2. Overview of the Retail Industry in Australia

(i) Retail Labour Employment

13. The retail industry as at December 2007¹ contributed 5.78% of Australia's Gross Domestic Product (GDP) and is the largest employer in Australia, providing 15% of all jobs².

AUSTRALIAN LABOUR MARKET³

INDUSTRY	PERCENTAGE OF LABOUR MARKET
<i>Agriculture, forestry and mining</i>	3.4%
<i>Mining</i>	1.3%
<i>Manufacturing</i>	10.3%
<i>Electricity, gas and water supply</i>	0.8%
<i>Construction</i>	9.1%
<i>Wholesale trade</i>	4.2%
Retail Trade	15.1%
<i>Accommodation, cafes and restaurants</i>	4.7%
<i>Transport and storage</i>	4.7%
<i>Communication services</i>	1.8%
<i>Finance and insurance</i>	3.7%
<i>Property and business services</i>	11.6%
<i>Government administration and defence</i>	4.6%
<i>Education</i>	7.3%
<i>Health and community services</i>	10.5%
<i>Cultural and recreational activities</i>	2.8%
<i>Personal and other services</i>	4.0%

**rounded to the nearest one decimal place*

(ii) Economic Projections for the Retail Industry

14. The retail industry in Australia has experienced a sharp and steady decline in profit and confidence during 2008 and the economic down turn looks sure to continue into 2009. The latest ACCI- Westpac Survey of Industrial Trends reveals a plunge of general business confidence to the lowest level since the December quarter 1990 with a sharp decline in actual net outcomes for demand, output, employment and investment.⁴

¹ Calculated using ABS Australian Labour Market Statistics 6105.0 January 2008

² Calculated using ABS Australian Labour Market Statistics 6105.0 January 2008

³ Calculated using ABS Australian Labour Market Statistics 6105.0 January 2008

⁴ ACCI Media Release 18/12/08

15. The trend estimate of turnover for the Australian Retail series increased by .02% in October 2008.⁵ However, this meagre increase is most likely a result of the anticipated seasonal Christmas trading boost and cannot be viewed as a permanent positive turn for the retail industry. The reality of the situation is reflected in retailer's expectations for employment in the coming months. "Looking forward, retailers reported lower expectations for employment for the current quarter. A net negative two per cent of retailers reported expecting to increase their employment levels in the coming quarter, down five percentage points."⁶

16. The extent of the damage the global economic crisis is having on the retail industry was highlighted in September when retail sales suffered the biggest monthly slide in three years despite the first interest rate cut since 2001. Retailers have continued to suffer since September as unemployment rises and economic pessimism about the future spreads.

17. Small retailers have proven particularly vulnerable to the current economic climate and with out Government assistance many look sure to collapse in 2009. In September 2008, "profit growth (in small business) continued its significant decline below the key 50.00 level to 36.5 – more than ten points below the five year average, and the lowest level since the ACCI Small Business Survey began in December 1996."⁷

18. Expected economic performance also declined to its lowest since December 1996 and is almost 20 points below its five year average, showing that small business expects a continued deterioration in Australia's rate of growth over the next twelve months.

⁵ ABS Retail Trends, Australia Oct 2008

⁶ ARA Retail Index December 2008

⁷ ACCI Small Business Survey November 2008

3. What the *Fair Work Bill* will mean for retailers

19. Some of the points contained below are generic to most small to medium sized businesses. At the heart of our concern with the Bill is:

- the unprecedented power it gives to unions to enter premises where they have traditionally not had a presence;
- the compulsory arbitration of agreements particularly with the low paid workers sector;
- the possible pattern bargaining that will occur as a result of good faith bargaining; and finally
- the inclusion of extensive low paid provisions with a much wider coverage than the usually understood sectors of TCF, child care, cleaners etc.

20. The ARA believes that the combined effect of the points above will lead to a situation of further contraction in the retail labour market – there is already considerable economic evidence on rising unemployment levels across all industry sectors. Rather than witnessing an expansion in permanent employment, at best the casualisation of the workforce will be increasingly seen as the only viable option for employers striving to retain employees.

21. Minister Gillard in the second reading speech on the Bill stated:

“The Bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age. It balances the granting of rights with the imposition of responsibilities.”

The Ministers intention if followed through by the Bill would be totally supported by the ARA and its members. Unfortunately the “Objects of the Bill” fail to reflect the needs of the employer in the new industrial environment.⁸ We are perplexed as to why in the modern age the principles of fairness for the employer are not even given a cursory mention in the Objectives of the Bill.

22. The ARA notes that the industrial relations pendulum whilst expected to swing back from the pre-2007 regime has now swung further than SME employers envisaged and further than originally outlined by the Minister through the Forward

⁸ Fair Work Bill 2008, Division 2, Page 3

with Fairness policy. This is a view shared by many external observers not just the employer groups of Australia.

4. Agreement Making

23. ARA is very concerned about the introduction of certain agreement-making provisions. Before highlighting our concerns it is clear that the government is trying to promote collective bargaining through its reforms.⁹ The ARA takes no issue with that concept in itself; however, we believe that in order for retailers to embrace collective bargaining there needs to be a reasonable minimum safety net as well as reasonable rights throughout the process. The ARA believes the proposed reforms would achieve neither.

(i) The Minimum Safety Net

24. The current financial crisis and uncertainty as to its duration reflects the need for the government to act very cautiously when establishing minimum safety nets both generally and for agreement-making purposes. The ARA and economic forecasters in general all agree that the uncertainty surrounding our current economic conditions will continue for 2009 and into 2010.

25. The introduction of modern awards already means that retailers are facing increased payroll and flow-on costs from 1 January 2010. The ARA has previously made submissions to the AIRC regarding award modernisation for retail and has also identified the following increases in payroll costs for retailers in each state. This is further explored later in our submission.

26. The proposed National Employment Standards (NES) reflect a further elevation in entitlements for employees and it is understood that these will form the minimum safety net for enterprise agreements along with modern awards. Whilst the ARA does not oppose agreements being subject to a form of “no-disadvantage test” as is currently the case, it is very much opposed to the introduction of a test

⁹ Fair Work Bill 2008, Part 1, Div 2, s3(f)

requiring agreements to reflect superior conditions to what would otherwise be the minimum safety net.

27. Why is there a need to force employers to provide superior conditions rather than simply not disadvantage employees by providing an equivalent safety net in a varied form? We believe the government has failed to afford sufficient reasoning for this proposition and rather than encouraging employers to embrace agreement-making it will likely have the effect of deterring them from it.

(ii) Good Faith Bargaining

28. ARA is very concerned about the proposed introduction of good faith bargaining provisions. It should be the absolute prerogative of any business owner to decide whether they wish to enter into a workplace agreement or not. There is absolutely no justification for forcing an employer to negotiate workplace agreement terms when they are complying with the safety net and other award entitlements applicable to that industry sector.

29. What the reforms propose effectively forces employers into the negotiation process expending time, money and other resources when there may be no interest from the employer to begin with.

30. Given that the retail sector is predominantly comprised of small and medium size businesses, most do not have the time nor the resources required to deal with the proposed good faith bargaining requirements. We believe that this could allow unions to take advantage of small and medium size businesses as they may be threatened with applications for bargaining orders if they refuse to give in to union demands. Most of these business types are unlikely to employ dedicated HR or IR staff and hence, are not properly equipped to make informed decisions or judgements about such matters.

31. Of further concern to us is the apparent lack of clarity on when bargaining is actually taking place. The Bill does not appear to provide specific explanation or guidance on this point and given that arbitration could result from the process, it is critical that employers, unions and employees are aware of when they are considered to be bargaining so far as the law is concerned. Parties may be in

general discussion about the possibility of agreement implementation but this could be a far cry from what might be seen as actual negotiations or an agreement to bargain.

32. In the event that good faith bargaining remains part of the reforms, any such requirements should only commence applying once it can be established that the parties have actually agreed to negotiate the terms of a workplace agreement.

5. Low Paid Provisions

33. The Low Paid provisions in the Bill are most concerning to the retail sector. The failure by the Bill to articulate exactly who or what is to be considered low paid leaves the final determination to Fair Work Australia after a potentially costly process undertaken by employee bargaining agents against individual or whole industry sectors. This is notwithstanding the assurances given that pattern bargaining will not be allowed.

34. While Minister Gillard on a number of occasions, including in the second reading speech refers to the low paid as being typified by *“employees in industries like child care, community work, security and cleaning...”* the definition of what is low paid remains very ambiguous. If low paid means anyone on an Award payment then the ARA has some very serious concerns.

35. The ARA notes that while the Minister has attempted to confine those on low paid to these industries, unions in the past have argued that all employees on award rates and not involved in productivity bargaining arrangements are considered low paid. The ARA supports the ACCI submission that draws attention to the extension of such a definition to employers who have done nothing more than being lawful.

36. The retail industry, putting aside large national retailers, has traditionally been characterised as an award-reliant industry. Employers paying award wages and award conditions are being lawful in their employment practices. Employees being paid award wages are not being disadvantaged.

37. Low paid provisions will lead to pattern bargaining – if not overtly then by result. Awards have been negotiated and improved on over the years to take into account the specific industry environment. Awards are based on concepts of relativity and for years we had comparative wage arguments which we will now return to via the low paid provisions.

38. These same employers are rightfully alarmed at the prospect of being subjected to hostile low paid bargaining actions as mooted by some union officials. This possibility must be clearly prohibited by the Bill.

39. Difficult to understand the intent of having the Low Paid provisions in the Bill – a combination of the NES and the new Modern Awards has meant that those employees traditionally considered low paid will have protection in legislation and through industrial instruments never previously experienced. The argument that low paid should be just as entitled as anyone else to productivity based employment improvements is misguided and naive.

40. The Award has been modernised, the NES has been put in place with its ten minimum safety standards, allowing the Fair Work Australia to have determination and arbitration powers for this sector is a massive undertaking for retailers. Retailers paying the Award who believe they are doing the right thing by having Award conditions may now find themselves roped into pattern bargaining or determinations by FWA with ensuing higher labour costs. The sector is already undergoing major economic survival difficulties.

41. Adding further low paid measures simply will lead to wage blow outs and unnecessary representation in a small to medium employment sector which is sensitive to cost.

6. Right of Entry Provisions

42. The enactment of the Bill will expose the retail industry to union pressures through the expansion of the right of entry provisions. Although a number of aspects contained in the current *Workplace Relations Act 1996* are retained – the main changes which relate to the expansion of powers to reach non union members will

have a significant impact on the retail industry. As the retail industry is not highly unionised employers have not had significant exposure to powers and presence of union officials (permit holders).

43. The ability for union officials to make copies of, any record or document relevant to the suspected contravention has alarmed retail employers. The main issue relates to the fact that the right to inspection and copying of documents is not limited to employee records.

44. The union's ability to enter a workplace on the grounds of suspected contraventions of the Bill could also result in increased union presence within the retail industry. The increased presence would be a result of the entry being granted on the basis that the suspicion of contravention is formed in the mind of the union official. Contesting the lawfulness of a right of entry request will be both costly and time consuming for retailers who have not had experience with union action.

45. Under the objective test the suspicion must be reasonable in order for a permit holder to enter a workplace. Although the onus of proof is with the permit holder to justify that the suspicion is a reasonable one, retailers may find they have limited choice when granting entry due to restricted access to protective measures.

46. Union presence will also be enhanced by a permit holder's ability to enter premises for the purpose of holding discussions with members, and people eligible to be members of the permit holder's organisation. Right of Entry rules as permitted by this Bill will not constrain the ability of the union official to conduct activities within the workplace environment other than those originally cited in the entry permit.

47. The default appointment of the union as the bargaining representative could subject retailers to the pressures of the union in the bargaining process despite having minimal exposure previously. The default appointment will continue to expand the right of entry for union officials into the workplace.

7. Unfair Dismissal

48. Unfair dismissal provisions contained in the Bill will re-introduce the concept to the retail industry.

49. The concept of dismissals on the basis of genuine operational reasons has been removed and has been replaced by a provision that states that dismissal is not unfair should it be for a case of genuine redundancy. Although genuine redundancy is defined within the Bill - retailers will face difficulties in determining when it is not a case of genuine redundancy.

50. Genuine redundancy is taken to occur when the job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Examples of what is deemed operational requirements are provided in the explanatory memorandum but a definition is not provided in the Bill.

51. The Bill indicates that it is not a case of genuine redundancy if it would have been reasonable for the employer to redeploy the employee. The Bill extends redeployment to within the enterprise and an enterprise of an associated entity of the employer. The extent of the requirement to redeploy to an enterprise of an associated entity of the employer would need to be clarified for retailers. For example how will this relate to a franchise system operation or a retail employer with multiple business entities? The Bill leaves the matter to Fair Work Australia's determination thereby once again tying retailers into a costly system.

52. The retail industry could also be largely affected by the fact that casual employees are no longer excluded from the unfair dismissal provisions of the Bill. As the retail industry largely engages employees on a casual basis – the minimal requirements for access to unfair dismissal could see retailers being subjected to an area of employment law that they have not previously been exposed to.

53. ARA members are indicating that with the counting of an employer's workforce to be actual head count as opposed to equivalent full time and the procedural rights under the unfair dismissal provisions a return to "go away money" will once again return, as happened under the previous legislation prior to 2004.

8. Combined Effect of “the Bill” and the Modern Retail Award

54. The ARA in preparation for the modern retail award contracted Piper Alderman legal services, principally its noted labour law expert Professor Andrew Stewart to provide guidance on determining the financial costs of various award changes and roster arrangements. The model provided by Professor Stewart has enabled the ARA to conclude that at a very basic level, a small retailer with two full time and two casual employees would have a wage bill increases of up to \$28,500.

55. A close examination of the direct labour costs of the new award on a State by State basis shows that the small retailer will incur the following:

New South Wales:	\$28,473p/a	(16.5% increase)
Victoria:	\$18,821p/a	(11.5% increase)
Queensland:	\$25,402 p/a	(15.5% increase)
Western Australia:	\$19,496 p/a	(11.5% increase)
South Australia:	\$26,123 p/a	(15.6% increase)
Tasmania:	\$23,693 p/a	(14% increase)
Australian Capital Territory:	\$24,863 p/a	(15% increase)
Northern Territory:	\$15,581 p/a	(9.5% increase)

56. To an average Australian small retailer the financial impact of the new award will hit their bottom line. Larger retailers may be able to absorb the new award's wage bill rise but smaller retailers simply cannot afford another blow in this tightening economic climate, which is further compounded through this Bill.

57. The Retail industry far from having an industrial playing field commensurate with the 21st Century demands of consumers is handicapped by a so called 'modern' retail award which also includes a penalty rate structure reminiscent of the 1980s and ignores the seven day trading demands of modern consumers.

58. Under the new award smaller retailers are penalised for being open to meet consumer demand with overtime and loadings taking effect after prescribed working days not prescribed working hours. This means to stay open and meet consumer demand a small retailer must pay more for staff on a Sunday than they do on a Monday.

59. The ARA has never objected to the payment of penalty rates. It has argued that any modern workplace attempting to meet the conflicting demands of consumer trading hours expectations and employee's needs for work-family balance should pay penalty rates on those hours outside the normal work pattern arrangements, whenever the hours are worked.

60. The objectives set out in the Minister's original request for award modernisation to the AIRC have not been achieved. Instead the focus of the award modernisation has been on simplification and rationalisation. The new retail award has overwhelmingly failed to respond to the modern retail market. The result is an unnecessary financial imposition on retailers who are struggling and who were just beginning to smell an air of confidence following the Rudd Government's Economic Stimulus package. We ask that the Senate do not make the same mistake with the punitive costs expected to flow from this Bill.

61. There is no doubt consumers will foot the bill through price increases on goods and groceries. Both the AIRC's new modern retail award and if enacted in its current form the Fair Work Bill, will ensure increased costs with the consumer paying at a time when they can least afford it. Further inflationary pressures of this nature at a time of a shrinking labour market and crisis of confidence amongst employers and taxpayers is the last thing the retail sector, the economy or the Australian government should be sanctioning.