



National Retail Association

IN THE SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT

Submissions of the National Retail
Association on the *Fair Work
Amendment (Family and Domestic
Violence Leave) Bill 2018*

DATE: 24 September 2018
Lodged by: National Retail Association
Address for service: Level 3, 33 Park Road, Milton QLD 4064
Contact: Calum Woods

PREAMBLE

- [1] The National Retail Association (**NRA**) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and under Chapter 12 of the *Industrial Relations Act 2016* (Qld).
- [2] At present, the NRA has over 5,500 members across Australia in the retail, fast food, hairdressing and beauty, and hardware industries, representing 19,000 shop fronts and their attendant employees.
- [3] Under one name or another, the NRA has been representing employers in the retail, fast food, quick service and hair and beauty sectors in Queensland, and more recently throughout Australia, for almost 90 years. The NRA's membership encompasses some of the largest retail enterprises in Australia, as well as a plethora of small and medium businesses, including franchisees and licensees.
- [4] The Federal Government has introduced the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* (**Bill**) that seeks to incorporate a new type of unpaid family and domestic violence leave into the National Employment Standards (**NES**) under the *Fair Work Act 2009* (**FW Act**).
- [5] The entitlements in the NES are accessible to all national system employees in Australia, including retail and fast food workers, senior executives and Members of Parliament, regardless of whether a modern award, enterprise agreement, or employment contract applies to their employment.
- [6] The Bill has been referred to the Senate Standing Committee on Education and Employment (**Committee**) for inquiry. The NRA has sought the views of its members with respect to the Bill, and thanks the Committee for the opportunity to provide submissions on their behalf.

BACKGROUND

- [7] Recent research suggests that the most prevalent victims of domestic violence in Australia are women aged between 18 and 24.¹ As the largest employer of young people in Australia, almost one third of women working in the retail industry are aged between 15 and 24.
- [8] In 2016, the NRA commissioned research into the impact of family and domestic violence in the retail industry. The NRA estimates that for the period 2014/15, almost 45,000 women working in the retail industry experienced some form of family or domestic violence, costing the industry approximately \$62.5 million per annum in lost productivity, absenteeism, and staff turnover, with a direct cost to employers of \$1,404 for each instance.
- [9] As such, the NRA has actively advocated on the behalf of its members in respect of this issue across a number of forums.
- [10] On 26 March 2018, the Full Bench of the Fair Work Commission (**Commission**) determined to vary 120 modern awards to include an entitlement to 5 days of unpaid family and domestic violence leave.² The determinations came into effect on 1 August 2018, and are accessible to over 2 million award-reliant employees in Australia.³ The NRA supported the introduction of the entitlement into modern awards. Feedback received from members suggests that the financial

¹ Australian Bureau of Statistics 2016, *Personal Safety*, Australia 2016, cat. no. 4906.0.

² *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 1691.

³ An “award-reliant” employee is one whose employment is “covered” by a modern award, and an enterprise agreement does not apply to their employment: *Fair Work Act 2009* (Cth) s.47(1); Australian Bureau of Statistics 2016, *Employee Earnings and Hours*, Australia May 2016, cat. no. 6306.0.

impact of the entitlement has been negligible, with one member (with a workforce exceeding 2,000) budgeting for an increased cost of 0.05% as a result of the entitlement.

- [11] The intention of the Bill is to extend the existing entitlement to take 5 days unpaid family and domestic violence leave from award-reliant employees to all national system employees covered by the FW Act.

SUBMISSIONS

Protection against receiving a “double benefit”

- [12] The NRA supports the inclusion of the entitlement in the NES, however submits that in its current form, the Bill may have the unintended consequence of allowing award-reliant employees the benefit of both the entitlement in modern awards and in the NES.
- [13] The FW Act contains provisions intended to avoid the “double benefit” of entitlements, where the same (or substantially similar) entitlement is contained in both the NES and a modern award or enterprise agreement that may apply to a person.⁴
- [14] The NRA submits that the protection against receiving a double benefit is only enlivened in a limited number of circumstances, as permitted by s.55(6) of the FW Act. In the case of modern awards, the protection will apply where the terms of the modern awards are “*ancillary or incidental*” or “*supplementary*” to the operation of an NES entitlement.⁵
- [15] The FW Act specifically delineates between modern awards and enterprise agreements in this regard. The restriction against receiving a double benefit in respect of enterprise agreements will apply where the enterprise agreement contains terms that are “*ancillary or incidental*” or “*supplementary*” and also where it contains terms “*that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms...*”⁶
- [16] A similar provision does not exist in respect of modern awards. The circumstances in which the protection against receiving a double benefit are enlivened are more confined in respect of modern awards, than they are for enterprise agreements.
- [17] The NRA has concerns that the existing modern award entitlement, which substantially replicates the proposed NES entitlement, is not strictly “*ancillary or incidental*” or “*supplementary*” to the entitlement in the NES.
- [18] The entitlement in modern awards preceded the NES entitlement. The FW Act does not define what is meant by “*ancillary or incidental*” or “*supplementary*,”⁷ and as the Full Bench of the Commission observed, issues relating to the interpretation of this provision “*are not without a degree of complexity.*”⁸

Privacy and confidentiality

- [19] The NRA also has concerns with respect to the implementation of the entitlement. The absence of education for employers surrounding their obligations both legally and what constitutes best practice having specific regard to the importance workplaces play in such scenarios has generated some concern amongst the NRA’s members.
- [20] Work health and safety legislation requires employers to ensure the safety of workplaces for all persons. The confidentiality obligations in both the modern award entitlement and the

⁴ *Fair Work Act 2009* (Cth) ss.55(4),(5) and (6).

⁵ *Ibid* s.55(4).

⁶ *Ibid* s.55(5).

⁷ *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 1691 at [136].

⁸ *Ibid* at [154].

proposed NES entitlement create competing obligations for employers. For instance, if an employee notifies their employer of an intention to access family and domestic violence leave, how far must an employer go in order to discharge their obligations?

- [21] While the Bill (and existing modern award entitlement) permits employers to disclose information where it is “*necessary to protect the life, health or safety of the employee or another person,*” this places employers in the impossible position of balancing their confidentiality obligations and assessing the risk to individual employees.
- [22] Additionally, there is some difficulty in navigating privacy in such situations, where an employer is obligated to protect a worker who has made a disclosure, but cannot communicate specifics with other employees whose safety may be affected by such a disclosure.
- [23] Similarly, anti-discrimination legislation and the general protections provisions under the FW Act prohibit employers from taking adverse or discriminatory action against employees in certain circumstances. These circumstances include both being the victim of family and domestic violence, and accessing the leave entitlement.
- [24] The obligation that employers may have to reduce the risk of family and domestic violence in the workplace may, in some cases, amount to a breach of these protections. For example, changing an employee’s roster pattern to reduce the interaction they have with another employee may amount to an adverse or discriminatory action, despite the fact that the employer was obligated to make the change.

RECOMMENDATIONS

- [25] While it is preferential for modern awards to not substantially repeat matters in the NES if they are to have no separate benefit,⁹ the process of removing the entitlement from modern awards involves a significant amount of time and complexity. The NRA is not advocating for the removal of the entitlement from modern awards but instead urges the Committee to consider drafting changes to clarify the unintended ambiguities arising from the Bill.
- [26] The following recommendations of the NRA would remove any ambiguity surrounding the possible unintentional double benefit of both the entitlement in the modern awards and the NES, as well as any future ambiguity that may arise from further variations to modern awards and the NES.
- [27] The NRA recommends that ss.55(5) and (6) of the FW Act be amended as follows:
- (5) An modern award or enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).
- (6) To avoid doubt, if a modern award ~~includes terms permitted by subsection (4),~~ or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the **award or agreement entitlement**) that is the same as an entitlement (the **NES entitlement**) of the employee under the National Employment Standards:

...

⁹ See also *Fair Work Act 2009* (Cth) s.134 (g) which requires the Commission to ensure the modern awards system is “*simple, easy to understand, stable and sustainable... that avoids unnecessary overlap of modern awards.*” The introduction of the entitlement in the NES would create an unavoidable overlap of entitlements.

[28] Furthermore, for the removal of doubt, the NRA recommends that s.61(1) of the FW Act be amended as follows:

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if a modern award or enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows modern awards and enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

[29] The NRA notes that the FW Act permits employers to take “*adverse action*” against employees where that action is authorised by a State or Territory law prescribed by the *Fair Work Regulations 2009 (FW Regulations)*.¹⁰ The NRA recommends that the FW Regulations are amended to include that, for the purposes of s.342(3)(b) of the FW Act, ***State or Territory OHS laws*** are prescribed, and that this has the same meaning as regulation 3.25 of the FW Regulations.

[30] The NRA is grateful for the opportunity to represent its members in relation to the Bill. If the NRA can be of any further assistance, please do not hesitate to contact the NRA Legal Practice Director, Lindsay Carroll.

Lindsay Carroll
Legal Practice Director
National Retail Association

Calum Woods
Lawyer/Senior Workplace Advisor
National Retail Association

¹⁰ *Fair Work Act 2009* (Cth) s.342(3)(b).