5 February 2021

Committee Secretary
Senate Education and Employment Committees
PO Box 600
Parliament House
Canberra ACT 2600

Dear Committee Secretary

The ARA welcomes the opportunity to provide a submission to the Education and Employment Legislation Committee (**Committee**) in its inquiry into the provisions of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**Bill**). The ARA had the distinction of being invited to participate in the Working Group process instituted by the Attorney-General which was the precursor to the Bill and believes it can assist the Committee in its consideration of the Bill. The retail industry will continue to be a key contributor to the Australian economy as we continue the recovery from the COVID-19 pandemic and as such it is important that the views of those working within the industry are considered.

As Australia's largest retail industry group, the Australian Retailers Association's (ARA) represents around 7,500 independent and national members and, since 1903, has been the trusted voice for Australia's $340 billion retail sector, which employs more than 1.2 million people.

The ARA, through its long-standing membership of the Australian Chamber of Commerce and Industry (**ACCI**), has been involved in the development of the submissions to the Committee of ACCI. The ARA broadly supports the submissions and recommendation of ACCI, and provides these submissions to augment those submissions and to clarify matters that are of particular interest to the retail industry. The most critical reform areas for the retail industry are:

1. Casual Employees (Schedule 1 to the Bill).
2. Modern Awards (schedule 2 to the Bill).
3. Enterprise Agreements (Schedule 3 to the Bill).
4. Compliance & Enforcement (Schedule 4 to the Bill

Schedule 1 – Casual Employment

The issue of casual employment is of importance to the retail industry as the industry employs a higher proportion of casual employees when compared with all industries.[1] Flowing from this, any changes in the regulation of casual employment and/or the administrative elements of engaging and managing casual employees will have a substantial impact on the retail industry.

By way of summary, the ARA:

1. supports the inclusion of a casual definition in the *Fair Work Act 2009* (**Act**), and supports the definition proposed in the Bill with the amendment suggested below;
2. provides qualified support for the inclusion of a broad right of casual conversion, subject to the amendments set out below; and
3. supports the terms of proposed section 545A of the Act with the amendments set out below.

[1] ABS, *Labour Force, Australia, Detailed,* August 2020. Just under 40% of retail trade industry employees are defined as casual (without paid leave) compared to just over 20% for all industries.

Casual definition

The ARA supports the casual employee definition set out at Item 2 of Part 1 of Schedule 1 of the Bill. The definition will provide employers and employees with certainty as to the nature of the employment relationship that will be critical to employers' hiring decisions. The elements of the proposed definition that the ARA strongly recommends be retained are:

1. the limitation, as set out in subsection 15A(2), of the matters to which Courts are able to have regard when determining whether no firm advance commitment has been made by the employer;
2. that the determination of whether employment is casual is to be made on the basis of what is agreed by the parties at the time of engagement and not on any assessment of subsequent conduct; and
3. that a regular pattern of hours does not of itself indicate a firm advance commitment.

The ARA believes that certainty for employers and employees can only be achieved if these elements are included in the casual definition. They ensure that the parties know the nature of the relationship at the time they reach an agreement on employment terms, and prevent an overly technical and impractical approach to the determination of the relationship.

The ARA believes there are minor amendments that could be made to the definition that would further enhance this critical need for certainty. Subsection 15A(2)(b) provides that in determining whether no firm advance commitment has been made by an employer, regard can be had to whether the person will work only as required. The concern of the ARA is that this provision lacks certainty and is open to divergent interpretations. A retail business may require casual labour to supplement its permanent workforce on in the latter half of its trading week. On one view, because these employees would be working within the retailer's requirements, they are working only as required. On another view, because the requirement is likely to be ongoing, it is not work "only as required" but rather is ongoing work.

Consistent with the submission of ACCI, the ARA considers the removal of the word "only" from subsection 15A(b) will provide greater certainty and minimise the likelihood of divergent outcomes.

Casual Conversion

The casual conversion provisions proposed at Item 3 of Part 1 of Schedule 1 of the Bill represent a stark departure from the model casual conversion clause that was developed by the Fair Work Commission in the *Casual Employment Case*[2] (**the model clause**). The two most substantial aspects which demonstrate this departure are:

1. The model clause provides for a right for employees to request conversion once they have met qualification requirements. The Bill places an obligation on employers to make an offer of conversion once those employees have met similar qualification requirements and there is no basis on which an offer is not required to be made (see section 66B).

2. Administratively, the model clause required employers to provide a copy of the clause to all casual employees within 12 months of commencement of employment. Further administrative obligations only arose if an employee made a conversion request. In contrast, the Bill places an obligation on employers to conduct an assessment of eligibility for all casual employees

[2] [2017] FWCFB 3541

once they have been employed for 12 months, and are then obliged to meet a number of communication obligations in relation to these employees.

While the ARA is supportive of broad-based casual conversion rights, it has concerns about the administrative burden placed on employers of all sizes. Small retail employers with a small number of casual employees will be required to identify milestones for conversion rights, undertake assessments with respect to those rights and engage in a communication process with strict and tight deadlines in circumstances where they are likely to lack the systems and resources to easily do so. Large retailers who may employ many thousands of casual employees may have better systems and resources to allocate to compliance with the obligations, but this will come at a cost. By way of example, a retail employer with 5,000 casual employees on its books could be expected to undertake 100 or more assessments of conversion eligibility every week, and then comply with the notification requirements of the Bill for potentially all of those employees. This will require the establishment of systems and process as well as human resources in conducting assessments in relation to eligibility and requirement to make an offer.

The ARA is concerned that the administrative burden will be disproportionate to the need for such provisions. The ARA is aware anecdotally that many retailers offer conversion to casual employees and that few of these employees take up those offers. The ARA believes there is a high likelihood that this trend will continue under the casual conversion regime set out in the Bill.

The ARA supports two measures being implemented with respect to the casual conversion provisions of the Bill. Firstly, the ARA believes, consistent with the submissions of ACCI, that subclause 66C(3)(b) should be deleted. The removal of this subclause would remove the requirement to notify casual employees that a conversion offer will not be made to them in circumstances where the employee has not met the requirements of section 66B(1)(b), in that the employee, while having been employed for at least 12 months, has not, during the last 6 months of that period, worked a regular pattern of hours on an ongoing basis that they could continue to work without significant adjustment as a full-time or part-time employee.

The removal of subsection 66C(3)(b) would remove some of the significant administrative burden the Bill's provisions place on retail employers, while at the same time will not have any detrimental impact on employee rights.

Secondly, the ARA believes it would enable businesses to meet its administrative obligations if the timeframes within the Bill were extended. In this regard the ARA supports amending the following provisions of the Bill with the effect that "21 days" is replaced by "28 days":

- 66B(2)(c)
- 66C4(c)
- 66E(1)
- 66F(1)(c)(iv)
- 66J(1)
- 125A(2)(b)
- 47(2)(c)
- 47(2)(e)

The extension of this timeframe would not disadvantage employees but would provide reasonable additional time for employers to meet their obligations.

Given the ARA's concerns about the administrative burden of the casual conversion process, the ARA intends to monitor the utility of those provisions in order to determine whether the right balance has

been struck having regard to the administrative impost on employers and the prevalence of employees accepting conversion offers. If employee take up of conversion is very low, then it may be appropriate to revisit the administrative requirements imposed by the Bill on employers.

Double-dipping – section 545A

The inclusion of section 545A, as Item 6 of Part 1 of Schedule 1 of the Bill, is critically important to retail employers. If the economy is to recover quickly and sustainably, employers cannot have the uncertainty associated with potential entitlement liability for casual employees hanging over them. Employers need to get on with building employment with certainty and confidence. For the retail industry this is particularly important in its role as a key employer of young people. Section 545A should therefore be retained without any diminution of its scope.

Section 545A is a provision that promotes a critical workplace relations concept: fairness. Employees who are paid casual loadings or higher casual rates (however expressed) are paid those rates to compensate for the absence of permanent employee entitlements and for the uncertainty associated with casual employment. That is the agreement they reached with their employer when they accepted casual work. Fairness requires that if there has been an error in the characterisation of the employment, and an employee is later determined to have been employed on a permanent basis, they should not be entitled to claim those benefits that they were compensated for within the casual rate they were paid. Any other outcome means an employee is paid twice for the same entitlement.

The ARA strongly supports the ACCI's submission that it needs to be made completely clear that section 545A covers both existing and former employees.

The ARA also believes that section 545A would benefit from greater clarity in relation to subsection 545A(1)(b) and the definition and/or practical identification of what is defined as the **loading amount**. The Explanatory Memorandum to the Bill[3] acknowledges that casual employment arrangements may be informal and not reduced to writing. There is a real possibility that a Court could determine that no loading amount applies in informal and/or verbal arrangements because the "identifiable amount" has not been specifically expressed or reduced to writing.

If a Court is satisfied that an employment arrangement was characterised as casual in nature by the parties then it should be able, where the quantum of the casual component of the casual employee's rate of pay has not been set out in writing, to identify the loading amount by reference to the relevant provisions of the Act or the terms of the modern award or enterprise agreement that governs the employment of the employee.

As an example, if a retail business employs an employee on a casual basis as a retail assistant and does not employ that employee under an enterprise agreement, section 545A(1)(b) should clarify that a Court, if called on to determine the loading amount, should do so by reference to the casual loading percentage in the modern award. If a retail business employs an employee on a casual basis as a retail assistant and does so under the terms of an enterprise agreement, section 545A(1)(b) should clarify that the Court, if called on to determine the loading amount, should do so by reference to the casual loading percentage in that enterprise agreement. And finally, if a retail business employs a casual employee who is award and agreement free, a Court, if called on to determine the loading amount, should do so by reference to the casual loading percentage set out in the National Minimum Wage Order as applicable at the relevant time.

The ARA recommends the Bill be amended in this manner.

[3] at paragraph 12, page 4

Schedule 2 – Modern Awards

The ARA supports the intention of the Bill, at Item 5 of Schedule 2, to provide for a simplified process for part time employees to work additional hours. As set out in the submissions of ACCI, the significant majority of casual employees work part time hours. The ARA believes that if part time employment came with greater flexibility in relation to hours of work, while at the same time providing for strong protections for part time employees which ensure they have an appropriate level of control over, and certainty of, their hours of work, this would result in an increase in permanent part time work.

While the ARA supports the intention of the Bill, there are changes that the ARA considers are essential to be made in order for the Bill to achieve an outcome that delivers benefits to employers and employees. The ARA considers the two aspects of the Bill that require attention are:

1. At Item 5 of Part 1 of Schedule 2, section 168M(c)(i) and (ii) should be amended to provide that the quantum of hours required to be worked in order for a part time employee to enter into a simplified additional hours agreement (SAHA) is 8 per week.

Under its current terms, section 168M(c) is too limited in terms of the employees it applies to, and as such will be limited in its ability to promote permanent part time employment opportunities. If only part time employees working 16 hours or more are able to enter into such agreements then there is a substantial missed opportunity for those with the greatest need for additional work. Employees working less than 8 hours per week would have no capacity to avail themselves of a SAHA, and as such would be unlikely to be offered additional hours. Employers with less than 16 hours of work available, and who have fluctuating trading patterns, would be much more likely to offer that work on a casual basis because of the simplicity involved in offering additional hours to casual employees where trading patterns require additional resources.

2. Sections 168N and 168Q should be amended to provide that a SAHA can be entered into on an ongoing basis.

Under its current terms, it appears that the intention of the Bill is that a SAHA would be required for every time that a part time employee agrees to work additional hours. The ARA believes this is an unnecessary administrative burden on employers that creates a barrier to the use of such agreements. The ARA believes that employers and employees should be able to enter into SAHAs that continue on an ongoing basis and which are subject to a right for the employee to terminate. This would in no way limit the control that an employee has over their working hours and would encourage more employers to enter into such arrangements.

The Committee is encouraged to consider the terms of the *Hospitality Industry (General) Award 2020* (**HIGA**) which are extracted below. Under those terms a part time employee who works at least 8 hours per week is able to provide ongoing agreement to work additional hours at ordinary rates of pay (but with applicable penalty rates still applying) with the following protections:

1. the employee can only be rostered additional hours within the hours they have agreed that they will be available;
2. the employee and employer are required to agree on the number of hours that the employee will be guaranteed to work each week;
3. where the employee regularly works hours in excess of their guaranteed hours the employee can request an increase in their guaranteed hours, which an employer can only refuse on reasonable business grounds which they must notify the employee of in writing;

4. if the employee's personal circumstances which alter their availability they can provide the employer with notice of this. If this impacts their guaranteed hours then a new guaranteed hours agreement is reached.

These provisions strike the right balance between flexibility, certainty and fairness and the ARA recommends that the SAHA structure under the Bill be amended to align with these provisions.

Relevant provisions of the HIGA

10.2 Definition of part-time employee

A part-time employee is an employee who:

(a) is engaged to work at least 8 and fewer than 38 ordinary hours per week (or, if the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle); and

(b) has reasonably predictable hours of work.

10.3 A part-time employee is entitled, on a proportionate basis, to the same pay and conditions as those of full-time employees who do the same kind of work.

10.4 Setting guaranteed hours and availability

At the time of engaging a part-time employee, the employer must agree in writing with the employee on all of the following:

(a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and

(b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (**the employee's availability**).

10.5 Any change to a part-time employee's guaranteed hours may only be made with the written consent of the employee.

10.6 Rostering

The employer may roster a part-time employee to work their guaranteed hours and any additional hours in accordance with clause 15.2—Part-time employees and clause 15.5—Rosters (Full-time and part-time employees).

10.7 However, a part-time employee:

(a) must not be rostered to work any hours outside the employee's availability; and

(b) must have 2 days off each week.

10.8 Increasing guaranteed hours to match regular work pattern

If a part-time employee has regularly worked a number of ordinary hours in excess of their guaranteed hours for at least 12 months, then they may request in writing that the employer agree to increase their guaranteed hours.

10.9 If the employer agrees to a request under clause 10.8, then the employer and the part-time employee must vary the agreement made under clause 10.4 to reflect the employee's new guaranteed hours. The variation must be recorded in writing before it occurs.

10.10 The employer may only refuse a request under clause 10.8 on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it.

10.11 Change in employee's circumstances that changes their availability

If there is a genuine and ongoing change in the part-time employee's personal circumstances, then they may alter the times they are available by giving 14 days' written notice of the alteration to the employer.

10.12 If the employer cannot reasonably accommodate the alteration to the part-time employee's availability under clause 10.11, then (regardless of clause 10.5):

(a) the part-time employee's guaranteed hours agreed under clause 10.4 cease to apply; and

(b) the employer and the part-time employee must agree a new set of guaranteed hours under clause 10.4.

Schedule 3 – Enterprise Agreements

The ARA considers enterprise bargaining to be a significant area of reform need, and to that end it supports in general terms the amendments set out in the Bill.

The need for reform could not be clearer, and this applies more to the retail industry than most other industries. Enterprise bargaining has undergone an alarming decline in recent years. The tables below identifies that decline, both across all industries and the retail trade industry in particular.

All Industries

Date	Agreements in operation	Employees Covered
December Quarter 2011	25,150	2,603,500
September Quarter 2020	9,804	1,893,400
Decline	15,346 (61%)	710,100 (27.3%)

Retail Trade

Date	Agreements in operation	Employees Covered
December Quarter 2011	2,011	394,200
September Quarter 2020	152	255,300
Decline	1,859 (92.4%)	138,900 (35.2%)

Source: Trends in Federal Enterprise Bargaining, Historical Trends data – Current by quarter 18 December 2020

What is clear from the data is that the reduction in the number of enterprise agreements in operation has substantially outpaced the reduction in employees working under enterprise agreements. This would indicate that it is predominantly smaller businesses who have walked away from bargaining. At the end of the December 2011 quarter the average number of employees employed under the agreements in operation in the retail industry was approximately 196. The latest data, being the September 2020 quarter shows this average increased to approximately 1,680.

The ARA believes that the decline in bargaining is a result of the complexity of the system. The current provisions of the Act require employers to comply with a significant number of procedural steps, many of which are confusing and appear to serve little protective purpose. Failure to comply with these steps is, in most cases, fatal to the application for approval of the agreement by the Fair Work Commission. Further, the complexity of the approval process itself, and the time taken for agreements to be approved, acts as a significant disincentive to bargaining. There have been multiple examples in in recent years where retail businesses and their employees agree to terms of a new enterprise agreement delivering conditions of employment that both parties were happy with, only for the approval process to delay the implementation of those agreed terms, in some cases for more than 12 months. This cannot be consistent with an effective system for workplace bargaining and it is imperative that this change.

The ARA strongly supports the passage of Schedule 3 of the Bill with minimal amendments.

The amendments to the Objects of Part 2-4 of the Act, which are set out at Item 1 of Part 1 of Schedule 3, are a sensible measure that will promote the speedier implementation of enterprise agreements and respect for the outcome of bargaining (i.e. for what the employer and their employees agreed to). Sensibly, and of particular importance as Australia moves through an economic recovery, they focus attention on business and employment growth.

Part 3 of Schedule 3 of the Bill make important amendments that will prevent agreements that serve both employer and employee needs being rejected for minor procedural defects. By replacing the multiple (and separate) pre-requisite steps with a "catch-all" provision that focuses on whether employees are "given a fair and reasonable opportunity to decide whether or not to approve the agreement"[4], the Bill allows the Fair Work Commission to undertake a reasonable overall assessment of the circumstances of each application. The Commission will no longer be bound to reject agreements if a single procedural defect is identified.

Part 4 of Schedule 3 represents a sensible response to Commission decisions that have clarified the circumstances in which casual employees are entitled to vote on an enterprise agreement. For retail businesses this is particularly important given the frequent engagement of casual employees, particularly at store level.

Part 5 of Schedule 3 represents, in the ARA's view, a step in the right direction in relation to the way the Commission deals with the Better Off Overall Test (**BOOT**). The ARA and its members have always strongly supported tests in enterprise bargaining that protect employees against disadvantage by comparing the terms of the agreement against the terms of the underpinning award. Such protections ensure that employees are paid fairly for the work they perform. Unfortunately, the current provisions often result in outcomes that deprive employees of the benefit of enhanced employment conditions for narrow, technical and often hypothetical reasons.

Consistent with the submissions of ACCI, the ARA encourages Committee members to focus carefully on the detail in Part 5. The changes to the current operation of the BOOT are minor, but important. They direct the Commission, in assessing whether employees are better of overall, away from

[4] Proposed new section 180(2)

hypothetical (and in some instances, completely fanciful) working pattern and conditions scenarios and focus it instead on how the business actually operates. The Commission will assess whether existing and prospective employees are better off under the agreement based on how the business operates and what is reasonably foreseeable with respect to those operations in the future. The changes also provide the Commission with clarity in terms of the assessment of benefits and detriments in the proposed agreement when compared with the underpinning modern award. They ensure regard is had to overall benefits to employees, including non-monetary benefits.

Part 5, at Item 25, also places emphasis on the views of employees and their representatives and the employer as to whether an agreement passes the BOOT. The Commission, where it has some uncertainty about the overall benefits, which may include non-monetary benefits, will be able to consider how those who will work under the agreement and those who were involved in the negotiation of its terms believe the agreement will operate in terms of its overall impact. This is a welcome amendment which ensures the views of the parties are given appropriate weight and are not entirely discounted as they currently are.

Part 6 of Schedule 3 proposes a sensible amendment that will correct a deficiency in the current legislation which has consequences for the Commission's approval process. By including a model NES interaction term, the Bill eliminates a requirement that is of minimal utility (that terms of the agreement do not contravene the NES) and which almost invariably results in unnecessary delays in the approval process due to the need for undertakings. Critically, the amendment has no detrimental impact on employee rights.

The ARA does wish to specifically address Part 12 of Schedule 3, which deals with transfer of business, and in particular Item 62. Item 62 acts to "turn off" the transfer of business rules set out in Part 2-8 of the Act where an employee seeks, and is provided with, employment with an associated entity of their employer before their employment is terminated with that employer. The ARA is concerned that Item 62 in its current terms could be open to an interpretation that is too narrow to properly reflect what we believe to be its intent. The ARA proposes the following amendment to Item 62.

(1A)…
(b) before the termination of the employee's employment with the old employer, the employee ~~sought~~ agreed to become employed by the new employer ~~at the employee's initiative~~.

It should be recognised that employee's may come to work for associated entities of their employer (as an alternative to termination) in a variety of ways. The amendments that switch off the transfer of business rules should encompass all of these ways.

Schedule 5 – Compliance & Enforcement

The ARA supports a strong set of measures that promote compliance with minimum conditions of employment. As Australia moves through its economic recovery it is critical that employees are paid correctly for the work they perform and that businesses who adopt a deliberate strategy to underpay their employees in order to promote their own success are met with significant penalties such that such a strategy is not viable. At the same time, it is equally critical that the penalties at all times align with the gravity of the conduct. It would be entirely inappropriate if businesses who have made genuine errors, have worked to identify and address those errors and have demonstrated a commitment to compliance were to penalised in a manner similar to those who engage in deliberate conduct.

The ARA support Schedule 5 of the Bill subject to two areas where improvements could be made to avoid what we believe are unintended consequences.

Firstly, the ARA believes the Bill does attempt to distinguish, in the context of Item 46, deliberate conduct and conduct which arises from error, and that it does this through the use of the term “dishonestly”. The ARA accepts that this term is indicative of some exercise of decision making on the part of the offending party, and distinguishes this from the most clear instances of inadvertence. The ARA believes, however, that the Bill would benefit from further clarification, in that dishonesty should be called out as a specific limb of the test of criminality, rather than, as it currently is, being included alongside another component, being the systematic pattern of underpayment.

The ARA believes this is important because of the potential for the two concepts to be conflated. This is in primarily due to the construction of the matters that a court is able to have regard to, as set out at section 324B(5), in determining whether an employer has engaged in a systematic pattern of underpayment. It is conceivable that a number of the factors set out in section 324B(5) would arise in circumstances of inadvertent underpayment. By way of example, a retail business may have incorrectly set up its payroll system so that it failed to calculate one of the many penalty rates that apply under the modern award. Such a failure, because it is part of the payroll system, would likely mean that the number of underpayments and the number of employees affected by the underpayments would be determined to be significant. Depending on when the business identified the set up issue, it may also mean that the underpayments may have continued for an extensive period. This would mean that three of the six matters in section 324B(5) indicate a systematic pattern of underpayments. If a Court were to conflate the concept of systematic underpayment with the requirement for dishonesty, the risk is that the most significant available penalty, that which is associated with criminal dishonesty, would apply to inadvertent conduct.

Secondly, the ARA has some concerns regarding Items 4 and 5 of Schedule 5, which create a “value of the benefit” framework for the calculation of remuneration-related contraventions. While it is appropriate for significant penalties to be available to ensure that no business could be tempted to adopt underpayment as a business strategy on the basis the benefit to them would be greater than the risk of being caught, there is a real risk here that the potential penalty would be disproportionate to the conduct and, in some instances, higher than the penalties provided for dishonest offences under section 324B. As an example, a business may, through inadvertence, underpay a large number of employees over a substantial period of time such that the total amount of the underpayment is $3 million. Even if that employer, as soon as the underpayment issue was identified, took swift action to backpay all employees and correct the error, they would still be open to a pecuniary penalty of 2 times the value of the benefit, which would be a maximum of $6 million. By contrast, an employer who adopted a deliberate, dishonest strategy of systemic underpayments, and made no attempt to correct this, would be faced with a maximum penalty of substantially less than this.

The ARA would not like to see these new provisions act as a disincentive for businesses to publicly step forward to address underpayment issues that arise from legitimate errors. The ARA recommends that the “value of the benefit” penalties not apply to circumstances where the employer has engaged in swift rectification of the relevant underpayments.

If you have any questions, as always feel free to contact me

Yours sincerely,

Paul Zahra
Chief Executive Officer