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16 November 2021

Standing Committee on Employment, Education and Training
House of Representatives
Parliament of Australia

By email: ee.reps@aph.gov.au

Dear Committee Secretary,

Inquiry into the *Fair Work Commission Annual Report 2019-20* - Submissions of the National Retail Association, Union of Employers

The National Retail Association Limited, Union of Employers (**NRA**) welcomes the opportunity to comment on the Inquiry into the *Fair Work Commission Annual Report 2019-20* (**the Report**) with respect to the impact of the COVID-19 pandemic on the caseload of the Fair Work Commission (**the Commission**).

The NRA is Australia's most representative retail organisation, representing over 6,000 retail businesses ranging from small "mum-and-dad" operations to major international brands. Throughout the pandemic, the NRA has worked constructively with State and Federal governments to shape and implement policy responses to the unprecedented circumstances of the pandemic within our focus industries.

The NRA has generally been satisfied in its dealings with the Commission throughout the pandemic and extends its approbation for the efficiency and timeliness with which most applications have been processed.

We generally agree with the with the statement of the President of the Fair Work Commission, Justice Iain Ross, that due to the pandemic conditions the Commission has seen 'an increase in its caseload with substantial increases in the number of unfair dismissal matters and workplace disputes.'¹

The NRA has observed increases in requests for assistance with unfair dismissal claims and stand-down disputes involving its members as lockdowns and restrictions under State and Territory public health orders have caused employment relationships to end.

Data from the Commission indicates that unfair dismissal applications in 2019-20 increased by 18.88% compared to 2018-19, from 13,928 to 16,558.² This is significant given that the number of applications decreased by 1.17% on average per year between 2014-15 and 2018-19.

This data is consistent with NRA's increased caseload during the pandemic. The NRA assisted more members in responding to unfair dismissal applications in the twelve-month period beginning March 2020 compared to the same period in 2019-20. Lockdowns and government restrictions caused uncertainty and reduced trade with retail businesses in affected areas moving to contactless "click-and-collect" services or closing entirely – either for a temporary period or permanently.

¹ Fair Work Commission, *Annual Report 2019-20* (report, 23 September 2020) 6 ('2019-20 Report').

² 2019-20 Report (n 1) 63; Fair Work Commission, *Annual Report 2018-19* (report, 26 September 2020) 154 ('2018-19 Report').

In these circumstances, operational requirements made it necessary for businesses to stand employees down without pay, to withdraw offers of shift engagements for casual employees and in some cases, make roles redundant.

Many unfair dismissal applications involved disputation as to whether a termination of employment was a genuine redundancy, including whether the consultation and redeployment requirements under the *Fair Work Act 2009* (Cth) (**Fair Work Act**) were met.

Further, data from the Commission indicates that 183 applications to deal with disputes involving stand-downs were lodged in 2019-20, a significant increase compared to ten in 2018-19 and nine in 2017-18.³

This data is consistent with the experience of NRA members during the pandemic. The NRA assisted with a number of stand-down disputes under s 526 of the Fair Work Act brought on the basis that stand-downs implemented by members were not lawful because there was no stoppage of work for which the employer could not reasonably be held responsible.

The constantly changing nature of State and Territory public health orders and disparities between the rules in different jurisdictions meant that businesses faced legal uncertainty and risk when deciding to implement stand-downs.

Complexity regarding restrictions on movement in affected areas for the purposes of employees attending for work and the meanings of terms such as “authorised provider” and “essential service” led to lengthy disputes concerning the existence of relevant stoppages of work.

The NRA notes with approval that the Commission made extensive use of the power to vary modern awards on its own initiative under s 157 of the Fair Work Act. The NRA liaised productively with the Commission and other relevant stakeholders in relation to variations of modern awards pertaining to our focus industries, including the *General Retail Industry Award 2020* and the *Fast Food Industry Award 2010* and noted these matters proceeded efficiently and expeditiously in the circumstances.

Finally, we take the opportunity to note that the Commission’s caseload may be impacted by the number of unfair dismissal and general protections applications having no reasonable prospects of success that are lodged each year.

Applications with no reasonable prospects include those which are jurisdictionally barred for being brought outside statutory time-limits or in the wrong jurisdiction, or due to the existence of other claims related to the same facts.

The fundamental principle of these jurisdictions is to provide an expeditious and inexpensive forum for dispute resolution that is easy to access for applicants. Currently the only barrier to lodging an application is a fee of \$74.90.

Currently, applications with no reasonable prospects often progress through the standard process and are required to be dealt with at hearing before any jurisdictional objection can be upheld. This causes unjustified expense and delay for respondents and occupies valuable time before the Commission which would otherwise be allocated to meritorious claims, compromising the objective of providing an expeditious forum for dispute resolution.

The NRA recommends that consideration be given to a ‘triage’ process enabling respondents to make a prima facie contention ‘on the papers’ that a claim has no reasonable prospects prior to any initial mediation or conciliation. The Commission would make a preliminary assessment based on the submissions of the parties with ramifications for costs, including against representatives, in the event that the application proceeds and fails.

³ 2019-20 Report (n 1) 64; 2018-19 Report (n 2) 155; Fair Work Commission, *Annual Report 2017-18* (report, 18 September 2018) 143.

The NRA otherwise supports additional resourcing for the Commission to appropriately manage its caseload and serve fundamental the objective of providing an expeditious forum for dispute resolution.

Should you require any further information, please feel free to contact us directly.

Yours sincerely,

A handwritten signature in black ink that reads "L. Carroll". The signature is written in a cursive, flowing style.

Lindsay Carroll

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