ARA SUBMISSION ON THE DRAFT REPORT FOR THE SECURE JOBS, BETTER PAY REVIEW

18 February 2025

INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to provide a response to the Secure Jobs, Better Pay Review Draft Report (SJBP Draft Report).

The ARA is the oldest, largest and most diverse national retail body. We represent a $430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. Our members operate across the country and in all categories - from food to fashion, hairdressing to hardware, and everything in between. For this reason, we have a vested interest in multiple awards across retail, hospitality, restaurants, fast food, pharmacy, and hair and beauty.

This response builds upon the ARA's initial submission to the review of the Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 (SJBP Act) and addresses some key draft recommendations as well as areas where the Review Panel did not make any recommendations.

While the Review Panel acknowledges that further assessment is needed, the ARA believes that several recommendations (or lack thereof) require urgent reconsideration to avoid unintended economic and employment consequences.

CONTEXT OF THE REVIEW

Timing and Limitations of the Review

The ARA strongly reiterates that this review has been conducted prematurely. The SJBP Act introduced significant changes to Australia's industrial relations framework, many of which are still in their early stages of implementation. As a result, the full impact of these reforms cannot yet be accurately assessed.

The Review Panel itself acknowledges the limitations due to time constraints, data availability, and the lack of legal precedents in certain areas. Given this, the ARA strongly supports the recommendation for a follow-up review in 2 to 3 years (Draft Recommendation 1). However, the ARA urges the government to ensure that any subsequent review includes comprehensive industry data and case studies. The retail sector, in particular, operates under unique conditions, and any future reviews should be informed by robust evidence and meaningful consultation with retailers of all sizes.

RESPONSES TO KEY DRAFT RECOMMENDATIONS

Draft Recommendation 16: Fixed term contracts

Retailers rely on fixed-term contracts for seasonal employment, project-based work, and temporary staffing needs. As such, a one size fits all approach to fixed term contracts would have negative impacts on the retail sector given its unique circumstances. The SJBP Review Draft Report acknowledges that the number of fixed-term contracts has increased rather than decreased, contradicting the assumption that restrictions will lead to greater job security. Restricting fixed-term contracts could have unintended consequences, such as increased

reliance on casual employment arrangements. Furthermore, the two-year cap on fixed-term contracts is impractical and is difficult for businesses to manage.

The ARA recommends that:

- Exceptions be expanded to cover industries such as retail where fixed-term contracts are essential for managing fluctuating demand.
- Employers be allowed to renew fixed-term contracts beyond two years where employees consent.

RESPONSES TO KEY AREAS WITH NO RECOMMENDATIONS

Intractable Bargaining

The intractable bargaining provisions introduce excessive Fair Work Commission (FWC) intervention which undermines voluntary negotiations between businesses and employees. The retail industry relies on flexibility in enterprise bargaining, and excessive FWC intervention risks discouraging businesses from engaging in workplace agreements.

The ARA is concerned that the FWC's ability to impose workplace determinations could lead to inflexible, costly, and impractical outcomes. The current framework does not provide sufficient safeguards against the premature declaration of intractable bargaining disputes, which could stifle productive negotiations and force businesses into agreements that do not align with their operational needs. Further, the Review Panel highlights that the purpose of the intractable bargaining framework is to introduce a level of risk to continuing disagreement and to balance the positions and power of the bargaining participants. However, current workplaces are dynamic and the 9-month minimum bargaining period does not provide parties enough time to negotiate complex issues. Parties need to be given ample time to negotiate an agreement before their ability to do so is involuntarily taken from them. To address these concerns, the ARA recommends that:

- FWC intervention should be restricted to exceptional circumstances where genuine deadlocks exist.
- The threshold for intractable bargaining declarations must remain high to prevent premature applications.
- Clearer guidelines should be established to ensure transparency in the FWC's decision-making process.
- The end of the minimum bargaining should be extended to at least 18 months

Better Off Overall Test

The amendments to the Better Off Overall Test (BOOT) were intended to address longstanding concerns about the complexity and rigidity of the enterprise agreement approval process. However, these changes have not delivered meaningful improvements to employers. The BOOT continues to be applied in an overly prescriptive, clause-by-clause manner rather than through a holistic assessment. The persistence of mathematical calculations over practical considerations contradicts the intent of the reforms and continues to create uncertainty for businesses seeking to negotiate enterprise agreements.

Another key concern is the ongoing requirement for undertakings, which employer groups had expected to decrease following the amendments. Instead, the FWC continues to request undertakings at the same frequency as before, even for agreements that closely resemble previously approved ones. This undermines

the efficiency of the enterprise bargaining process and places unnecessary burdens on employers. The amendments have not effectively addressed the core concerns of employers including clear guidelines on the FWC criteria on assessing BOOT. Instead, they have perpetuated existing inefficiencies and introduced new sources of uncertainty.

The Review Panel acknowledges that there is little evidence to indicate that the amendments in relation to the BOOT have significantly reduced complexity or substantially changed the way the FWC assesses the BOOT but makes no recommendations. This is a missed opportunity to address a long-standing pain point for employers and the ARA urges the Review Panel to refine the BOOT framework by:

- Ensuring BOOT assessments consider the overall benefits of an agreement rather than enforcing a rigid, clause-by-clause comparison.
- Clarify the assessment criteria used by the FWC to determine whether an agreement passes the BOOT.
- Providing clearer guidelines for employers to structure agreements in ways that streamline approval processes.
- Introducing a fast-track approval pathway for enterprise agreements that exceed award conditions in key areas.

Multi-Employer Bargaining

The ARA remains concerned about the expansion of multi-employer bargaining and its potential to impose additional costs and rigidity on retail businesses. While the draft report suggests that initial take-up has been limited, this does not alleviate concerns about future impacts. The ARA is concerned that retailers may be compelled into multi-employer agreements, without a reasonable consultation process, that do not reflect their operational needs and limit their ability to tailor conditions to their workforce. This is especially true for small and medium businesses who typically lack the expertise and legal resources to navigate complex bargaining requirements, putting them at a significant disadvantage.

To protect small and medium-sized retailers, the ARA recommends that:

- Opt-out mechanisms be introduced for businesses that do not wish to participate in multi-employer agreements.
- Clearer guidance is provided to prevent businesses from being compelled into agreements that do not reflect their operational needs.

Right of Entry

The ARA opposes the expansion of union right of entry provisions under Part 16A of the Closing Loopholes Act. The retail sector already faces significant compliance burdens, and additional workplace entry requirements could create unnecessary disruptions and work health and safety risks.

The ARA recommends:

- Maintaining existing entry permit requirements to ensure that union officials follow proper protocols.

- Strengthening protections for businesses against unwarranted disruptions caused by excessive right of entry visits.

Prohibiting Pay Secrecy

The ARA acknowledges the intent behind prohibiting pay secrecy clauses but cautions against unintended consequences. Retailers have expressed concerns that the removal of pay secrecy provisions could lead to workplace tensions, especially in environments where pay structures vary based on experience, tenure, or location.

The ARA recommends:

- The introduction of clear guidance on how businesses can communicate pay structures transparently while maintaining workplace harmony.
- Exemptions for certain confidential pay arrangements, such as performance-based incentives.

CONCLUSION

The ARA appreciates the opportunity to contribute to this review and reiterates the importance of ensuring that industrial relations reforms support both employees and businesses.

Summary of Key ARA Recommendations:

a) Review Timing – A follow-up review should occur in 2–3 years, with sufficient industry data to assess real-world impacts.
b) Enterprise Bargaining – Intractable bargaining provisions should be restricted, BOOT assessments clarified, and multi-employer bargaining should include opt-out mechanisms.
c) Job Security & Gender Equality – Fixed-term contract restrictions should be eased, and pay secrecy provisions should be implemented with caution.
d) Union Right of Entry – The expansion of right of entry provisions should be reconsidered to protect businesses from undue disruptions.

The ARA remains committed to working with government to ensure that workplace relations laws are fair, balanced, and supportive of Australia's retail sector. We welcome further discussions with the Review Panel and other stakeholders to refine legislative measures that will best serve the interests of both businesses and employees.