ARA SUPPLEMENTARY SUBMISSION ON FWC MODEL TERMS FOR ENTERPRISE AGREEMENTS

13 December 2024

INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to make a reply submission on the effect of Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union [2018] FCAFC 146 (Energy Australia Case), in respect of the Model Terms for Enterprise Agreements.

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.

On 1 November 2024, the ARA filed its initial submission in response to the request for consultation on Model Terms for Enterprise Agreements and Copied State Instruments by the Fair Work Commission (Commission), advocating for the model terms to be preserved in their current form. Following that, we had the opportunity to review the recommendations put forward by other interested parties and made submissions in reply on 28th November 2024, maintaining our initial position.

On 3 December 2024, a public consultation was held wherein the Australian Council of Trade Unions (ACTU) was directed by the Commission to file a short note on the effect of the Energy Australia Case on the model terms. Other interested parties were invited to file a short note in reply.

The ACTU, in its submission dated 6 December 2024, concluded that the reasoning in the Energy Australia Case strongly suggests that the requirement in section 186(6) that employee organisations must be able to access the dispute term in their own right, is not confined to employee organisations covered by an enterprise agreement.

The ARA does not agree with this point of view. The position of the ARA is that the Energy Australia case limits the ability to initiate disputes to parties covered by an enterprise agreement. Any interpretation to the contrary is antithetical to the fundamental legal doctrines relating to an agreement between parties and misinterprets the purpose of section 186(6).

ARA POSITION ON THE ENERGY AUSTRALIA CASE

The decision by the Federal Court in the Energy Australia Case provides important insights into the standing of employee organisations in the dispute resolution process under enterprise agreements. Critically, the Federal Court affirmed that unions named as parties in an agreement, had standing to independently initiate disputes. This conclusion was grounded in the text and purpose of the enterprise agreement as well as the statutory framework of the Fair Work Act 2009 (Cth) (Fair Work Act).

The Federal Court specifically limited the workplace rights of the unions to their status as parties to the agreement. The court emphasised that coverage under section 53(2) of the Fair Work Act is a prerequisite for acquiring rights and responsibilities under an enterprise agreement. Without this

coverage, a union has no legal or contractual connection to the agreement and cannot enforce its terms or participate in its dispute resolution processes. This is highlighted in paragraph [61] where the court found:

'Each of the five unions had a workplace right, within the meaning of s 341(1)(a), because it had a role or responsibility under the Yallourn agreement and under s 341(1)(b), because it could initiate or participate in a dispute settlement process (within the meaning of ss 341(2)(j) and 186(6))'

Without such a limitation, any employee organisation would have unilateral workplace rights in all Australian workplaces, with the ability to initiate disputes of their own volition. Allowing unions not covered by an enterprise agreement to initiate disputes would contradict the industrial and statutory objectives of enterprise agreements. The court emphasized that these agreements are statutory instruments designed to regulate relationships between employers, employees, and covered unions. Extending standing to non-covered unions would undermine the integrity of this framework, introducing uncertainty and the potential for unnecessary interference.

Where it forms part of the agreement, the procedure required by section 186(6) is a feature of the enterprise agreement and not a separable component. As such, it follows that for a party to have the benefit of that procedure, the party must be a party to the agreement. This is a fundamental part of any agreement. Relevantly, section 186(6) outlines the requirements for a dispute resolution procedure in an enterprise agreement. It does not prescribe an enforcement mechanism. Therefore, it is implied that a party intending to make use of that procedure must be a party to the agreement. Otherwise, a party would have no recourse in relation to resolving disputes under the agreement.

CONCLUSION

The court noted in the Energy Australia Case that enterprise agreements are intended to provide a defined framework for dispute resolution, with clear boundaries for who can participate. Giving standing to unions not covered by an enterprise agreement would disrupt this framework and potentially lead to disruptions caused by prolonged disputes, as disputes could be raised by entities with no direct stake in the agreement's terms. The court's decision underscores the balance between statutory requirements, contractual clarity, and industrial harmony. By affirming the standing of covered unions while excluding non-covered unions, it preserves the integrity of enterprise agreements and ensures their effective operation within the framework of the Fair Work Act.

The ARA asserts that widening the model dispute terms to allow unions who are not a party to the agreement the ability to initiate disputes under an enterprise agreement is a misinterpretation of the purpose of s186(6) and the reasoning in the Energy Australia Case. Such an outcome would expand workplace obligations beyond what the process necessitates and create further complexities for all parties in navigating their rights and obligations in the workplace. It would also not be conducive to promoting harmonious workplace relations and productive dispute resolution processes. Consequently, the ARA maintains its position to preserve the model terms in their current form.

Thank you for the opportunity to provide a submission to this inquiry. Any queries regarding this submission can be directed to ARA Workplace Relations Policy Advisor Julius Afranie at julius.afranie@retail.org.au.