National Retail Association

National Retail Association Limited

Submissions in relation to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*

11 November 2022

1. ABOUT THE NATIONAL RETAIL ASSOCIATION

1.1. The National Retail Association Limited, Union of Employers (**NRA**) is a peak body for the retail industry and an industrial association of employers registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The National Retail Association supports close to 7,000 employers and 60,000 shopfronts in the retail, fast food, quick service and affiliated industries, the majority of which are small to medium enterprises.

1.2. We represent the full spectrum of retail in Australia, including a substantial network of traditional bricks and mortar, omni-channel and digital retailers, from small “mum and dad” businesses to major international brands.

1.3. The retail industry is a $400 billion sector, employing over 1 million retail workers and is the largest employer of young people in Australia. The industry is made up of a diverse collection of businesses that vary in terms of presence (physical, online or both), size, products sold, and business structures. The sector operates in a dynamic and globalised environment that is not immune to local or international economic pressures.

1.4. As an industrial association, the NRA has been a voice for its members since approximately 1921, and has grown and developed alongside the retail and quick service industries bringing with it the voice of almost 100 years’ solidarity with retailers.

2. NO MEANINGFUL CONSULTATION ON BILL

2.1. The National Retail Association welcomes the opportunity to provide its views in relation to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Bill**). However, we hold grave concerns about the Government’s attempts to rush these significant industrial relations reforms quickly through parliament without proper opportunity to scrutinise 249 pages of new law.

2.2. On 10 November 2022, the National Retail Association sought the views of its members in relation to the Bill. Notably:

- 64.5% of all respondents to the survey said they did not support the Bill;
- 24.6% of all respondents to the survey said they did not understand the Bill; and
- 10.9% of all respondents to the survey supported the Bill.

2.3. These survey results would likely have been vastly different if the membership of the National Retail Association felt that an appropriate amount of time was afforded to peak bodies and employers to consult in relation to elements of the Bill. The secrecy and haste has created deep suspicion among employers about the detail of the Bill and the Government’s motives.

2.4. Retailers are currently focused on ensuring a successful trading period to ensure business viability in 2023 and beyond – a period that will be characterized by the highest levels of inflation in 30

years, a continued labour crisis and troubled trading conditions. The retail industry will be damaged by significant disruption to the way in which retailers engage and pay their staff.

3. NO OBJECTION TO PARTS OF THE BILL

3.1. Whilst the National Retail Association holds serious concerns with the vast majority of the multi-enterprise bargaining regime set out in the Bill, we hold no objections in relation to a number of parts of the Bill that the National Retail Association considers are measured and reasonable amendments to the variation.

Prohibiting sexual harassment in connection with work

3.2. The National Retail Association does not object to the proposed Part 8 of the Bill which prohibits sexual harassment in connection with work and expands the Fair Work Commission's jurisdiction to deal with a sexual harassment dispute.

3.3. In respect of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) and the Bill which is the subject of this inquiry, the National Retail Association's strong position is that this reform should be accompanied by a wide-reaching education campaign for employers on their obligation to eliminate sex discrimination, including sexual harassment, in the workplace.

3.4. In circumstances where the law has been varied to require the focus of employers and PCBUs to shift towards prevention of sexual harassment, employer education and support is critical, particularly for small businesses who rarely have access to dedicated human resources personnel.

3.5. Specific education and support should be given to employers in the retail and hospitality industries because those industries:

- are collectively the largest employer of young people in the country, many who have limited workforce experience;
- employ a high proportion of female workers who are statistically more likely to be subjected to sexual harassment in the workplace; and
- interact significantly with members of the public over whom an employer has limited control.

3.6. Helping employers build their capacity to appropriately prevent sexual harassment in their workplaces will go a significant way towards meeting the Government's objectives of ensuring safer, respectful and more equitable workplaces in Australia.

Anti-discrimination and special measures

3.7. The National Retail Association does not object to the proposed Part 9 of the Bill which inserts three additional protected attributes into the Fair Work Act - breastfeeding, gender identity and intersex status.

Fixed term contracts

3.8. The National Retail Association does not object to the proposed Part 10 of the Bill which seeks to limit the use of fixed term contracts for the same role to two consecutive contracts or a maximum duration of two years. We consider that the exceptions provided for at section 333F of the Bill are comprehensive and reflect the circumstances in which most retailers may utilise fixed term contracts of employment.

Flexible work

3.9. The National Retail Association and its members have long supported measures to address family and domestic violence in Australia. It was the only peak employer body for the retail industry to publicly support the introduction of the unpaid family and domestic violence leave into modern awards and recently, supported the introduction of a paid family and domestic violence leave entitlement into the National Employment Standards.

3.10. We support the vast majority of Part 8 of the Bill which enables a person experiencing family and domestic violence leave to request a flexible work arrangement from their employer. We also support the requirement for employers to provide a written response to all requests for flexible work arrangements, irrespective of the reason why the request was made.

3.11. However, we have concerns about new section 65C of the Bill which provides for the Fair Work Commission to arbitrate disputes about flexible work arrangements. While it appears the proposed amendments are primarily aimed to reflect those of the model flexibility term in modern awards, the amendments do not similarly reflect the model dispute resolution term. The dispute resolution term of modern awards relevantly provides for mediation, conciliation, and consent arbitration. Here, the proposed amendments only provide for compulsory arbitration.

3.12. The NRA submits that forcing parties to arbitration is a timely, costly, and over-formal manner in which to resolve disputes. The dispute resolution procedure under modern awards provides for a more informal and facilitative environment in which parties can navigate disputes and reach a resolution. The NRA submits a broader approach to dispute resolution ought be taken, and parties provided the ability to mediate and conciliate, and only arbitrate by consent.

Terminating “Zombie Agreements”

3.13. The National Retail Association does not object to Part 13 of the Bill which will have the effect of terminating aged industrial instruments (or “zombie agreements”) that, in many cases, do not reflect modern pay and conditions and in some cases, are anti-competitive.

3.14. Amongst the membership of the National Retail Association, it is observed that the vast majority of businesses that continue to have “zombie agreements” in place are small businesses (many of whom do not necessarily appreciate how these agreements have been publicly characterised in

recent years). We agree that the 12-month transition period provided for in the Bill is a fair and equitable period of time to allow employers, including small business, to align their pay and conditions with the relevant modern award.

3.15. As part of the transition period, the National Retail Association notes that employer associations should receive support to assist small business members with education and understanding of the transition process, modern award entitlements and wage compliance obligations.

Errors in enterprise agreements

3.16. The National Retail Association has no objection to Part 17 of the Bill which provides a sensible mechanism for the Fair Work Commission to exercise the power to correct or amend “errors, defects or irregularities” in enterprise agreements.

4. JOB SECURITY

4.1. Despite the Bill’s title, there is very little substance of the Bill that will achieve job security for Australian workers. In fact, there are large tracts of the Bill that threaten the viability of business and in turn, the job security of the people those businesses employ.

4.2. The National Retail Association is concerned that varying the objects of the Fair Work Act to include a reference to job security may have unintended consequences for our industry, being one that frequently relies on (and in the case of retail workers, preferences) casual labour.

4.3. We are also concerned that the amendment proposed by the Bill signals towards the Government proposing further workplace reforms that will seek to undermine and limit the availability of casual employment in Australia. In these circumstances, the evidence that will be given by our membership in relation to casual employment, and specifically casual conversion, is that the vast majority of offers of conversion from casual to permanent employment are refused by retail workers. This is because retail workers express that they value the flexibility that comes with casual employment (not otherwise afforded by the part-time work provisions in the General Retail Industry Award) or because they do not want to forgo a 25% casual loading on top of their base rate in exchange for permanent employment. Where casual employment in Australia has remained relatively stable for decades, there is no case to support undermining a critical feature of the industry that provides most young Australians with their start in the workforce.

4.4. Importantly, the current objects of the Fair Work Act provide for workplace relations laws that promote productivity and economic growth for Australia's future economic prosperity. Fundamentally, if this object of the Fair Work Act is achieved, then job security follows and is offered not by Governments but by healthy and viable business. In the face of forecasted economic challenges, the Government should be seeking to promote laws that advance productivity and economic growth for Australia's future economic prosperity, not undermine it.

5. PAY SECRECY

5.1. In principle, the National Retail Association does not object to the prohibition on pay secrecy clauses in employment contracts. However, we are concerned that Part 7 of the Bill creates a civil remedy provision meaning employers can be exposed to fines if they contravene section 333D.

5.2. While s 333C will see pay secrecy terms ceasing to have effect, s 333D is unclear as to whether it will apply with immediate effect to existing contracts. If it is the case that the civil remedy provision will apply immediately, or to contracts which are currently in force, the National Retail Association submits that, to ensure fairness and business continuity, a grace period ought apply.

5.3. Business needs to be provided the opportunity to be able to continue to recruit and operate while they seek to have amendments made to their existing contracts. Amendments will require both time and cost to be expended by business, where this will be particularly difficult for small business to manage if the proposed prohibitions have immediate effect.

5.4. The National Retail Association proposes a grace period of 6 months ought apply to the effect of s 333D to provide business with adequate opportunity to seek appropriate advice and amendments to affected contracts.

5.5. Further, for the avoidance of doubt, the National Retail Association does not support measures which compels pay transparency or disclosure of pay and conditions upon request. We recognise the Bill does not mandate this type of disclosure however, this should be expressly clarified in the Bill.

6. MULTI-ENTERPRISE BARGAINING

6.1. The National Retail Association acknowledges the Bill provides for 3 “streams” of multi-enterprise bargaining, namely:

- the “single interest” stream;
- the “supported bargaining” stream; and
- the “cooperative workplaces” stream.

6.2. The National Retail Association does not object to the “cooperative workplaces” stream of multi-enterprise bargaining proposed by the Bill but strongly opposes the compulsory multi-enterprise bargaining proposal set out in the “single interest” stream and has concerns about detail that’s lacking from the “supported bargaining” provisions in the Bill.

6.3. Our high-level position on compulsory multi-enterprise bargaining is that small and medium sized employers, who otherwise would rely on modern award entitlements, will be forced to engage in the time and cost of bargaining, or face being subject to agreements bargained for by other businesses which may be prejudicial or detrimental to their business. The potential for power imbalance and inequitable outcomes for smaller and medium retailers is significant.

6.4. Where a large employer may be able to offer compromise, small business will struggle with financial and administrative overcomplications which are beyond their ability, not required, or are inappropriate for their enterprise. The needs of individual businesses and their employees vary, and bargained terms for one business may not be appropriate, implementable, or desirable for another.

6.5. Further, non-unionised workforces and individual employees who are agreeable to modern award terms, have themselves already negotiated terms of employment which suit them, or do not wish to be forced into bargaining, will be burdened with participating in bargaining which may be of no real benefit to them.

6.6. The National Retail Association believes workers should have access to collective bargaining and the NRA supports the single-employer enterprise bargaining framework currently in the Fair Work Act. We believe the current system strikes a good balance between improving wages and conditions for workers while giving businesses the flexibility they need to support those higher wages.

6.7. The "single interest" stream is prejudicial to employers and unnecessary to achieve the Government's objective to improve wage outcomes in low paid and feminised sectors of work where the "supported bargaining" stream has this express purpose. Minister Burke has boasted that this will drive wages growth. At a time when the Reserve Bank is trying to contain inflation, this Bill would have the exact opposite effect. Industry-wide strikes and wage increases not linked to productivity gains can only lead to spiraling costs for businesses, which will flow through to higher prices for consumers. The Government has failed to make a meaningful case in support of the "single interest" stream and Part 21 of the Bill should be removed in its entirety.

6.8. The National Retail Association is extremely concerned that if the Part 21 of the Bill becomes law, there will be a number of significant adverse outcomes for the retail industry in Australia. Specifically, that employers will be bound by outcomes negotiated in multi-enterprise bargaining that aren't suitable for their business and the cost of doing business, in an already unstable economic environment, will threaten jobs. Concerningly, once subject to multi-enterprise bargaining under the "single interest" stream and because the "common interest test" prescribed by the Bill is exceptionally broad, employers may be tied to pay and conditions negotiated by:

- a larger retailer, with significantly more resources at its disposal; or
- a competitor business, with a different operating model; or
- a business with no common interest with the employer's retail business, except geographical commonality.

6.9. While multi-enterprise bargaining may provide ease to union bargaining representatives, it is simply blind to the intricacies and individualities of independent businesses and their employees. No two are the same. Ultimately, it is the case that some businesses and their employees, particularly small and medium businesses, can comfortably rely on the guarantees and protections enshrined within the Fair Work Act 2009, the National Employment Standards, and the relevant modern award.

EXAMPLE – COMPLIANCE COST AND COMPLEXITY WILL SKYROCKET

A medium sized Australian apparel retailer with approximately 40 locations across Australia currently pays its 400 retail staff in accordance with the General Retail Industry Award 2020. The business employs a total of three personnel in its combined human resources and payroll team. The annual cost of an integrated workforce management and payroll software system built for compliance with the General Retail Industry Award will cost this employer between $70,000 and $100,000 per year, excluding implementation costs.

If compelled to bargain for multiple "single interest" agreements where the "common interest" of employers is geographical location (i.e a shopping centre), that retailer will be required to re-configure its time and attendance and payroll system in accordance with the terms provided for under each multi-enterprise agreement and likely, be required to increase its headcount in payroll to account for the business needing to administer multiple industrial instruments in its business. This assumes the retailer has the internal capability and resources to engage in enterprise bargaining, which it does not.

The worst-case scenario for this Australian retailer is that, at significant cost to the business, it moves from having a single industrial instrument and set of pay and conditions for staff (the Retail Award), to 40 site or centre-specific multi-enterprise agreements with differing pay and conditions in each.

6.10. A non-complex business does not require a complex agreement. Any multi-enterprise agreement sought in respect of common geographical location (i.e. a shopping centre) will inevitably need to reflect multiple industry specific terms and conditions including for retail, fast food, restaurant, hospitality, fitness, cleaning, clerical and pharmacy at a minimum.

6.11. In most circumstances, engaging in bargaining is either not attractive or tenable where it is not required for the business, or the business does not have the means to engage in a bargaining campaign. As the size of a business may scale and become more complex, a bargained single-employer agreement may become palatable or even requisite to manage its specific operations, however, such agreements ought be tailored to the business it covers. Again, no two businesses are the same.

6.12. Where businesses range in size, resources, means, operation, culture, activity, and locality, multi-enterprise bargaining does not take into account the individual business or the individual employee. An approach which does not consider the needs of all who it seeks to apply is wholly inequitable and should not be implemented. The current system is well balanced between the needs of employers and employees, and it has been refined over the last 40 years. The best thing the Government could do is to not mess with the system that has delivered record low unemployment.

EXAMPLE – SMALL BUSINESSES DON'T HAVE THE RESOURCES TO PROPERLY ENGAGE WITH MULTI-ENTERPRISE BARGAINING

A franchisee in the fast-food industry operates four food outlets across four different locations and employs a total of 35 staff, the majority being junior employees working on a casual basis. The franchisee spends approximately 35 hours per week working in the four outlets, 20 hours per week working on business operations including finances, rostering, staff management and stock ordering. The franchisee engages a part-time bookkeeper to administer payroll in accordance with the Fast Food Industry Award 2020.

The franchisee is experiencing significant financial pressures as the cost of doing business increases. In addition to the above-award wages offered to attract staff amidst a critical labour shortage, the franchisee is navigating:

- an increase in leasing costs of approximately 9% this year because, like many retailers, the franchisee's lease provides for a fixed percentage increase + CPI each year;
- a significant increase in the cost of electricity and raw goods; and
- staff and skills shortages which significantly impact the amount of time the franchisee has to work on their business, rather than in it.

The franchisee has no capacity to engage in one negotiation (let alone, up to four site or centre-specific negotiations) for a multi-enterprise agreement and if they did have the resources to engage in bargaining, any productivity gains will likely not offset the increased pay and conditions resulting from the process.

6.13. The National Retail Association aligns with other members of the business community calling for a change to the definition of "small business employer" and the small business exemption threshold for multi-enterprise bargaining provided for in the Bill. Specifically, we agree that a small business employer and the exemption threshold should change from "15 or fewer employees" to "100 or fewer employees".

6.14. The elephant in the room for retailers is that there are few meaningful productivity gains to be achieved through enterprise bargaining and the administrative efficiencies are variable depending on the size of the employer's business. In many cases, and particularly for small business, any administrative efficiencies harnessed through enterprise bargaining, are not offset by the cost of

bargaining (time cost, and costs associated with advice and support through bargaining) and likely increased cost of wages resulting from the process.

6.15. This position is supported by the Productivity Commission, whose Chairperson recently stated:

> *"The predominant view in the literature is you get better productivity outcomes from a firm-based system than an industry-based system because that's what allows productive firms to grow, expand, offer a different deal to their workers. [It] allows workers to move towards higher productivity firms. And that's a very important mechanism by which economy-wide productivity growth occurs."*

6.16. The types of outcomes retailers seek through bargaining are ones that promote flexible and permanent employment in their businesses. For example, there is a significant need and desire by retailers for increased flexibility in part-time work arrangements that are otherwise stifled by the inflexibilities inherent in the General Retail Industry Award 2020 (one of the last remaining modern awards for a service industry without such flexibility). The Bill currently provides no comfort to retailers that these types of outcomes are achievable through multi-enterprise (or, in fact single-employer) bargaining.

EXAMPLE – LEGITIMATE, IN TERM ENTERPRISE AGREEMENTS MAY BE UNDERMINED BY THE SUPPORTED BARGAINING REGIME

A retailer and the registered employee organisation for the retail industry, the Shop, Distributive and Allied Employee's Association (**SDA**) bargain for a single employer enterprise agreement covering the majority of the retailer's workforce which is subsequently approved by the Fair Work Commission.

A rival, unregistered union is critical of the deal struck between the parties. The rival union, in the capacity of an employee bargaining representative, applies to the Fair Work Commission for a supported bargaining authorisation and is granted an authorisation which covers the retailer who has an in-term single enterprise agreement negotiated with the SDA.

The retailer cannot reach agreement with the rival union through the supported bargaining process and despite having an in-term enterprise agreement in place (which would ordinarily mean protected industrial action cannot be taken), the retailer is exposed to industrial action organised by the rival union in accordance with the new supported bargaining scheme.

If the retailer is forced to capitulate to the rival union's demands, the supported bargaining agreement will replace entirely the terms of the in-term enterprise agreement struck with the SDA.

6.17. In respect of the "supported bargaining stream", the National Retail Association has serious concerns about the lack of critical detail in the Bill. Specifically, the Bill does not define the meaning

of the expression "low paid worker" which could have the unintended consequences of having retailers and their workers subject to supported bargaining agreements.

6.18. Where, for the first time, industrial action is available for supported bargaining and any supported bargaining agreement automatically prevails over any other enterprise agreement applicable to an employer, retailers need certainty about whether Parts 19 and 20 of the Bill will have application to their business and their workers, or not.

6.19. Further, proposed section 180A would see employers required to have the agreement of employee organisation bargaining representatives prior to the agreement being voted on. Ultimately, the bargain is between the employer and the employees, not the employer and employee organisation. Proposed section 180A would enable a situation where a majority of employees may agree and desire that an agreement be approved, however, an employee organisation may not be willing to permit them to vote on such an agreement until all its claims are met.

6.20. This section is inhibitive to voluntary and representative bargaining for all employees, where employees who are not members of an organisation, or even those who are, will be prejudiced by ongoing bargaining when a majority of employees support an agreement and it could be 'made'. Drawing out bargaining to the prejudice of all involved for union motives should not be encouraged. The National Retail Association submits proposed section 180A should be removed.

7. INDUSTRIAL ACTION

7.1. Industrial action rarely occurs in the retail industry. Of all Protected Action Ballot Orders (**PABO**) made by the Fair Work Commission between November 2017 and November 2022, less than 0.5% related to retail businesses.

7.2. Retailers and their employees have a demonstrated history of being able to successfully navigate bargaining disputes without resorting to costly and disruptive industrial action. The National Retail Association position is that there no case in support of the measures proposed by Part 19 of the Bill, besides those which seek conciliated outcomes to bargaining disputes before parties' resort to industrial action.

7.3. The National Retail Association objects to the amendments proposed by section 459(1A) of the Bill which seek to extend the period within which industrial action can be taken following a PABO. Currently, industrial action must be taken within 30 days of the PABO and the Bill seeks to extend this to 3-months, in the process limiting the availability of employer response action in certain circumstances.

7.4. Further, the compulsory multi-enterprise bargaining streams in the Bill create the potential for industrial action to occur across the retail industry. The increased risk of industrial action across multiple employers will have devastating consequences for small to medium sized businesses and threaten jobs.

> EXAMPLE – STRIKE ACTION ACROSS THE RETAIL INDUSTRY WILL DISABLE THE SUPPLY CHAIN
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> Where a "single interest" authorisation or "supported bargaining" authorisation is granted for the retail industry in respect of an enterprise agreement proposed to cover retail distribution centres across Australia, industrial action organised and executed across multiple retail distribution centres has the potential to significantly disrupt the supply chain.

8. ENTERPRISE BARGAINING AND AGREEMENT APPROVAL

Initiating bargaining

8.1. Part 15 of the Bill permits a single employee, or a union representing a single employee, to initiate bargaining automatically once a request to bargain has been sent to the employer. This part of the Bill does away with the requirement for a majority support determination to commence bargaining,

8.2. The mechanism for majority support is an important safety net for employers who do not have the means to engage in enterprise bargaining. Anecdotally, many retailers who are requested to bargain, do not force majority support determination proceedings through to completion in the Fair Work Commission. Many, in good faith, rely on the evidence or advice of employee bargaining representatives about whether a majority of employees seek to bargain for an enterprise agreement.

8.3. It's non-sensical to introduce amendments that enable a single, self-interested party to commence enterprise bargaining on behalf of a workforce that may have legitimate reasons not to displace their existing pay and conditions, or simply have no desire to bargain. The National Retail Association submits that Part 15 of the Bill should be withdrawn in its entirety.

Agreement approval and the Better Off Overall Test

8.4. The National Retail Association supports the measures in the Bill which simplify the Fair Work Commission's existing complex agreement approval process.

8.5. Part of these measures require the Fair Work Commission to determine whether an enterprise agreement has been "genuinely agreed", which it must be satisfied of before approving an enterprise agreement. In principle, the National Retail Association supports this reform. However, because the Bill provides the Fair Work Commission the discretion to develop a "Statement of Principles" against which genuine agreement will be assessed (rather than the relevant principles being fixed by law), we note that employers have little capacity to understand from the text of the Bill, how future enterprise agreements will be assessed.

8.6. Further, the National Retail Association supports measures which simplify the Better Off Overall Test (**BOOT**), subject to our submissions below. The proposals which seek to remove unnecessary complexity from the enterprise agreement approval process will help to instill greater confidence in employers in relation to enterprise bargaining.

Reassessment of the BOOT

8.7. One of the hallmarks of the current enterprise bargaining framework is that, following a rigorous (or "line by line") assessment of the BOOT and subsequent approval by the Fair Work Commission, an employer has certainty over the pay and conditions in place for its workforce for the life of the agreement.

8.8. The Bill seeks to depart from this important aspect of the enterprise bargaining regime by introducing the capacity for an employee or union to apply to have an approved, in-term enterprise agreement re-assessed for BOOT compliance. The National Retail Association strongly objects to these provisions of the Bill which are open for abuse by employees seeking to agitate pay disputes and frustrate the employer with complicated and resource-intensive proceedings in the Fair Work Commission.

8.9. Where the Fair Work Commission must be satisfied that the strict pre-approval requirements for an enterprise agreement have been met, that a majority of employees voted in favour of the agreement and that the agreement satisfies the BOOT, there is no rational need for sections 227A-D of the Bill which destabilise the certainty of terms in the employer's industrial instrument.

9. BARGAINING DISPUTES

9.1. Part 18 of the Bill concerns the Fair Work Commission being given the power to arbitrate bargaining disputes where there is "no reasonable prospect of agreement being reached" and it is "reasonable in all the circumstances to make (an intractable bargaining) declaration, taking into account the views of the bargaining representatives for the agreement". The National Retail Association submits this approach is unnecessary and prejudicial to employers. Where a pre-requisite to an application for an intractable bargaining declaration is that parties have already engaged with the Fair Work Commission in dealing with a dispute, an outcome ought to have already been reached and if not, the employer likely has reasonable business grounds to support its position in bargaining.

9.2. Where parties have already engaged in a process and been unable to reach an outcome, a forced outcome is not an equitable outcome. This approach detracts from the core of the bargain. Bargaining by definition is to negotiate and reach agreement. Giving the Fair Work Commission the power to decide terms removes any sense of genuine agreement. It is unclear how the Fair Work Commission will assess or determine that there is no reasonable prospect of agreement being reached or what weight the Fair Work Commission will give to the views of the bargaining representatives.

9.3. The National Retail Association submits by the nature of bargaining, binding outcomes should only arise by the agreement of the parties. If the parties are unable to reach a bargain, and appropriate processes have been undertaken to mediate or conciliate have failed, then it should be accepted that a bargain will not be reached.

9.4. The National Retail Association's strong position is that forcing and binding parties to terms which are not agreed is wholly inequitable, and the Fair Work Commission's role should be only that of mediator, conciliator, and only if agreed by all parties to a dispute, arbitrator.

9.5. We acknowledge the Government's amendment to the Bill which provides that the Fair Work Commission is not able to make an intractable bargaining declaration in relation to a proposed agreement unless it is after the "end of the minimum bargaining period" of 6 months. However, the Bill lacks critical detail surrounding the meaning of the expression "intractable bargaining dispute" and accordingly, this part of the Bill is not supported by the National Retail Association.

10. AGREEMENT TERMINATION

10.1. The National Retail Association is concerned that Part 12 of the Bill unfairly restricts employers from seeking termination of nominally expired enterprise agreements. We also consider that the Bill unreasonably directs disputed or unilateral enterprise agreement termination proceedings to a Full Bench of the Fair Work Commission, introducing greater formality and cost to the employer seeking to have the enterprise agreement terminated.

10.2. Again, the Government has made out no meaningful case in support of Part 12 of the Bill. The existing framework in the Fair Work Act strikes a fair balance between seeking out and protecting the interests of employees covered by an agreement and allowing the Fair Work Commission the discretion to decline an application for enterprise agreement where it is contrary to the public interest to do so.

11. FINAL REMARKS

11.1. The National Retail Association's members operate tens of thousands of shop fronts across Australia, supporting the livelihoods of hundreds of thousands of workers and their families. Retailers rely for their success on the efforts of their dedicated staff. Particularly for small businesses, this is very much a partnership between business owners and those they employ.

11.2. The National Retail Association is deeply concerned that the multi-enterprise bargaining provisions of this Bill will cause irreparable damage to workplace relationships in many small businesses across the nation. It will pit business owners and their staff against one another, fighting battles that are not of their making and that they are not able to resolve within their own enterprises. This is a recipe for industrial and economic discord on a scale not seen in Australia in living memory.

11.3. While there are many positive aspects to this legislation, as outlined earlier in this submission, the overall impact will be to take Australia backwards by several decades – back to before the bold and visionary Accord of the 1980s and the subsequent drive towards genuine workplace bargaining that recognises the individual circumstances and needs of each business and its employees. On behalf of our members, the National Retail Association expresses its deepest disappointment and concern at the objectionable multi-enterprise bargaining provisions, as described earlier, and we urge the Senate to vote down those elements of the Bill.