

## ARA SUBMISSION

# FAIR WORK COMMISSION MODERN AWARDS REVIEW 2023-24 (REPLY TO THE LITERATURE REVIEW - WORK AND CARE)

### INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to provide another submission to the work and care stream of the Fair Work Commission ('FWC') Modern Awards Review 2023-24 (Awards Review).

The ARA is the oldest, largest, and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts, small and large, and online stores, the ARA informs, advocates, educates, protects, and unifies our independent, national and international retail community.

Our members operate across a diverse range of categories - from food to fashion, hairdressing to hardware, and everything in between. This leads to the ARA having a deeply vested interest in the development and review of multiple Awards.

In our initial submission to the work and care review, we expressed our dedication to 'achieving meaningful change for all industry participants',<sup>1</sup> and this commitment remains unchanged.

The ARA maintains a balanced approach to work and care can be achieved through the variations to the General Retail Industry Award (GRIA) proposed by the ARA in their application to vary the award.<sup>2</sup>

We advocate that any recommended changes to awards proposed by the literature review or employee groups be *selectively* and *carefully* assessed against the Modern Award Objectives and current effective legislative frameworks.

### BACKGROUND

On 12 September 2023, the Minister for Employment and Workplace Relations, the Hon Tony Burke MP, wrote to the President of the FWC, the Hon Justice Adam Hatcher, indicating the Australian Government's interest in the FWC initiating a "targeted review" of modern awards.

As part of the targeted review, the Minister suggested key focus areas including commencing a consultation and research process considering the impact of workplace relations settings on work and care, having regard to relevant findings and recommendations of the Final Report of the Senate Select Committee on Work and Care (Senate Report).

In a Statement dated 15 September 2023, the President of the FWC initiated a review of awards on the FWC's own motion under s 576(2)(a) of the Fair Work Act 2009 (*Cth*) ('The Act') to consider, among other areas, the impact of workplace relations settings on work and care.

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<sup>1</sup> Australian Retailers Association | [ARA-Submission-FWC-Award-Review-Work-and-Care.pdf \(retail.org.au\)](#).

<sup>2</sup> Australian Retailers Association | [Form F46 – Application to vary a modern award \(retail.org.au\)](#).

On 8 March 2024, a literature review was published by Western Sydney University, forming part of the research for the FWC targeted review of Modern Awards. The literature considered the impact of the workplace relations frameworks on work-carers.

Submissions in response to the literature review are due by 12 Noon (AEST) on Friday, 26 April 2024. The ARA sets out its response to the Literature Review herein.

## **POSITION**

In our initial submission, we highlighted the reality that legislative entitlements and protections are available to carers within s 65 of the Fair Work Act 2009 (*Cth*) ('FWA'). We also acknowledged, that as part of our application to vary the GRIA, the GRIA can create barriers to employee flexibility, specifically with changing or adjusting hours of work, and these barriers should be addressed.

While the ARA is confident that these barriers will be examined thoughtfully in the separate consultations and hearings with the Fair Work Commission, these recommendations are still of great relevance to the Modern Award Review.

Since our submission, the ARA has also engaged in meaningful consultations with the Fair Work Commission and other industry groups to highlight our position on what changes to the Award would be effective and ineffective in addressing the barriers between work and carers.

The ARA continues to advocate that this review of the Awards should not become a mechanism which burdens employers with greater costs, administration, or frameworks that are unnecessarily complex. Instead, the purpose should be to enable employers to accommodate greater flexibility for carers through policy outcomes that support this objective.

## **OVERVIEW OF THE LITERATURE REVIEW**

The literature review highlights key proposals for altering the National Employment Standards and Modern Award provisions to better enable a balance for workers with care responsibilities. It is highlighted that the proposals made are non-exhaustive and should also be read in accordance with the Senate Select Committee on Work and Care Findings.

It is important to note the proposals outlined by the literature do not include proposals from employer groups or explore the potential ramifications of the recommendations made that employers would face.

### **Reliability of the literature**

The literature review outlines many key areas for change and indicative proposals to be advanced to enable better work care outcomes for employees. These proposed changes and recommendations are formed from the data explored within the text which is extracted from varied sources segmenting specific demographic groups.

While the sources of information, provide some key insights about work and care arrangements, a keenly critical eye must be cast to the consideration of this in informing award changes.

Certain contexts with certain groups cannot commensurately represent broader society, and the inadequacies in the award system wholly.

The literature can help discern *some* social realities, and barriers to work for carers. However, the ARA affirms caution should be exercised when relying on various sources of academic research to inform legal decisions or legislative reforms.

### Consideration of the Literature

The literature review should not be used to advocate for changes to awards that undermine a 'fair and relevant minimum safety net of terms and conditions'.<sup>3</sup> In doing so, this would prioritise social data over industry and/or enterprise realities, potentially leading to errors of law to arise.

## CONSIDERATIONS OUTSIDE THE LITERATURE

### Modern Award Objectives

The Fair Work Act 2009 (*Cth*) ('the Act') s 134 outlines the Modern Award Objectives. These objectives, in conjunction with the National Employment Standards ('NES'), provide a 'fair and relevant minimum safety net of terms and conditions...'<sup>4</sup> taking into account a range of important considerations. Fairness in the context is taken to be 'assessed from the perspective of employees and employers covered by the modern award in question'.<sup>5</sup>

Among the legislated considerations, three specific considerations<sup>6</sup> provide that regard must be had to businesses, the greater economy and award useability.

- The Act s 134 (f) provides 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'.
- The Act s 134 (h) outlines 'the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'.
- The Act s 134 (g) outlines '(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards'.

These objectives apply to the 'performance or exercise of the FWC's modern award powers'.<sup>7</sup> These considerations, to the extent they are relevant, are significant in the decision-making process.<sup>8</sup>

Correspondingly, variations to awards must be 'justified on their merits'.<sup>9</sup> Given the purpose of the Modern Award Review, variations to awards could arise, thereby it is important to reflect and contemplate these considerations as part of the process of review.

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<sup>3</sup> Fair Work Act 2009 (*Cth*) s 134 | [FAIR WORK ACT 2009 \(NO. 28, 2009\) - SECT 134 The modern awards objective \(austlii.edu.au\)](#)

<sup>4</sup> Fair Work Act 2009 (*Cth*) s134 | [FAIR WORK ACT 2009 \(NO. 28, 2009\) - SECT 134 The modern awards objective \(austlii.edu.au\)](#).

<sup>5</sup> Fair Work Commission, 4 yearly review of modern awards | [Decision \[202\] FWCFB 2057](#)

<sup>6</sup> Fair Work Act 2009 (*Cth*) s 134 (f-h) | [FAIR WORK ACT 2009 \(NO. 28, 2009\) - SECT 134 The modern awards objective \(austlii.edu.au\)](#)

<sup>7</sup> Fair Work Commission, 4 yearly review of modern awards | [Decision \[202\] FWCFB 2057](#)

<sup>8</sup> 7 Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161 at [33].

<sup>9</sup> Fair Work Commission, 4 yearly review of modern awards | [Decision \[202\] FWCFB 2057](#).

## Limited Data on Broad Context

Many of the data points recognised and incorporated into the literature will be explored within this submission, particularly those relevant to the retail industry. While the text does highlight areas of weakness in award terms and useability that detract from an individuals' ability to balance work and care responsibilities, it needs to be recognised that often research into social dynamics and policy outcomes meditates on a biased approach of exposing deficiencies and shortcomings in established frameworks.

While there are areas of policy requiring review and development, without research or commentary on what is working well, it would be difficult to discern which areas do and do not require change.

For this reason, we advocate for proper and fair consideration of the views of industry and employer groups during this process of review, rather than singular reliance on report findings.

## SPECIFIC RESPONSES TO THE LITERATURE REVIEW

### The Definition of casual employment

The literature review highlights the proposition that casual employment results in insecure work, which offers limited leave entitlements, especially for regular and ongoing casuals. It posits that therefore, a new definition should be introduced defining casual employment to be exclusively 'work, which is intermittent, seasonal or unpredictable'.<sup>10</sup>

This proposed definition would undermine the broad merits of casual employment.

Casual employment can enable a greater work-life balance for individuals who want to work when they choose rather than being burdened by systematic and demanding work schedules.

This type of employment is also no longer as insecure, unprotected, or persistent. Casual employees have access to paid and unpaid leave entitlements<sup>11</sup>, recently legislated enhanced casual conversion pathways<sup>12</sup> and protections from adverse action.<sup>13</sup>

The newest definition to casual employment, coming into effect on 26 August 2024, repeals the current definition enabling the 'real substance, practical reality and true nature of the employment relationship'<sup>14</sup> and 'casual loading'<sup>15</sup> to be considered in determining whether an employee is casual. This definition broadly limits which employment arrangements can be defined as casual, offering further protections and securities for existing employees.

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<sup>10</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>11</sup> Fair Work Ombudsman | [Leave | Small Business Showcase Fair Work Ombudsman](#)

<sup>12</sup> Fair Work Ombudsman | [Closing Loopholes: Additional Fair Work Act changes - Fair Work Ombudsman](#)

<sup>13</sup> Fair Work Ombudsman | [Protections at work - Fair Work Ombudsman](#)

<sup>14</sup> Fair Work Ombudsman | [Closing Loopholes: Additional Fair Work Act changes - Fair Work Ombudsman](#)

<sup>15</sup> Fair Work Legislation Amendment (Closing loopholes No.2) Act 2024 | [Federal Register of Legislation - Fair Work Legislation Amendment \(Closing Loopholes No. 2\) Act 2024](#)

The proposition to change the casual definition before the new definition is even to take effect would cause confusion and ambiguity for employees and employers alike.

For these reasons, the ARA does not believe that changing the definition of casual employment will improve work and care outcomes for employees, instead, it will create barriers to employment for individuals that want to have more control over their pattern of work.

### **‘Immediate Family’ definition**

Among the many indicative proposals outlined by the literature review, is the recommendation that the pre-requisite of *immediate family* relative to the carers leave entitlement under the NES be expanded to include ‘extended family members, close friends and community members’.<sup>16</sup>

The purpose of sick and carer’s leave is to provide employees time off to help them deal with ‘personal illness, caring responsibilities, or family emergencies’.<sup>17</sup>

The purpose of the *immediate family* pre-requisite is to support employees in providing care to members that are close to them. The current definition already extends to individuals beyond the nuclear family dynamic including ‘former spouse, step relations and household members’<sup>18</sup>.

Enabling employees to take carers leave for all types of relationships would unduly provide for more staff absences as employees already have access to ‘2 days unpaid carer’s leave each time an immediate family member or household member of the employee needs care and support’.<sup>19</sup>

This would lead to more extensive operational challenges for businesses, particularly for those in consumer-facing sectors like retail. The effect of this could impede retailers’ ability to cope with customer demand and stock management creating challenges to consumer satisfaction, completing sales from beginning to end and managing business reputation.

This could also lessen workforce productivity, and burden workload distribution among team members which would heighten employee dissatisfaction and burnout. An important consideration relative to the modern award objectives, is the objectives of government to enable a more ‘productive workforce’<sup>20</sup> and employee well-being.

It is also unclear how this proposal will address other barriers work and carers face. Specifically, other carer-based disparities in career and salary development will not be appropriately addressed through expanding leave provisions.

The current system allows employers to implement workplace policies that build upon the current definition of *immediate family* at their own discretion through generous workplace policies. With many retailers already incorporating different types of relationships, and modern family dynamics into leave entitlements, further changes to legislation could restrict an employer’s ability to create discretionary flexibility within the meaning of immediate family.

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<sup>16</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>17</sup> Fair Work Ombudsman | [Sick and carer's leave - Fair Work Ombudsman](#)

<sup>18</sup> Fair Work Ombudsman | [Sick and carer's leave - Fair Work Ombudsman](#)

<sup>19</sup> Fair Work Ombudsman | [Unpaid carer's leave - Fair Work Ombudsman](#)

<sup>20</sup> Australian Government Employment Whitepaper | [Working Future: The Australian Government's White Paper on Jobs and Opportunities | Treasury.gov.au](#)

The ARA supports workers being able to balance care needs. However, we contend this proposition does not properly factor in the costs for some businesses, the purpose of the leave entitlements, the other barriers facing work-carers and the reality that, where they can, employers will work with employees to expand leave provisions and offer flexibility with legislative definitions.

### Taking unpaid leave before paid leave

The literature suggests that work-carers are unduly impacted by restrictive regulations that prohibit the taking of unpaid carers leave before paid personal/carers leave is exhausted.<sup>21</sup> The ARA disagrees with this contention.

Taking paid leave initially enables employees to have time off from work without worrying about wage loss. The amount of unpaid carer's leave is equal to 2 days each occasion<sup>22</sup> while personal leave is 10 days per year,<sup>23</sup> subject to personal accrual.

Enabling employees to move back and forth between unpaid and paid carers leave would also create extensive complexity for employers and employees alike, enviably leading to confusion over leave balances, correspondingly lessening award useability.

### Extending paid and unpaid leave entitlements

The literature asserts many proposals to remedy the 'inadequacies'<sup>24</sup> of leave available to carers. The most prominent is the proposition that **all** employees should have access to **more** paid and unpaid leave entitlements.

The ARA rejects this recommendation for a few significant reasons.

Casual loading is payable to a casual employee in satisfaction of the absence of most paid leave entitlements. Enabling casual employees to receive both paid personal/carers leave and/or annual leave, and casual loading would be an extreme increase in the costs of wages that would unduly burden businesses, many of whom are already struggling with heightened business costs.<sup>25</sup> This would also provide that casual employees would receive more pay and the same entitlements as other non-casual workers, providing inequality between employment arrangements.

If an employer was obligated to provide additional paid leave to casuals, the purpose of the casual loading would be rendered obsolete, and in accordance with fairness to both parties, should accordingly not be payable. This would ultimately demote the viability and attractiveness of casual employment for those that prefer these arrangements because they offer higher earnings in the short term.

Increasing the number of paid personal/carers leave and unpaid carers leave days available to employees would again unduly increase the costs for businesses, making employers pay more for lower productivity, a likely reflection of higher staff absences.

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<sup>21</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>22</sup> Fair Work Ombudsman | [Unpaid carer's leave - Fair Work Ombudsman](#)

<sup>23</sup> Fair Work Ombudsman | [Paid sick and carer's leave - Fair Work Ombudsman](#)

<sup>24</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>25</sup> ARA Member Pulse Survey 2024.

Current entitlements provide employees to take unpaid carer's leave on unlimited occasions, for this reason, the ARA is not content that these provisions do not achieve the same outcome as the ones proposed.

A different view may be afforded if the paid leave was to be funded by state governments as is the case in Victoria within the Victorian Sick Pay Guarantee.<sup>26</sup>

### Flexible Work Arrangements

The literature review, supplemented by the Senate Select Committee on Work and Care ('committee'), proposes the alteration of the FWA s 65 provisions to enable all casuals, and employees with less than 12 months continuous service with their employer, to access the flexible work arrangements.<sup>27</sup>

The Committee's recommendations, as endorsed by the literature review, also recommend replacing an employer's grounds for refusal of a flexible work arrangement with 'unjustifiable hardship'<sup>28</sup> instead of 'reasonable business grounds'.<sup>29</sup>

These proposals are made, in conjunction, with the assertion that the FWA provisions do not adequately support any employment arrangement other than full-time and that correspondingly, the established framework does not allow for worker-care flexibility.<sup>30</sup>

These findings and recommendations are wholly inconsistent with established workplace flexibility entitlements contained within the FWA and modern awards.

Awards and the NES enable the continuation of different employment arrangements such as full-time, part-time and casual. With general protections within the FWA ensuring the longevity of these employment arrangements for employees that have chosen them.

The current FWA provisions only enable an employer to refuse a flexible work arrangement request reasonably and if they have held discussions with the employee, and tried to reach a genuine agreement of accommodating and the ramifications for refusing the employees request has been considered.<sup>31</sup>

Reasonable grounds include circumstances whereby the arrangement would be too costly, there is no capacity for other employees to accommodate the request, the change is impractical, or the requested arrangement would result in significant inefficiency, and productivity or create a negative impact on customer service.<sup>32</sup>

This requires more than just having business grounds to refuse a request. Instead, reasonable regard to the adverse impact against personal circumstances and the work/life needs of the employee must be had.<sup>33</sup>

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<sup>26</sup> Business Victoria | [Sick and carer's pay for Victoria's casual and contract workers | Business Victoria](#)

<sup>27</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>28</sup> Select Committee on work and Care | [Interim Report \(aph.gov.au\)](#).

<sup>29</sup> The Fair Work Ombudsman | [Flexible working arrangements - Fair Work Ombudsman](#)

<sup>30</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>31</sup> Fair Work Ombudsman | [Flexible working arrangements - Fair Work Ombudsman](#)

<sup>32</sup> Fair Work Ombudsman | [Flexible working arrangements - Fair Work Ombudsman](#)

<sup>33</sup> *Ambulance Victoria v Fyfe* (2023)FWCFB 104 | [2023fwcfb104.pdf](#)



The FWA s 65 provides that employees that are parents or have the responsibility for the care of a child of school age or younger,<sup>34</sup> and an employee recognised as a carer within the meaning of the Carer Recognition Act 2010 (Cth)<sup>35</sup>, can access flexibility as to their working arrangement.

Individual Flexible Arrangements ('IFA's'), a term contained within most awards, establishes an entitlement for any award-covered employee to find flexibility as to when work is to be performed, regardless of their length of service or employment arrangements.

Arrangements for when work is performed is also often negotiated between employers and employees during employment, without relying on legislative entitlements.

For these reasons outlined, the ARA rejects the proposition that these legislative provisions should be reformed, given that current legislative provisions, and award terms promote different employment arrangements and enable flexible work arrangements for work-carers.

### **Unpaid Parental Leave Extensions**

Reviewing the unpaid parental leave entitlements under the NES so that employees with less than 12 months of continuous service could access this leave entitlement would undermine notice requirements that employees have to provide<sup>36</sup>, and simultaneously, lead to an uncertain workforce for employers.

Business performance could be detrimentally affected by long periods of staff absence when employees are being on-boarded, or are in probation, leading to great operational instability for businesses.

### **Hours of Work**

The literature review puts forth the suggestion that work weeks should be shorter and 38 maximum weekly hours enforced.<sup>37</sup>

As outlined in our application to vary the GRIA, the ARA in-principle supports the first proposition of providing employees access to a shorter work week spread across 4 days instead of 5 pursuant to clause 15.7 (c) of the GRIA. We reaffirm that any variations to the GRIA should align with those proposed in our application, and to the extent of any inconsistency, the ARA's position should be preferred.

We reject the second proposition given these regulations already exist in the National Employment Standards ('NES') and awards.

The NES outlines 38 maximum weekly hours for employees, providing that overtime can be reasonably refused. While awards can enable arrangements for the averaging of hours, most of these arrangements cannot exceed a specific time frame.<sup>38</sup>

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<sup>34</sup> The Fair Work Act 2009 (Cth) (1A) (a) | [FAIR WORK ACT 2009 \(NO. 28, 2009\) \(austlii.edu.au\)](#)

<sup>35</sup> The Fair Work Act 2009 (Cth) (1A) (b) | [FAIR WORK ACT 2009 \(NO. 28, 2009\) \(austlii.edu.au\)](#)

<sup>36</sup> Fair Work Ombudsman | [Applying for parental leave - Fair Work Ombudsman](#)

<sup>37</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>38</sup> Fair Work Ombudsman | [Maximum weekly hours - Fair Work Ombudsman](#)



For this reason, the change to awards in this manner is not required given existing protections enable employees to refute working additional hours already exist, or if employees do work more hours one week, they can work less the next in accordance with award provisions.

### Part-time working time standards

The literature purports the view that part-time work standards should be ‘non-negotiable’<sup>39</sup> given that these types of work enable employees to be ‘on-demand’ as hours of work can be flexed up or down.<sup>40</sup>

In reply to that observation, it seems important to acknowledge the existence of express part-time provisions of agreed hours in most awards including the GRIA, Fast Food Industry Award and Restaurant Industry Award.

These awards do not enable an employee’s hours to be changed, in most cases, without notice, consultation or agreement.

While we maintain these provisions can actually serve to restrict employee flexibility, as explored within our application to vary the GRIA, we reject the allegation that part-time employees are ‘on-demand’.

The contention that part-time work standards are negotiable seems misaligned with award realities.

### Roster changes

There is an ongoing narrative in the literature that the retail industry provides ‘poor rostering practices and weak award protections for reasonably predictable hours of work’.<sup>41</sup> For this reason, the literature puts forth recommendations to change rostering terms in awards that provide more ‘certainty and predictability to working hours’.<sup>42</sup>

This proposition fails to consider the realities of the retail industry, specifically that retailers rely on staff attendance to operate, and they cannot, in advance accommodate for unforeseen staff absences.

Thereby further amendments to the GRIA and other awards that require employers to provide *advanced* notice of roster changes or predictability in rosters would not be commensurate with the abilities of employers to navigate those demands or the needs of employee flexibility.

It is the ARA’s position that the current provisions, with the exception of the modifications proposed within our application to vary the GRIA, operate effectively and fairly by balancing the Modern Award Objectives, and providing security in rostering arrangements for employees.

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<sup>39</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>40</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>41</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

<sup>42</sup> Western Sydney University Literature Review | [Literature review for the Modern Awards Review 2023-24 - work and care \(fwc.gov.au\)](#)

### Minimum engagement for casuals

It is highlighted that that the minimum engagement period for casuals in feminised sectors is too low and therefore, should be better aligned with minimum engagement periods in 'male-dominated' awards.

The ARA rejects an increase to the minimum engagement periods for casuals.

Casual employees who are carers require flexibility and accordingly benefit from smaller minimum engagement periods for shifts meaning they can fit work around their caring responsibilities.

### CONCLUSION

The ARA recognises the importance of enabling and supporting workforce participation for carers. We also recognise that the importance of aligning award variations with the Modern Award Objectives.

The ARA affirms the position that any recommended changes to awards proposed by the literature review or employee groups be *selectively* and *carefully* assessed against the Modern Award Objectives and current effective legislative frameworks.

We also maintain that in circumstances whereby another industry party proposes variations to the awards which is inconsistent with this submission, or the variations proposed in the ARA's application, the ARA's recommendations should be preferred.

The ARA and its members thank the FWC for the opportunity to provide a submission to this important review. Any queries in relation to this submission can be directed to our policy team at [policy@retail.org.au](mailto:policy@retail.org.au).