



National
Retail
Association

ANNUAL WAGE REVIEW 2018-19

Submissions In Reply to the Expert Panel
of the Fair Work Commission

April 2019



About the National Retail Association

The National Retail Association, Union of Employers (**the NRA**) is an industrial organisation representing the interests of employers in the retail, fast food, and associated industries and is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

The NRA has fulfilled this function, under one name or another, since its formation as a non-corporatised entity in the 1920s and then as a formally registered union of employers since 1931.

Since that time, the NRA has grown and now represents the interests of over 6,000 retailers, encompassing over 24,000 shop fronts and their associated employees nationwide.

NRA Contact for this submission

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Introduction

- (a) On 15 March 2019, the National Retail Association (**NRA**) submitted its main submissions in the *Annual Wage Review 2018-19* (**March submissions**). In our March submissions, we urged the Expert Panel to take a cautious approach in determining the level of any increase to minimum wages in this year's Annual Wage Review.
- (b) In our March submissions, we expressed our support for the submissions of the Australian Chamber of Commerce and Industry (**ACCI**) in relation to the broader economy, and draw the attention of the Expert Panel to the following matters particular to the retail industry for consideration:
 - (i) The majority of goods of the kind subject to retail sale continue to experience minimal increases, or further decreases, in real price, as a result of continuing price competition in the retail industry.
 - (ii) Where retail goods have experienced significant increases in price, this is regularly the result of government action in the form increased excises (as in the case of alcohol and tobacco), with the additional revenue not being to the benefit of the retailer.
 - (iii) Gross operating profits in retail businesses have declined in both trend and seasonally-adjusted terms over the financial year to date, as have seasonally-adjusted sales of goods and services.
 - (iv) With the real price of goods decreasing, or increasing at a much lesser rate in most cases than real wages, the gap between the profit derived from sales and the labour cost of making those sales is widening.
- (c) The 3.5% increase awarded by the Expert Panel in the *Annual Wage Review 2017-18*, on the back of the 3.3% increase awarded in the *Annual Wage Review 2016-17*, have resulted in two consecutive years in which the statutory increase to minimum wages was exceptionally high relative to prevailing economic conditions, particularly inflation.
- (d) In the circumstances, we submitted, and reiterate now, that a modest wage increase of **no more than 1.8%** (equivalent to CPI as at December 2018) is warranted in this year's Annual Wage Review.
- (e) We have considered the submissions of other parties to this Review, and none of these have caused us to change the views expressed in our March submissions.
- (f) In this Reply Submission we have not sought to address issues of wider economy raised by other parties, as we believe this appropriate to be dealt with by those organisations which have coverage over industry as a whole. We therefore express our in-principle support of the submissions of ACCI with respect to the wider economy.
- (g) This Reply Submission will also address, where necessary, the Questions on Notice published by the Expert Panel on 3 April 2019. We have not sought to address each Question on Notice but have retained the numbering convention of the Questions on Notice for ease of reference. Where each Question on Notice has been extracted in these submissions, footnotes have been removed.
- (h) This Reply Submissions will also address specific parts of submissions made by other parties to this Review with which NRA disagrees. Any silence by NRA on a particular submission of a party ought not be taken to indicate agreement with that submission.

1. Decision-making process

1.1 Question to all parties

ACBC proposed an inquiry to determine the appropriate margins for skills and responsibilities (or work value) of the C10 rate in the Manufacturing and Associated Industries and Occupations Award 2010 and the Level 1 graduate employee rate under the Professional Employees Award 2010.

Does any other party support such an inquiry?

- (a) The NRA does not support the inquiry proposed by the Australian Catholic Bishops Conference (**ACBC**) as outlined above.
- (b) We note that ACBC's submission appears to intend this review to presume that the classifications mentioned from the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Professional Employees Award 2010* are an appropriate benchmark for all other awards.
- (c) Whilst there may be precedent to suggest that the C10 rate is an appropriate benchmark for the purposes of equivalency with respect to occupations in the children's services sector, the same cannot be said for other industries.
- (d) Specifically, the inquiry proposed by ACBC appears to be based on the 2005 decision of the Australian Industrial Relations Commission (**AIRC**).¹
- (e) In this case, the tribunal determined to fix the rates of pay for child care workers under the *Child Care Industry (Australian Capital Territory) Award 1998* and the *Children's Services (Victoria) Award 1998* by determining that certain classifications in these awards ought to be treated as equivalent to classifications in the *Metal, Engineering and Associated Industries Award – 1998*.
- (f) This case itself drew from jurisprudence established by the AIRC in the 1968 *Vehicle Industry Award* decision.² The providence of both of these decisions was considered by the Full Bench of the Fair Work Commission in *Application by United Voice and the Australian Education Union*.³
- (g) The abovementioned 2005 and 2018 decisions dealt specifically with the consideration of the equivalency of the classifications in awards applicable to the children's services and childcare industries with the C5 and C10 classifications in the relevant manufacturing awards in force at the time.
- (h) There is no precedent to indicate that the C10 and Level 1 classifications in the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Professional Employees Award 2010* respectively are the appropriate benchmarks for a wholesale review of award minimum wages as proposed by ACBC.
- (i) This is a significant preliminary question that would need to be addressed by a Full Bench before any such inquiry could proceed on the basis proposed by ACBC.
- (j) The NRA respectfully submits that unless ACBC further refines its proposed inquiry, it will extremely difficult if not impossible for ACBC to lead sufficient evidence to convince a Full Bench of the benchmarks it proposes for this inquiry.
- (k) We also submit that it is impractical, in the context of this Review, for the parties to gather and provide to the Expert Panel sufficient evidence within the timeframe of the Review to allow such an inquiry to be held.

¹ PR954938

² (1968) 124 CAR 295

³ [2018] FWCFB 177

- (l) The NRA respectfully submits that, should ACBC wish to pursue this inquiry further, a separate application for a variation to specific modern awards ought to be made to the Fair Work Commission seeking an exercise of the Commission's powers under section 157(2) of the *Fair Work Act 2009* (Cth) (**the Act**).

1.3 Question to CCIQ and other parties

The CCIQ has sought a deferral of any increase in the NMW and modern award minimum wages on the basis of the January and February 2019 rainfall event in the Townsville region. The submission states that:

The proposed mechanism to determine which employers should receive the minimum wage deferral is to be guided by the Disaster Recovery Funding Arrangements 2018 (FRFA) and specifically the DRFA event – North and Far North Queensland Monsoon Trough, 25 January – 14 February 2019'.

The submission further identifies three forms of assistance, namely:

- *Disaster Assistance (Essential Working Capital) Loans Scheme for Small Business*
- *Disaster Assistance (Small Business Loans)*
- *Special Disaster Assistance Recovery Grants for Small Business (hereinafter referred to as the Special Recovery Grant)*

CCIQ is requested to provide the following additional information:

- *Is it proposed that an employer in receipt of any one of the three forms of assistance would be subject to the deferral? If not, what scope is proposed and how will the relevant employers be formally identified in the NMW order and any determination concerning the modern awards?*
- *What are the criteria by which businesses that receive the relevant DRFA assistance are identified and assessed?*
- *Are any of the relevant forms of assistance directed to assisting businesses to pay employee wages and entitlements and/or support continuing employment?*
- *What forms of assistance are available to directly assist employees impacted by the relevant DRFA event?*
- *How would the proposed deferral impact upon the considerations in the modern awards objective (s.134) and the minimum wages Objective (s.289)?*

Other parties are invited to comment on these matters.

- (a) The NRA is not privy to the details of what is proposed by CCIQ with respect to its proposal, and defers to that organisations to discuss further what is contemplated by its submission.
- (b) Whilst the NRA can appreciate the reasoning behind CCIQ's proposal, it does not support the proposal.
- (c) Without wishing to detract from the losses suffered by individuals and businesses in the January – February monsoon event in Queensland, there are a number of other declared disaster events in 2019 alone, including:
- (i) Severe Tropical Cyclone Trevor, Queensland and Northern Territory (March 2019);
 - (ii) Victorian Bushfires (February 2019);
 - (iii) Northern NSW Bushfires (February 2019);
 - (iv) Inland NSW Storms and Floods (January 2019);
 - (v) St Ronans Bushfire, WA (January 2019);

- (vi) Rosedale Bushfire, Victoria (January 2019).
- (d) As this Review pertains to industrial instruments of national import, in NRA's view it would be inappropriate to defer the application of any increase to minimum wages to any particular declared disaster area unless the particular disaster event has been assessed against other prevailing disaster events and determined as having a greater economic impact than other disaster events.
- (e) At present, it does not appear that such an assessment is proposed by CCIQ, nor does NRA believe that such an assessment is practicable in the context of this Review.
- (f) We also note that assistance up to \$100,000 is available to businesses in the affected area for the purposes of meeting operational costs, including wages, with respect to the disaster referred to by CCIQ, which will be a significant factor weighing against the granting of the deferment sought.

2. Economic and labour market considerations

2.5 Question to the ARA, MGA and NRA

Over the year to the December quarter 2018, the increase in the Wage Price Index (WPI) in Retail trade was 2.0 per cent. The increase in the NMW and modern award minimum wages in 2018 was 3.5 per cent.

Are ARA, MGA and NRA able to explain how the WPI increase in Retail trade was so much less than the increase in the NMW and modern award minimum wages?

All other interested parties are invited to comment.

This issue was also discussed at paragraph 162 of the 2017–18 Review decision.

- (a) The NRA notes that this question has been of concern to the Expert Panel in the past, particularly in the Annual Wage Review 2017-18 as referred to.
- (b) At paragraph 162 of last year's Review, the reason for this concern appeared to be largely based on the fact that the WPI for the three most award-reliant industries, including the retail industry, was significantly less than headline WPI.
- (c) At the time, various explanations were provided, including that a degree of consideration ought to be made for the prospect of non-compliance with the minimum standards. NRA's view with respect to the incidence of non-compliance in the retail industry is well-documented in our responses to various inquiries on the subject matter.
- (d) In NRA's view, it is more likely that the reason for this discrepancy lies in the following circumstances:
 - (i) that the scope of what is understood to be the 'retail industry' for the purposes of this Review (and the *Fair Work* system generally) is much narrower than what is included within the scope of the expression 'Retail Trade' for statistical purposes; and
 - (ii) an increasing tendency among retail businesses to absorb annual increases to the minimum wage in above-award payments.

The scope of the 'retail industry'

- (e) For the purposes of the WPI, the Australian Bureau of Statistics (**ABS**) groups various sub-industries into the 18 industries referred to in its various publications according to the *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006* (cat. no. 1292.0).⁴
- (f) Division G of the ANZSIC defines what is included in the 'Retail Trade' industry for the purposes of the statistics published by the ABS. For these purposes, the 'Retail Trade' industry includes:
 - (i) motor vehicle retailing;⁵
 - (ii) fuel retailing;⁶
 - (iii) boat and boat trailer retailing;⁷ and
 - (iv) pharmacy retailing.⁸

⁴ Australian Bureau of Statistics, 2012, *Wage Price Index: Concepts, Sources and Methods, 2012, Chapter 5: Coverage and Classifications*, cat. no. 6351.0.55.001, viewed 8 April 2019, <http://www.abs.gov.au/ausstats/abs@nsf/Lookup/6351.0.55.001Chapter252012> (ANZSIC)

⁵ ANZSIC, p. 245

⁶ ANZSIC, p. 247

⁷ ANZSIC, pp. 255 - 256

⁸ ANZSIC, p. 258

- (g) These elements of the 'Retail Trade' industry are not insignificant in and of themselves, and are generally covered by modern awards other than the *General Retail Industry Award 2010*.
- (h) In particular with respect to the sub-industries outlined above, the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* and the *Pharmacy Industry Award 2010* would be more relevant.
- (i) It should be noted, particularly with respect to motor vehicle and boat and boat retailer retailing, there is likely to be a number of remuneration partially by commission which may skew the statistical data.
- (j) It may be appropriate to seek the views of the Motor Trades Association (**MTA**) and the Pharmacy Guild in relation to the potential impact of those sub-industries on the calculation of WPI when compared to the outcome of last year's Review.
- (k) Further, the ABS assesses each industry through the prism of a *Type of Activity Unit (TAU)*. The TAU:

*... comprises one or more business entities, sub-entities, or branches of a business entity within an Enterprise Group that can report production and employment data for similar economic activities.*⁹
- (l) This means that a branch of a business performing retail-like functions will be included in the statistical reckoning of the 'Retail Trade' industry, even if the employing entity is not itself in the retail industry and is covered by another award (such as, for example, the *Amusement, Events and Recreation Award 2010*).
- (m) Consequently, although the general retail industry is largely award-reliant, those jobs taken into consideration for the purposes of statistical reporting by the ABS may not necessarily be employed in an award-reliant industry even though the activities of that branch of the business entity may be of a retail nature.
- (n) As such, whilst it may be accepted that the general retail industry, as understood in the forum of the Fair Work Commission and the Expert Panel, is highly award-reliant, the 'Retail Trade' industry as understood by the ABS for the purposes of reporting WPI is far more wide-ranging and includes areas.
- (o) We note that this divergence between WPI and annual wage increases may be more noticeable under the industry-based modern award system than it was under the former system as, at least at the State level, this was largely based on the job of the individual employee rather than the industry of the employer.

Tendency towards above-award payments

- (p) As a result of the changes to the *General Retail Industry Award 2010* brought about by the current four-yearly review of modern awards, the NRA is aware, from its interactions with members, that retail employers are developing an increased propensity to pay permanent employees a 'loaded' above-award salary.
- (q) This is largely due to the administrative burden placed on employers under the *General Retail Industry Award 2010* being required to update the rates of pay for casual employees in their payroll systems four times between the outcome of this Review and the next such Review, where previously such updates were required only annually.
- (r) In an effort to counteract this administrative burden, we are aware that retail employers are increasingly seeking to minimise the need for regular updates for permanent employees by moving to an above-award salary model of remuneration.
- (s) It is possible that the increase determined by last year's Review was able to be absorbed, at least in part, by these above-award payment arrangements.

⁹ Supra, note 4

3. Relative living standards and the needs of the low paid

3.5 Question to all parties

The ACTU submits that the record rate of Australians working a secondary job recorded by the ABS in December 2018 is an indicator of financial stress. They cite the fact that many of the secondary jobs are in low-paid sectors as evidence that this increase is a result of financial stress.

Does the ACTU have any further evidence that this trend is being caused by financial stress or deprivation? What is the response of the other parties to this submission?

- (a) The NRA submits that the mere fact that individuals choose to have a second job in a low-paid sector cannot be taken, in and of itself, to be an indicator of financial stress.
- (b) Whilst the ACTU appears to assign the holding of a second job as a signifier of financial desperation (and in fairness, this may in some circumstances be the case), it is equally possible that the holding of a second job is a signifier of financial aspiration.
- (c) The NRA is aware from its interactions with members that it is not unheard of for casual employees in the retail industry, working solely on weekends and public holidays, to maintain full-time employment in professional roles during the week. In these cases, the second job tends to be a means of obtaining greater funds for discretionary spending rather than a means of securing the necessities of a reasonable standard of living.
- (d) In NRA's view, unless the ACTU is able to provide concrete evidence of the reasons for workers seeking secondary employment, the abovementioned assertion ought to be accorded minimal weight.

4. Other relevant considerations

4.1 Question to ACCI

ACCI submitted that:

'With the exception of mining, and accommodation and food services, all other industries are making less use of agreement making, not more across the past eight years.'

Is this statement based on data on award reliance by industry (Table 7.1 of the Statistical report)? If not, can ACCI provide the appropriate data source?

- (a) In addition to any submissions made by ACCI on this point, the NRA notes that it is aware that the majority of its members rely on the relevant modern award to determine the rate of pay payable to non-managerial employees, and that the incidence of collective/enterprise agreements in the retail sector is largely limited to:
- (i) major employers with significant workforces; or
 - (ii) employers with collective/enterprise agreements covering only part of their workforce; or
 - (iii) small businesses with legacy collective agreements.
- (b) Typically, the age of legacy collective agreements is such that minimum wages are effectively set by reference to the base rate specified in the modern award for the relevant classification.

5. Response to initial submissions of other parties

5.1 Joint submissions of the National Union of Workers and United Voice

- (a) At page 6 of their joint initial submissions, the National Union of Workers (**NUW**) and United Voice (**UV**) state:
- It is estimated that 40% of work in Australia is insecure ...*
- (b) In support of this statement, NUW and UV cite a speech given by then-president of the ACTU, Ged Kearney, to the Melbourne Press Club in 2012.
- (c) The NRA submits that the Expert Panel ought to have no regard for this assertion, as not only is the statement referred to itself almost seven years old, it is not supported in any way by the data obtained by the ABS.
- (d) Considering the potential indicators of casual employment, the data obtained by the ABS indicates that the incidence of such 'insecure work' is anywhere between 19% and 25%.¹⁰
- (e) When considering one of the main characteristics of insecure employment – uncertainty – only 19% of employees did not have a minimum number of guaranteed hours each week.¹¹
- (f) The NRA notes that whilst the lack of paid leave entitlements may be indicative of casual, and therefore insecure, employment, it is not necessarily determinative, as:
- (i) there exist enterprise agreements which allow for permanent employees to enter into 'permi-flex' arrangements under which they are provided with the security of permanent employment but the entitlements of casual employment; and
 - (ii) the National Training Wage allows trainees to agree to forego paid leave entitlements in exchange for an additional 25% loading on their pay, without altering the full-time or part-time nature of their employment.
- (g) Consequently, the assertion of NUW and UV in this respect is significantly flawed.

5.2 Submissions of the Federal Opposition

- (a) The NRA disagrees with the submissions of the Federal Opposition in three key respects:
- (i) that the system of minimum wages is a "reward for effort";
 - (ii) that "everything is going up but people's wages"; and
 - (iii) that wages growth is "sitting around records lows at 2.3 per cent over the year to December".
- (b) The NRA disagrees with all three of these propositions.
- (c) First, the system of minimum wages is entirely divorced from the notion of a reward for effort. The system of minimum wages, as instituted by the Rudd-Gillard Labor government, is a minimum safety net to which all employees are entitled, irrespective of how much or indeed how little effort the individual employee may put into their employment.
- (d) Second, the implication that wages are not increasing is demonstrably incorrect purely on the WPI data available. For the assertion of the Federal Opposition to be correct, WPI would need to be negative. The ABS has published the change in WPI from the corresponding quarter of

¹⁰ Australian Bureau of Statistics, 2018, *Characteristics of Employment, Australia, August 2018*, cat. no. 6333.0, viewed 11 April 2019, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6333.0Main+Features1August%202018?OpenDocument>

¹¹ Ibid

the previous year, this being the 'headline' WPI, since September 1998, and at no point has WPI been a negative integer.¹²

- (e) Third, the change in WPI from December 2017 to December 2018 was from 1.9% to 2.3%. Quite contrary to the assertion of the Federal Opposition that wages have been 'sitting' stagnant, the ABS data indicates that wages have experienced steady upwards movement over the year to December 2018.¹³

5.3 Submissions of the ACTU

- (a) The NRA notes the request of the Australian Council of Trade Unions (**ACTU**) at paragraph 17 of its initial submissions to take into consideration the effect of the *Penalty Rates Case*.¹⁴ This case saw Sunday penalty rates in three modern awards reduced to parity with Saturday penalty rates.
- (b) We note that the Full Bench in that decision that the needs of the low paid are best met through the mechanism of the Annual Wage Review,¹⁵ noting the effect that the reduction in Sunday penalty rates would have on the take-home pay of workers who ordinarily worked Sundays.
- (c) The NRA notes that the Federal Opposition has pledged to reverse the effect of this decision by legislation if elected in the May 18 election;¹⁶ if the Federal Opposition is elected to government in the interim, this will no longer be a relevant consideration.
- (d) The NRA further submits that the *Penalty Rates Case* altered Sunday penalty rates in three specific modern awards. The outcome of this Review will affect the minimum wages payable under all modern awards. Care should be taken to ensure that all other industries are not penalized by an increase to minimum wages disproportionate to the impact of this case on those industries.
- (e) The NRA also submits that if the effect of the *Penalty Rates Case* is accepted to be a relevant consideration for the purposes of this Review, so too must the effect of the decision in *4 Yearly Review of Modern Awards – General Retail Industry Award 2010 (AM2017/43)* [2018] FWCFB 5897 (**Saturday Rates Case**).
- (f) The Saturday Rates Case determined to increase Saturday penalty rates for casual employees in the *General Retail Industry Award 2010* to parity with the penalty rates payable to permanent employees under that Award, an increase of 25% (the same proportion as the reduction to Sunday penalty rates) being phased-in between 1 November 2018 and 1 March 2020.
- (g) If the Expert Panel forms the view that the reduction in Sunday penalty rates is a factor weighing in favour of granting a more significant increase to minimum wages, then the increase to casual Saturday penalty rates must also be taken a factor weighing against a significant increase to minimum wages.

¹² Australian Bureau of Statistics, 2019, *Wage Price Index, Australia, December 2018*, "Table 1. Total Hourly Rates of Pay Excluding Bonuses: Sector, Original, Seasonally Adjusted and Trend", time series spreadsheet, cat. no. 6345.0, viewed 11 April 2019, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6345.0Dec%202018?OpenDocument>

¹³ Ibid

¹⁴ [2017] FWCFB 1001

¹⁵ Ibid at [823]

¹⁶ The Hon. Brendan O'Connor, Shadow Minister for Employment and Workplace Relations, Address to the SDA WA Delegates' Conference, Perth, 9 April 2019



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