

INQUIRY INTO WORKERS COMPENSATION AMENDMENT BILL 2021

Organisation: National Retail Association

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Portfolio Committee No. 1 – Premier and Finance
Legislative Council
Parliament of New South Wales

By email: PortfolioCommittee1@parliament.nsw.gov.au

Dear Committee Secretary,

Inquiry into the *Workers Compensation Amendment Bill 2021* - Submissions of the National Retail Association, Union of Employers

The National Retail Association Limited, Union of Employers (**NRA**) welcomes the opportunity to comment on the Inquiry into the *Workers Compensation Amendment Bill 2021* (**the Bill**) with respect to the proposed repeal of s 19B of the *Workers Compensation Act 1987* (NSW) (**the Act**).

The NRA is Australia's most representative retail organisation, representing over 6,500 retail businesses ranging from small "mum-and-dad" operations to major international brands. Throughout the pandemic, the NRA has worked constructively with State and Federal governments to shape and implement policy responses to the unprecedented circumstances of the pandemic within our members' industries.

The NRA supports the decision to repeal s 19B of the Act. The provision, which was inserted into the Act in May 2020 by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*, creates a rebuttable presumption that for the purposes of making a workers' compensation claim a worker in one of the prescribed industries who contracts COVID-19 is presumed to have contracted the disease in the course of employment. Prescribed industries include retail and restaurants (s 19B(9)), covering the majority of NRA members.

The NRA agrees that the presumption was an understandable emergency measure in May 2020 when little was known about COVID-19, contact tracing was nascent and imperfect, no effective vaccine was available, and parts of NSW were facing indefinite lockdowns.¹ Under lockdowns and stay-at-home orders in affected areas, workers in the prescribed industries were far more likely than now to have caught the virus while at work since all other businesses were closed and residents were required to stay home unless attending for work. In these circumstances the presumption was a fair compromise and accorded with common sense.

However, with all businesses and entertainment venues reopening and pre-COVID freedoms being substantially reinstated to unvaccinated citizens, workers will be participating in normal social activities at pubs and clubs, bars and restaurants, sporting events and countless other high risk settings. These activities take place outside work hours and therefore beyond the employer's control and the scope of its work health and safety duties.

¹ New South Wales, *Parliamentary Debates*, Legislative Council, 17 November 2021 (The Hon Victor Dominello MP) ('Second reading speech').

In these circumstances, it is unfair and inconsistent with the scheme of the Act to presume that a worker contracted COVID-19 'in the course of employment' unless the employer can 'prove the negative' that this could not possibly have happened. The effect is that employers in the retail and restaurant industries will bear the full cost of the pandemic in respect of their workers through increased premiums, subsidising these workers to return to normal social and commercial life and to take risks over which the employer has no control.

The NSW Government anticipates that the s 19B presumption will result in some 25,000 additional claims,² representing a cost to the workers' compensation system of \$638 million over the coming year.³ Average premiums are expected to rise by up to 27% in some industries, meaning potential increases for small business employers of up to \$950, from \$3,579 to \$4,535 on average.⁴

Despite having traded through local and general lockdowns, retail and hospitality businesses are not well-placed to bear these increased costs. Lockdown trade in NRA member industries was heavily constrained by COVID-19 restrictions, and international border closures meant a dearth of revenue from tourism. Most member businesses saw significantly reduced incomes throughout the 2020-21 year and are relying on reopening trade to recover from these setbacks and return to their pre-COVID positions. There is no economic 'buffer' available within these industries to subsidise the general costs of the pandemic, especially in regards to micro- and small-enterprises.

The NRA submits that the s 19B presumption is rule of evidence applying to disputed claims arising under the Act, and should not be treated as the source of a de facto disaster relief payment scheme or any new entitlement to compensation. A no-fault compensation scheme for COVID-19 should be introduced through specific policy or legislative measures similar to previous government disaster payments rather than as a leftover emergency measure, and should apply equally to all employers and workers rather than only certain businesses that were able to trade through lockdowns.

The recently published *Public Health (COVID-19 General) Order (No 2) 2021* has removed all requirements for retail and hospitality businesses in relation to COVID Safe check-ins using the Service NSW App. This means that the now-sophisticated system of contact tracing used in NSW will not be readily available to provide evidence for the purposes of disputed workcover claims. Employers will not know when a customer who has COVID-19 has been in the workplace, and will therefore be even less able to prove that an employee's infection did not occur in the course of employment. Equally, employees will be less able to prove that the infection did occur in the workplace.

Short of suggesting that check-ins be reinstated in Member industries, the NRA submits that this revised public health measure leaves an even evidentiary playing field for disputed claims, and is not a persuasive consideration in relation to the fairness of the s 19B presumption as discussed above.

As emphasised by the Minister in the second reading speech of the Bill, the amendment will not deprive workers of the right to make workers' compensation claims when they do contract COVID-19 at work. The amendment removes an evidentiary rule which was an emergency response to the conditions of the early pandemic, but which is no longer fair or justified in the context of reopening and the NSW Government's policy of 'living with covid'.

² Second reading speech (n 1).

³ NSW Parliament, 'NSW Government to save business half billion dollar COVID bill' (media release, 14 November 2021).

⁴ Second reading speech (n 1).

The NRA on behalf of all members in the affected industries, calls upon the Government to stand by the businesses, and especially small businesses, that have made sacrifices and faced unprecedented uncertainty throughout the pandemic, relying on a fair chance at recovery.

Should you require any further information, please feel free to contact us directly.

Yours sincerely,

Lindsay Carroll
Legal Practice Director

NRA Legal

