IN THE FAIR WORK COMMISSION

AM2021/7

IN THE MATTER OF:

APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

SDA/AWU/MGA (APPLICANTS)

SUBMISSION OF
RETAIL AND FAST FOOD WORKERS UNION (RAFFWU)

A. INTRODUCTION

1. The Retail and Fast Food Workers Union Incorporated ("**RAFFWU**") opposes the application to vary the Award.

2. We submit the expedited trial of these matters prejudices those in opposition and carries the very real likelihood the opposing voice of very many workers (and their representatives) may not be heard. While RAFFWU has prepared this submission with much less time available to the union than was available to the applicants in preparing their application, we do not wish for this submission to be used as a basis for satisfaction that an expedited trial is appropriate.

3. The application for all intents and purposes is an ambush on the very many workers in the retail industry who rely on the Modern Award and the Fair Work Act to regulate their employment. Due to the ambush and the expedited trial RAFFWU has not had the opportunity to consult with members and develop an evidentiary response to the applicants' scheme.

4. The application includes no evidence. The assertions submitted with the application are without any clear foundation. The lead applicant, SDAEA, participated in the Fast Food Industry Award proceedings which failed due to lack of evidence. It ought to have known the application would elicit strong contestation by RAFFWU as representative of many workers in the retail sector.

5. Without any evidentiary base it should not be permitted to proceed.

6. The application relies on the brief note[1] prepared by Professor Borland in March 2020 – a full 12 months ago. That note is not replicated in the application but it is relied on by the applicants.

7. It is important to analyse what flexibility Professor Borland was referring to in the report.

> *What is meant by 'benefit from allowing extra flexibility?' In this report the term 'allowing extra flexibility in employment arrangements' is taken to mean that it may be possible to modify award provisions in order to make it easier for a worker's hours of work to be varied – for example, from full-time to part-time. Allowing extra flexibility in this way could mean that* ***extra employees are able to be retained in employment*** *in response to a decrease in labour demand. For example, a business which used to hire three workers for 40 hours per week, and which during the pandemic only requires 40 hours of labour in total, might then be able to retain each of the Benefit from greater flexibility in employment arrangements 3 three workers for 13 ⅓ hours per week, rather than needing to lay off two workers and retaining one worker in a full-time position. Retaining extra employees in employment has potential benefits for both the employee and an employer. Employees who are laid off experience a variety of costs that do not occur (or are smaller than) when they are retained at reduced hours – including loss of income; loss of firm-specific human capital and skill atrophy; negative psychological effects; and the need to undertake search activity to find a new job. Similarly, employers who layoff a worker and subsequently need to hire a new worker to fill the vacancy created when demand conditions improve will experience costs that do not occur when they can retain employees at reduced hours – including loss of the value of firm-specific human capital accumulated by the worker; and costs of searching for new worker and retraining. The potential benefits of retaining employees during episodes such as the current pandemic seems to represent are especially large. Many firms are experiencing a substantial decrease in their demand for labour, but as the pandemic is controlled are likely to have the same level of labour demand as before the pandemic. That reversal of the effect on labour demand, together with what will hopefully be a shorter duration than an average downturn, makes it more valuable for firms to retain an already trained worker and to not have to search for a new worker.*
>
> **Emphasis added**

8. This application does not introduce flexibilities as described by Professor Borland. Far from it. There is no material, evidence or anecdote identifying how casualising part-time work will ensure *extra employees are able to be retained*

[1] Benefit from greater flexibility in employment arrangements, Professor Jeff Borland, March 2020, accessed 3 March 2021 at https://www.fwc.gov.au/documents/documents/awardmod/variations/2020/am202012-information-note-flex-010420.pdf

in employment. In fact, the proposal de-securitises and casualises work and is likely to lead to loss of employment.

9. No evidence is presented of particular or specific decreases in labour demand. No evidence is presented as to how any such decrease manifests in a need to implement arrangements proposed in the application. On the contrary, the submission of the ACTU describes the substantial recovery in the retail sector.

10. The changes do not meet the stresses of COVID-19. There is nothing about these changes which preserves jobs. The cost of the application of these changes is just a cost on employees.

11. In essence, the applicants propose a scheme which they say would retain workers in employment by paying those workers less than they would otherwise earn. That is not a "flexibility" which should be entertained by the Fair Work Commission.

12. The scheme proposed by the applicant and its consenters is structured in a way that targets the most vulnerable. This includes employees who are engaged on a part-time basis, in low paid employment, who regularly rely on being able to agree to additional shifts with their employer to meet their costs of living.

13. The scheme would provide the opportunity for an employer to entirely casualise all additional hours to be worked by an employee without the impost of any casual loading or overtime rate.

14. Purported entitlements to be 'paid for hours not worked' and to 'apply for hours to be contracted after 6 months periods of additional agreed hours' are easily avoided by employers and will no doubt be vociferously opposed by the exploiters of labour. While such proposals are worthy of implementation, they ought be pressed with evidence and without reference to the proposed scheme of casualisation of part-time work.

Part-Time Employment

15. The Award provides specific arrangements for part-time work including:

> **10. Part-time employees**
>
> **10.1** An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.
>
> **10.2** An employer may employ part-time employees in any classification defined in Schedule A—Classification Definitions.
>
> **10.3** This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.
>
> **10.4** A part-time employee is entitled to payments in respect of annual leave and personal/carer's leave on a proportionate basis.
>
> **10.5** At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:
>
> **(a)** the number of hours to be worked each day; and
>
> **(b)** the days of the week on which the employee will work; and
>
> **(c)** the times at which the employee will start and finish work each day; and
>
> **(d)** when meal breaks may be taken and their duration.
>
> **10.6** The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.
>
> **10.7** The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6, and give another copy to the employee.
>
> **10.8** For any time worked in excess of the number of hours agreed under clauses 10.5 or 10.6, the part-time employee must be paid at the overtime rate specified in **Table 10—Overtime rates**.
>
> **10.9** The minimum daily engagement for a part-time employee is 3 consecutive hours.
>
> **10.10 Changes to roster**
>
> **(a)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change.
>
> NOTE: Clause 15.7 contains additional rostering provisions.
>
> **(b)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee.
>
> **(c)** However, the roster of a part-time employee must not be changed from week to week or fortnight to fortnight or to avoid any award entitlements.
>
> NOTE: See clause 27—Rostering restrictions for the rosters of shiftworkers.

16. Further, the Award provides:

> **11.2** An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

17. In 2018 and 2019, the Australian Industry Group applied for a variation to the Fast Food Industry Award to include a term without the benefits of the relevant part-time clause in that Award. In rejecting the application, the Fair Work Commission in [2019] FWCFB 272 stated:

> ***[135]*** *Ai Group contends that its application is based on 'industrial merit' and includes:*
>
> > *'the adoption of a standard clause that encompasses adequate protections for employees but retains flexibility for employers, as well as the encouragement of part time employment in circumstances where casuals are often used to work additional hours'*
>
> ***[136]*** *Given the basis of its application, that is, industrial merit, Ai Group submits that there is no (or a limited) need for evidence in support of its application, in particular:*
>
> > *'There is no need for employers or franchisors to consult widely with employees or franchisees as part of gathering evidence in support of its application'.*
>
> ***[137]*** *We propose to make* ***two general observations about the 'industrial merit' and fairness*** *of the proposed claim.*
>
> ***[138]*** *First, if granted the claim would permit an employer to roster part time employees within the range of the 'employee's agreed availability'. If the variation were granted* ***it would effectively mean that a part time employee would have to be available to work at any time within the range of their stated availability and that the times they could be required to work may change from week to week***
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> ***[139]*** *An example serves to illustrate the breadth of the proposed clause. Say the agreed guaranteed minimum hours are 9 hours per week and the employee's agreed availability is between 9am and 3pm Monday, Wednesday and Friday. Under the proposed clause an employee may be rostered to work their guaranteed minimum hours in any one of a number of figurations, including:*
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> - *9am to 12 noon Monday, Wednesday and Friday;*
> - *9am to 3pm Monday and 12 noon to 3pm Friday;*
> - *12 noon to 3pm Monday, Wednesday and Friday.*
>
> ***[140]*** *Further, the employees' roster may change from week to week.*
>
> ***[141]*** *This aspect of the proposed clause* ***is very different to the existing part time employment clause in the Fast Food Award*** *(clause 12, see [93] above). The existing clause mandates that the employer and the part time employee agree on 'a regular pattern of work' which specifies:*
>
> - *the number of hours worked each day;*
> - *which days of the week the employee will work;*
> - *the actual starting and finishing times of each day;*

- *that any variation will be in writing;*
- *that the minimum daily engagement is three hours; and*
- *the times of taking and the duration of meal breaks.*

[142] *Any change to the agreed 'regular pattern of work' must be by agreement, in writing, before the change occurs.*

[143] *The* ***existing part time clause*** *is consistent with the general principle stated by the AIRC Full Bench in the Award Modernisation Decision of 4 September 2009, in that is* ***provides part time employees with a 'degree of regularity and certainty'.*** *It seems to us that the* ***proposed flexible part time clause provides little certainty as to when guaranteed minimum hours will be worked****. Indeed the proposed clause* ***may facilitate working arrangements which are more akin to casual employment rather than part time employment, albeit without the requirement to pay a casual loading.***

[144] *It is no answer to this criticism to suggest that the employee exercises control over their working arrangements by specifying their availability.* ***We do not doubt that as a practical matter, employees would feel some pressure to maximise their stated availability in order to obtain employment****. Further, the capacity for an employee to alter their 'agreed availability'* ***is significantly constrained*** *by the proposed clause, which is the second general observation which we wish to make.*

[145] *Proposed clause 12.6* ***places a significant constraint on an employee's capacity to alter*** *the days and hours of their 'agreed availability', in particular:*

- *there must have been a 'genuine and ongoing change to the employee's personal circumstances'; and*
- *the employee must give the employer 14 days' written notice.*

[146] ***Nor is there any obligation upon the employer*** *to accept a proposed alteration – if it cannot 'reasonably be accommodated by the employer' then the employer and employee need to reach a new agreement concerning guaranteed minimum hours.*

[147] *The constraints imposed by proposed clause 12.6 are particularly problematic in view of the evidence in these proceedings. That evidence supports a finding that employees in the Major Fast Food Chains change their availabilities regularly, including on a permanent or ongoing basis and a temporary basis. The reasons for permanent or ongoing changes include changes in school or university timetabling and commitments as well as sporting commitments. The reasons for temporary changes include studying for school or university examinations, taking school and university holidays and attending family or social commitments.*

[148] ***In our view the proposed variation lacks merit. If the award was varied in the manner proposed by Ai Group it would not provide 'a fair and relevant minimum safety net of terms and conditions'****; it would not achieve the modern awards objective. In reaching this conclusion we have taken into account the s 134 considerations, insofar as they are relevant to the claim. We reject the claim for those reasons.*

Emphasis Added

18. The scheme of the applicants does not guarantee any additional hours will be worked within an availability. It is worse than the rejected Fast Food scheme.

19. The scheme of the applicants proposes a structure by which employees would contract to work hours without agreeing the times, days and other ordinary inclusions in a regular pattern of work contemplated by clause 10.5 of the Award.

20. The contracted work hours could be required to be worked at any time. There is no capacity for an employee to refuse. There is no capacity for an employee to exit the scheme without the consent of the employer.

21. Presumably employees currently regularly agreeing on set additional shifts concordant with clause 10.6 would now be required to enter into the scheme if they wish to access additional hours.

22. In the *Loaded Rates Case*[2] the Full Bench of the Fair Work Commission stated:

> *[136] Having regard to the relevant provisions of the Aldi Agreements and the evidence of Paul Joyner, it is clear that Aldi's* ***system of part-time employment is inconsistent with the above provision, in that it does not involve reasonably predictable hours of work; does not require agreement at the commencement of employment upon a regular pattern of work specifying the days of work, the hours to be worked on each day or the starting and finishing times; and does not require any change to this to be by agreement with the employee.*** *However it does not follow from this that Aldi's part-time employment system is simply not permitted by the Retail Award and is for that reason alone to be regarded as failing the BOOT. Clause 12.6 of the award provides:*
>
> > *12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.*
>
> *[137] Thus the Retail Award allows an employer to pay as a casual employee any employee who is not a full-time employee and does not fit its definition of a part-time employee****. It follows, we consider, that where an enterprise agreement in the retail sector provides for a form of employment that does not constitute full-time or part-time employment as contemplated by the Retail Award, the appropriate point of comparison for the purpose of the BOOT is the catch-all of casual employment under the award.***

[2] [2018] FWCFB 3610

> *[138] Such a comparison would need to take into account, from a direct remuneration perspective, the rates of pay, casual loading, and weekend and public holiday penalties payable under the Retail Award and the loaded rates of pay, Sunday work allowances, public holiday penalties and leave entitlements payable under the Aldi Agreements. Attached to this decision in Schedule B is a preliminary BOOT analysis of the Aldi Prestons Agreement undertaken by Commission staff under the supervision of Commissioner Lee which takes these matters into account. It shows that part-time employees under the agreement are better off overall than under the award on all of the scenarios modelled except where the part-time employee works only weekend shifts.*

23. While obviously the BOOT consideration is different to the Modern Award variation test, the critical relevance is the finding of the five member Full Bench of the Fair Work Commission that a system similar to that of the scheme (for all additional hours) is inconsistent with part-time work and the appropriate comparator was casual rates of pay.

24. In truth, the applicants' structure is ***akin to casual employment, albeit without the requirement to pay a casual loading***.

25. In the alternative, the applicants' structure is a ***voluntary overtime*** scheme ***without any overtime rates of pay*** or ***any capacity to refuse unreasonable overtime***.

26. In either case, the scheme would substantially diminish the rights of workers.

s.134 Considerations

27. The only substantive (but limited) submissions on the s.134 considerations were filed by SDAEA and ACTU. Neither entity has produced any evidence in support of their illusory contentions of benefit.

28. Those submissions seriously misrepresent the calamitous impact of the applicants' scheme on workers.

s.134 (a)

29. The changes will wreak havoc with the needs of the low paid and the relative living standards of the low paid. Work which was essentially casual in character will no longer earn a casual loading. Work which was essentially overtime in character will no longer earn overtime rates.

30. Work which was essentially offered and agreed additional hours and shifts will no longer be specifically agreed and a worker will be at risk of charges of misconduct for not complying with their agreed arrangement if they were to not work additional time for any one of a multitude of reasons including:

    (a) Carers commitments such as not being able to access childcare;
    (b) Study commitments;
    (c) Community commitments; or
    (d) Family commitments.

31. It is nonsense to suggest any component of the scheme is optional. Workers are well aware they would have to agree to participate in the scheme if they wanted to access additional shifts which had been previously the subject of specific agreement.

32. The living standards and needs of the low paid are ruthlessly and specifically attacked by this scheme. At [20] in its submission, SDAEA states the scheme allows for the substitution of casual engagement at short notice. That is a core purpose of the scheme. To casualise part-time work.

33. The proposed scheme will have a serious and detrimental impact on the needs of the low paid. The low paid are more likely to be highly sensitive to the opportunity to work additional hours to supplement their incomes. They are more likely to make concessions to their employers to secure the opportunity to work additional hours.

34. The low paid are also less likely to be able to secure flexible arrangements, such as short notice childcare, because of the costs associated with these arrangements. If the Award was varied as proposed, the low paid are more likely to see:

(a) greater uncertainty in their working hours; and

(b) a potential reduction in their opportunities to work overtime.

35. As was said in the Casual and Part-time Employment Case, regularity in relation to hours worked is an important feature of part-time employment and in the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. The Tribunal recognised then, and cannot sensibly depart from the observation now, that if hours of work are subject to change at short notice it can create problems for organising child care (and, RAFFWU adds, other carer responsibilities and personal commitments) as these arrangements generally require stable hours and predictable timing.

s.134 (b)

36. The scheme will specifically (and no doubt deliberately) encourage enterprise bargaining as employers rush to have agreements made subject to the lower BOOT threshold secured by the applicants' scheme, with similar arrangements to be included in new agreements abolishing casual loadings and overtime rates (and protections).

s.134 (c)

37. The scheme has a centrepiece of destabilizing secure employment by casualising additional hours regularly worked but without any casual loading. It is ludicrous to suggest workforce participation will increase. It does the opposite by placing greater power in the hands of employers to forcefully roster employees at any time.

38. The scheme will undermine social inclusion. The ACTU submission is plainly wrong

when it says agreement is reached on working hours which are "certain and predictable". This shows a complete disregard for the actual working experience in retail workplaces. No evidence is adduced by ACTU, SDA or any other applicant.

s.134 (d)

39. The scheme destabilises part-time employment and casualises the employment relationship. There is nothing productive or efficient about such practices.

40. The scheme is structured to undermine additional remuneration by avoiding the casual loading and any overtime rates. SDAEA acknowledges the circumvention of overtime rates but does not grapple with the casualization of hours of work. ACTU refuses to even acknowledge the smashing of wages wrought by the applicants' scheme.

s.134 (e)

41. SDAEA purports the targeting of women by the scheme is not a relevant consideration. ACTU properly recognises women are targeted by the scheme but fails to acknowledge the ruthless attack on the rights of part-time workers wrought by the applicants' scheme and identified throughout these submissions.

s.134 (f)

42. The scheme will reduce employment costs. That is its purpose. However, there is no "essential" basis for the changes. There is no evidence that any of the changes will ensure the viability of any employers. There is no evidence on which the Commission can act in favour of the scheme. The failure to bring evidence should count against the applicants and their supporters. Any evidence must be up to date and examinable.

s.134 (g)

43. There is nothing modern about the proposed scheme. To the contrary, they are

subversive amendments that seek to reverse the gains secured by part- time employees. The proposed changes seek to secure cost-saving benefits to employers, at the expense of important protections for part-time employees. This elevates the profit motive of employers at the expense of certainty, security and stability for part-time workers and their families. The impact is particularly acute for low paid part-time workers, who form the vast majority of the relevant class.

44. The scheme proposed by the applicant and its consenters does not meet the Modern Award objective and must not be implemented.

Political Motivation

45. The true motivation of some or all of the applicants appears to be to purport to propose a superior alternative to the legislation proposed in Parliament colloquially termed the *Ombinus IR Bill*. That legislation would modify the relevant Award by introducing 'agreed additional hours' arrangements.

46. That proposal is bad legislation and ought not be passed, but it is a reasonable comparator to the scheme of the applicants.

47. That proposal has a number of safeguards which the applicants' scheme does not including that the proposed legislation will:

(a) Require additional hours to be identified on one or more days and be for periods of work which obviously require arrangements at least commensurate with clause 10.5 to be met (as shown in the example contained in the *Explanatory Memorandum*);
(b) Allow an employee to unilaterally exit the scheme with 7 days' notice;
(c) Require an employee to be contracted for at least 16 hours per week (as distinct from the applicants' 9 hours per week); and
(d) Contain a suite of other arrangements which are superior to the applicants' scheme (albeit introducing a structure which inappropriately undercuts the Modern Award safety net.)

48. To avoid any doubt, RAFFWU does not support the proposed legislation. However, that those attacks on the conditions of workers are not as profound as the attacks sought by the applicants is cause for serious concern.

Retail and Fast Food Workers Union

4 March 2021