**From:** Josh Cullinan <jcullinan@raffwu.org.au>
**Sent:** Tuesday, 16 March 2021 3:17 PM
**To:** Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>; AMOD <AMOD@fwc.gov.au>
**Subject:** RE: AM2021/7 - Award Flexibility - General Retail Industry Award - Amended Directions

Dear Associate to President Ross

Pursuant to the Directions of the Fair Work Commission dated 12 March 2021, please find attached further submission of RAFFWU in PDF and Word formats in the subject proceeding for filing.

Kind regards

Josh Cullinan
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**IN THE FAIR WORK COMMISSION**

**AM2021/7**

**IN THE MATTER OF:**

**APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020**

**SDA/AWU/MGA (APPLICANTS)**

**FURTHER SUBMISSION OF**
**RETAIL AND FAST FOOD WORKERS UNION (RAFFWU)**

## A. INTRODUCTION

1. The Retail and Fast Food Workers Union Incorporated ("**RAFFWU**") made a submission in the application on 4 March 2021. RAFFWU relies on that submission.

2. Since the earlier submission the Joint Applicants have confirmed their application is premised on any "agreed additional hours" being subject to the requirements of clause 10.5.

3. That is, the agreed additional hours must be documented as a regular pattern of work with agreed start times, finish times, days of work and breaks. With those concessions RAFFWU no longer opposes the core basis of the application. That said, the proposed variation itself is deficient in that it doesn't clearly identify this premise. Until such clarity is ensured, the Full Bench ought not embark on that part of the proposed variation.

4. It is now apparent that the application of the Joint Applicants has been used as the stalking horse for a further proposed alteration by ABI which has not been formed as a proper and genuine application, nor been the subject of consultation with RAFFWU and workers in the sector.

5. At its core, the ABI alteration seeks to permit ad hoc or ongoing additional hours being worked without any written variation in the terms contemplated by

clauses 10.5 and 10.6 of the Award.

6. Neither the application nor the alteration includes any credible evidence. The ABI alteration purports to have some foundation in a simple survey of 79 purported employers. RAFFWU understands no evidence is proposed to be led by any party of the experience of an employer or employees.

7. Without any evidentiary base the application should be dismissed. A survey as to the preference of undisclosed, and not called, employers is no basis for the Fair Work Commission to be moved to alter the Award – the core safety net for employees established by the Act.

8. No submission has been made by ABI as to the compelling need for the proposed alteration. At this time, prior to the opportunity to consider any such submission, we make the following points:

   (a) Every retail employer **must have** a structure of recording ad hoc, additional, overtime and similar hours in writing;
   (b) Those records **must be kept** as business records for the statutory periods; and
   (c) The proposed alteration would make it impossible to determine the difference between agreed additional hours at ordinary rates and overtime.

9. The current structure permitting additional hours to be worked as contractual ordinary hours and therefore at ordinary rates was a structure accepted by the Fair Work Commission as meeting the Modern Awards objective. In [2010] FWAFB 305 the Full Bench said:

> ***Part-Time Employment***
>
> ***[8]*** *The Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the NRA seek changes to the part-time employment provisions. They rely on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request (the consolidated request).*

> ***[9]*** *Clause 53 of the request contains* ***a requirement to ensure that the hours of work and associated overtime and penalty arrangements in the retail****, pharmacy and any similar industries* ***do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees.*** *Clause 53 was included in the consolidated request by an amendment made on 26 August 2009, after the modern retail award was made.*
>
> ***[10] We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request, to make it clear that when variations to part-time hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement.*** *We will vary the modern award to replace the second sentence of cl.2.7 to read as follows:*
>
> > *"All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 28.2—Overtime(excluding shiftwork)"*
>
> ***[11]*** *To avoid any confusion we will also delete cl.26.3(b).*
>
> ***[12]*** *The SDA also seeks a very detailed alternative part-time employment provision. We do not believe that the level of prescription sought is warranted.*

Emphasis added

10. The proposed ABI alteration would permit the abandonment of such variations agreed in writing. This is despite the revolution in simple means for such agreements to be recorded in writing in the intervening 10 years.

11. That structure (variations to clause 10.5) was an important set of safeguards against the exploitative working of overtime at rates other than overtime rates.

12. The ABI alteration offers no system for **guaranteeing** a worker is not required to work overtime at ordinary rates.

13. There is no overwhelming and evidence based case that the Modern Award objective is not being met. To the contrary, ABI and other employers have had every opportunity to prosecute this case through the Award Review process ***and chose not to***. It is telling that a piggy backed purportedly urgent application is now used as a stalking horse for the non-application alteration to implement changes which undermine the workplace rights and conditions of over one million Australian workers.

14. An alteration for which not a single employer is prepared to appear as witness despite it purportedly being of diabolical and immediate need to address the consequences of COVID-19.

15. This farcical premise is nonsense and the ABI alternative ought be disregarded (since dismissing a non-application is probably beyond juridisction.)

**Retail and Fast Food Workers Union**

**16 March 2021**