IN THE FAIR WORK COMMISSION

AM2017/49

IN

FOUR YEARLY REVIEW OF THE FAST FOOD INDUSTRY AWARD 2010

(APPLICATION BY AUSTRALIAN INDUSTRY GROUP)

BRIEF OUTLINE OF SUBMISSION

1. In December 2017 the Australian Industry Group ("the Applicant") applied to vary clause 12 of the Fast Food Industry Award 2010 ("the Award"). It is put by the Applicant that the SDAEA has conceded the variation.

2. The Retail and Fast Food Workers Union Incorporated ("RAFFWU") represents workers covered by the Award and is an Industrial Association within the meaning of the Fair Work Act.

3. RAFFWU also represents members as bargaining representative and was involved in bargaining with Domino's Pizza Enterprises Ltd.[1]

4. While the McDonald's group is the largest group covered by the Award, by total employees, the Domino's Pizza group is the largest group, by total employees, to whom the Award applies.

5. The Domino's Pizza group recently applied to have an agreement approved by the Fair Work Commission. RAFFWU is contesting that application. In the F17 Statutory Declaration of Domino's Pizza Enterprises Ltd dated 9 February 2018, Mr Tim Van Schyndel declares the agreement would cover 18 198 employees[2], that 9 686 of those persons are engaged as casual employees (53.2%) and 6 836 are engaged as part-time

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[1] See for example *[2018] FWC 145*

[2] See 2.10 of the Statutory Declaration of Tim Van Schyndel in AG2018/442

employees[3]. It follows that, according to Mr Van Schyndel, 8 512 (46.8%) are engaged on a non-casual basis.

6. The Award applies to Domino's Pizza group employers and employees. If the application is granted, it will have a substantive immediate impact on the workplace rights of 6 836 part-time employees engaged within the Domino's Pizza group. We note proposed clause 12.2 does not offer any protection to a worker whose employer has not complied with clause 12 of the Award.

7. The Affidavit of Ms Anderson identifies the McDonald's group of companies employ 103 058 employees covered by the *McDonald's Australia Enterprise Agreement 2013*. Of those, 73 021 employees (70.8%) are engaged on a casual basis and 30 037 are engaged on a non-casual basis.

8. Despite the statement of Ian Flemington, "Craveable Brands" group has not provided direct evidence of the number of employees employed in the group, nor the number of employees engaged in particular modes of employment. Mr Flemington extrapolates a total number of e-learning participants with ratios of corporate employment mode, to assert the group employs 11 977 persons.[4] Of those, it is purported 7 304 (or 61%) are engaged on a casual basis and 4 673 (39%) are engaged on a non-casual basis.[5]

9. The statement of Ms Montebello-Hunter of the Hungry Jacks group identifies it employs 16 134 persons in its corporate outlets and 389 of those persons are engaged on a casual basis (2.4%)[6] leaving 97.6% of the workforce engaged on a non-casual basis.

10. AIG relies on its lawyer's assessment in the Hossain affidavit to assert 189 449 workers are engaged in the Fast Food Industry. That assessment failed to include numerous other ABS codes related to the food industry – including over 26 000 workers engaged in *Other Specialised Food Retailing*.

11. From available materials:

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[3] See 4.3 of the Statutory Declaration of Tim Van Schyndel in AG2018/442

[4] See [28] and [29] of Flemington statement, 383 added to 11 594.

[5] See [28] and [29] of Flemington statement.

[6] See [12] of the Montebello-Hunter statement.

(a) McDonald's group employs 103 058 relevant persons[7]

(b) Domino's Pizza group employs at least 18 198 relevant persons[8]

(c) Hungry Jacks group employs 16 134 relevant persons[9]

(d) Craveable Brands group employs 11 977 relevant persons[10]

(e) KFC group employs approximately 34 000 relevant persons[11]

12. This is a total of 183 367 persons. It does not include popular Fast Food outlets such as Schnitz, Grill'd, Subway, Pizza Hut, Boost Juice and others which operate over one thousand outlets and likely employ tens of thousands of staff. It does not include the thousands of small business outlets such as fish and chip shops, takeaway pizza shops, takeaway burger outlets or many others.

13. It is a matter of simple logic that the conclusions drawn from the analysis undertaken by Ms Hossain are unreliable.

14. It is of note that the submissions and evidence of AIG do not appear to include any material from entities to which the Award applies. The AIG case is summarised at [75] to [78] of its submissions.

15. At [75], it is put that a purported discouragement on requiring part-time staff to undertake overtime at ordinary rates means the Award is failing to meet the modern awards objective. With respect, this is nonsense. A part-time staff member can agree to alter their hours, in writing, prior to the hours being worked.

16. There is no evidence that the clauses of the Award discourage the engagement of part-time employees.

17. At [76], it is put that unpredictable fluctuation in customer demand requires alteration to the Award to meet the modern award objective. The evidence on this issue is scant

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[7] AIG Materials

[8] See 2.10 of the Statutory Declaration of Tim Van Schyndel in AG2018/442

[9] AIG Materials

[10] AIG Materials

[11] See KFC Evidence to *Senate Education and Employment References Committee Inquiry into Penalty Rates 2017*

and no research nor detailed company analysis is provided. The Fair Work Commission ought not vary the Award on such limited, biased and non-detailed material. The decision relied on at [76] was making the point that part-time employment was not being used. It was a "dead letter" through non-use. That cannot be said in this industry nor is there any evidence to suggest as such.

18. At [77], it is put the modern award objective is not being met because the clause has not been inserted. This classic "me too-ism" ought be rejected.

19. At [78], it is put that the contemporary circumstances of the industry will be met by the variation. With respect, the Award does not apply to any of the employers who have given evidence. In truth, this is a demand that the burden on documenting contract variations should be relieved of employers.

20. In the *Casual and Part-Time Work* decision - *[2017] FWCFB 3541* - the *Hospitality Award* application was made in specific context:

> *[414] AHA, MIMA and AAA (collectively the Hospitality Associations) have sought variations to the part-time employment provisions of the Hospitality Industry (General) Award 2010 (Hospitality Award) to permit greater employer flexibility in the rostering of working hours.* ***The Hospitality Associations contend that the current part-time provisions****, which require that ordinary hours are to be fixed at the commencement of employment and thereafter changed only by written agreement,* ***are unworkable and rarely utilised in the hospitality industry because there is insufficient flexibility to allow employers to meet fluctuating and variable work demands. This, the Hospitality Associations contend, is a major reason for the high degree of casualisation in the sector.***

Emphasis added

21. The Full Bench went on to find:

> *Usage of part-time employment under the Hospitality Award*
>
> *[516]* ***The evidence makes it clear, we conclude, that the current part-time employment provision in the Hospitality Award is little used and has proven to be ineffective.*** *The survey conducted by the Hospitality Associations, which we consider to have been reasonably reliable concerning the degree of usage of part-time employment, given that it involved 455 full responses and concerned a factual matter rather than the expression of an opinion, demonstrated that for employers to whom the award applied (that is, who were not covered by enterprise agreements),* ***showed that only 3.6% of the workforce were part-time employees.*** *The evidence of individual hotel employer witnesses called by the AHA,* ***which we consider covered a representative***

> ***cross-section of the industry***, *confirmed this picture; they all employed no or very few part-time employees.*
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> *[517]* ***That is clearly a very small proportion of the workforce having regard to a number of matters.*** *First, the percentage given by the survey is lower than the percentage of permanent part-time employees in the workforce as a whole. Second, the large majority of employees in the industry covered by the award work part-time hours, but overwhelmingly do so as casual employees. Third, the employer witnesses called by the Hospitality Associations generally expressed a preference to employ more part-time employees, because they had a greater commitment to the business, were subject to a lesser turnover rate than casuals, and operated under employment arrangements where they were obliged to attend for their rostered shifts unlike casuals who could accept or refuse shifts according to their personal convenience. The Hospitality Associations' survey likewise indicated that about 32% of respondent employers would employ more permanent part-time employees if there was a more suitable part-time employment clause in the award.*
>
> Emphasis added

22. Here the opposite is true. The part-time provisions of the Award do work – there is no evidence to the contrary. At the Domino's Pizza group, the largest group to whom the Award applies, the group asserts 46.8% of the workforce is non-casual. This is not an overwhelming majority of workers engaged on a casual basis. The entities identified by the applicant are unable to put evidence on this because the part-time provisions of the Award do not apply to their workforce.

23. No evidence is drawn from employers to whom the Award applies. This is despite the applicant having the means and resources to identify evidence from entities to whom the Award applies. Unlike the Hospitality Award, there is no evidence that the Award "*does not provide a workable model for the regulation of part-time employment in the sector covered by the Award.*"[12]

24. The applicant's case is premised on the preference of employers to whom the Award does not apply. The applicant conflates the three groups (popularly known as McDonald's, Hungry Jacks and Red Rooster) as being "the fast food industry".[13]

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[12] See [524] in *[2017] FWCFB 3541*
[13] See [54] to [67] of the AIG Submission

25. As explained above, while the McDonald's group employs very many workers, they are not "the fast food industry". There is no accurate evidence on "the fast food industry", nor is there any overarching evidence drawn from the sector. The applicant puts no survey of employers, no survey of employees, no analysis of the mode of employment of those to whom the Award applies nor any evidence from employees directly affected by the issues.

True Intent

26. It would appear, on the evidence, that the groups relied on by the applicant have enterprise agreements (or equivalent workplace instruments) in place. It begs the question why they are involved in seeking such a substantive change to the Award rights of part-time employees.

27. It is notorious employers involved in the application apply agreements which leave very many workers substantially worse off financially than if no agreement applied.[14]

28. That is, they pay a small loading for ordinary hours in lieu of much more substantial loadings for penalty rates and other Award rights. It is a matter of simple logic[15] that very many workers – those who work between 10pm and 6am on weekdays and who work on weekends – will be substantially better off on the Award.

29. Those employers face the very real prospect of applications to terminate the workplace instruments, the agreements, which are currently in place. It is not disclosed by the applicant which of these groups have faced such applications.

30. Successful termination applications will result in those employers paying substantially higher wages because they will be obliged to pay the minimum Award wage rates. Faced with such higher costs, the path chosen is to find avenues to discount those

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[14] See, for example, submission 25 to the *Senate Education and Employment References Committee Inquiry into Penalty Rates 2017* and, for example, http://www.smh.com.au/business/workplace-relations/sold-out-quarter-of-a-millionworkers-underpaid-in-union-deals-20160830-gr4f68.html and http://www.smh.com.au/national/investigations/mcdonalds-defends-not-paying-weekend-penalty-rates-and-controversial-wage-deal-with-shoppies-union-20170826-gy4qh2.html

[15] See [11] *Hart v Coles [2016] FWCWB 2887*

inevitable future increases to wage costs while maintaining significant flexibilities. This is achieved by avoiding casual loadings.

31. That is the effect of the applicant's application. It seeks to maintain flexibility in rostering, while avoiding the casual loading which would otherwise apply. The casual loading is avoided by appointing part-time workers without guaranteed start and finish times. This application has the effect of being a defensive bulwark to potential termination proceedings.

32. The second tier to the fear of termination applications relates to overtime.

33. The Objects of the Fair Work Act relevantly specify at Section 3 (b) "*ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.*"

34. By virtue of old instruments made before the Fair Work Act, or new agreements made without the necessary statutory consideration, the employers whose evidence the applicant relies on have avoided the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders*.

35. Paragraph [78] of the applicant's submissions makes plain the applicant is seeking the burden of paying overtime at overtime rates relieved of these employers. The truth is that having not had to pay overtime to part-time employees in most circumstances by virtue of their other workplace instruments, they now wish to ever be relieved of such a burden.

36. That is, they seek the injustice meted out on their employees under extant instruments to be codified and applied to all fast food employees. They know this is the only way to guarantee they avoid the overtime (and offset the penalty rates) burden which will befall them when workers successfully terminate their extant instruments.

37. Paragraphs [86], [90] and [93] of the application lay out the efforts of the applicant to eliminate overtime protections for part-time staff. Those protections are significant and the removal of those protections substantially impact on part-time workers under the Award. Those protections include the obligation to reduce to writing variations to hours, prior to them being worked, if overtime rates are to be avoided.

38. The change is not genuinely to "overcome the lack of flexibility and the administrative burden" of the Award right. It is to entrench the practice at the groups involved in the applicant's application of avoiding overtime rates of pay without contract variations. Paragraph [93] makes this plan. The change "reduces overall employment costs". Though not for any of the employers involved in the application - to whom the Award appears to not apply.

39. The effect of the application will be to diminish the relative living standards and needs of low paid part-time employees as they will no longer have the benefit of knowing the start and finish times of shifts, having to wait on rosters. They will not have the benefit of overtime rates of pay where they work additional hours in a week in circumstances where they don't reduce to writing contract variations.

40. Workers who no longer have rostered agreed start and finish times will no longer benefit from the casual loading – a further diminishment in the relative living standards and needs of low paid workers.

41. Social inclusion will be adversely impacted as part-time workers will not be able to plan ahead with their families and their communities – their start and finish times on particular days able to be changed from week to week.

42. The diminishment of rates of pay of overtime for part-time workers should be a basis for not granting the application. An entire class of work – those that work hours in addition to contract hours – will not attract overtime rates of pay merely because it is included in "availability". Overtime pay is not for working at times one is not available.

43. The complexity the change generates – from what is a very simple and straightforward arrangement – must be considered against the objective at 134 (1) (g).

44. We submit all the benefits in the application are in favour of employers. The Award does not appear to apply to the applicant's employer groups participating in its application. No evidence is drawn from anyone else. The system is not broken. The current Award terms are not a "dead letter".

45. The application ought be denied.