IN THE FAIR WORK COMMISSION

AM2017/49

IN THE MATTER OF:

FOUR YEARLY REVIEW OF THE FAST FOOD INDUSTRY AWARD 2010

(APPLICATION BY AUSTRALIAN INDUSTRY GROUP)

CLOSING SUBMISSIONS OF RETAIL AND FAST FOOD WORKERS UNION (RAFFWU)

A. STATEMENT OF PRINCIPLE

1. RAFFWU accepts the statement of principle set out in the Fair Work Commission document titled "The Review" sent by the Fair Work Commission to the parties on 18 July 2018. To that summary, it adds the following. The Tribunal must direct itself to the task formulated by s 156, read with ss 134 and 136. Before exercising power under s 156(b)(i), the Tribunal must reach the state of satisfaction prescribed by s 136. In reaching that state of satisfaction – being whether the Award provides a fair and relevant minimum safety net of terms and conditions – the Tribunal must act judicially and on probative evidence.

2. Further, in the exercise of power of the kind found in s 156, it is not appropriate to speak of an "onus of proof". No person appearing before the Tribunal bears an "onus" in the traditional sense. Rather, the Tribunal that must be positively satisfied before it can exercise power. The requisite state of satisfaction under s 134, conditioning the exercise of discretion under s 156, cannot be reached on the basis of assertion or speculation or incomplete evidence. If the Tribunal does not have the necessary evidence before it, it must obtain it. If it does not do so, it cannot lawfully reach the required state of satisfaction.

B PRELIMINARY OBSERVATIONS

B1. This case is not synonymous with the Casual and Part-time Employment Decision

3. The present application is not synonymous with the *Casual and Part-time Employment Decision* [2017] FWCFB 3541 (the **Casual and Part-time Decision**) and must not be treated as such. That is so because:

   (a) the central issue is not the same; and

(b) the evidentiary foundation for the current application is markedly different; and

(c) the proposed changes are radical departure from the history and purpose of part-time provisions and should not be made without a clear and cogent basis.

B1.1 The central issue is not the same

4. In the Casual and Part-time Decision, it was said that the central concern expressed was "not so much about the administrative difficulty (although there was some complaint about this), but the fact that employers could not guarantee a weekly number of hours for part-time employees without knowing in advance whether they would be able to roster them to work the hours that were required to be worked in accordance with client demand".[1] It was for this reason that the clause had fallen into disuse and was a "dead letter".[2] That the clause had fallen into "disuse" was a "dead letter" were the principal factors in favour of amending the clause.

5. The issues identified by the AIG in this case are different. The two central propositions advanced by the AIG are set out in paragraph [75] of its written outline of submissions. They are not concerned with the clause having fallen into disrepute, nor with it being "a dead letter".

6. The Award applies to the vast majority of enterprises in the fast food industry in Australia. In the *Penalty Rates Decision*[3] the Full Bench of the Fair Work Commission accepted that, in 2015, there were 24 564 enterprises across Australia in the fast food industry in 2015.[4] RAFFWU estimates that well over 20 000 of those enterprises apply the Award. There is no contemporaneous evidence about the use of casual and part-time employment in the vast majority of those 20 000 enterprises.

7. That the Award clause is not a dead letter is confirmed by the AIG's evidence. Oporto, which has stores operating under both the Award and various enterprise agreements, has the same proportion of part time, full time and casual employees in all stores, irrespective of which industrial instrument applies.[5] All Domino's Pizza outlets operate under the Award – the largest employer group in the industry to whom the Award applies. The F17 filed by Domino's Pizza Enterprises Limited (referred to in RAFFWU's earlier submissions) identified a substantial number of part-time and full-time employees to whom the Award applies.

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1 [516]-[522].
2 Ibid, [524].
3 [2017] FWCFB 1001.
4 [1238].
5 PN247-PN245.

8. That the provision is not a "dead letter" So much is conceded by the AIG in its submissions in reply.[6] Rather, the AIG is concerned with the "administrative burden" that was eschewed in the Casual and Part-time Decision, along with the cost of overtime. That the primary concerns are those set out in paragraph [75] of the AIG's written submissions is confirmed by the evidence of the witnesses called by the AIG. Each witness identified the issues as being:

   (a) the administrative burden of the Award requirement to record agreed changes to part-time hours in writing;[7] and

   (b) the financial obligation to pay part-time employees at overtime rates for all hours worked in excess of their agreed hours.[8]

9. Further, there is no probative evidence in this case of the central concern motivating the Tribunal in the Casual and Part-time Decision, being the variability of labour demand. The variability contended for by the AIG is not marked in the same way as in the hospitality and club industries.

10. First, the AIG has not tendered:

   (a) any analysis of actual rosters showing any variability in hours at a macro level; or

   (b) any analysis of actual rosters showing variability among employees.

11. Chapman – who presently applying the Award in his stores – says that part-time employees only change their availability "from time to time" and that the changes are less frequent than casuals because they have "a regular work pattern".[9] He gives this evidence despite not employing any part-time employees.

12. Second, discussed in more detail below, there is no suggestion that the variability in labour requirements is anything other than a standard variation which can be accommodated by the existing forms of labour. The variability is largely predictable, can be planned for in advance[10] and can be accommodated by a mix of part-time, full-time and casual employees.

13. There has been no forensic evidence of actual roster variation. It is common sense that the Fast Food Industry largely operates on a meal basis. Outlets are busier at certain times of the day

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6 AIG Submissions in Reply dated 26 June 2018, 6(c).

7 AIG3, [93]; Flemington at PN151-154 and AIG1, [57]; AIG7, [54]; AIG6, [46]; AIG9, [38]; AIG11, [23]-[25]; AIG12, [48]; AIG13, [52]-[54]; AIG10, [31].

8 AIG3, [90]-[91]; AIG1, [57]; AIG7, [55]; AIG6, [47]; AIG9, [38]; AIG12, [49]; AIG13, [55]; AIG10, [31]

9 AIG10, [19].

10 AIG11, [26]-[33]; AIG7, [30]-[31]; AIG10, [16]; AIG12, [27]-[31]; AIG13, [40]; AIG9, [24]; AIG1, [40]; AIG3, [73].

based on the service of common meals – breakfast, lunch and dinner. This allows for basic roster preparation in a very different way to the Clubs industry and Hospitality industry. Such information is readily available to the applicant and those who have participated in the proceeding. It is noteworthy that no such analysis has not been produced.

14. Further, there is no evidence of change in labour variation since the Award was made in 2010. When the Award was made, the part-time clause in its present form was "fair and relevant" in the context of the industry. There is no evidence at all that the industry has changed such as to render the clause anything other than "fair and relevant". While it is accepted that there need not be any material change in circumstances in order for the Tribunal to form the view that a clause is not "fair and relevant", it is also the case that it is to be assumed the clause was "fair and relevant" when the Award was made. That there has been no change in the industry between when the current clause was found to be "fair and relevant" and the date of this application is a consideration that is to be given proper weight.

15. Third, such evidence of roster variability as was given is largely unreliable because it relates to workplaces utilising a so-called "flexible part-time" provision which is based on worker availability. The rostering of workers for "availability" is a practice that is inherently likely to increase variability in labour supply. That is because a worker engaged under a minimum hours contract who wishes to work additional hours will maximise the additional hours they are eligible to be offered. To do so they must set their window of availability as wide as possible to increase the likelihood of being offered the additional hours. This involves balancing the width of their available window against their personal commitments. Inevitably, this will result in uncertainty and insecurity and increase the likelihood that changes will be required.

16. This self-evident proposition was not admitted by the AIG witnesses, but nor was it soundly refuted. Flemington accepted that rostering for "availability" could "potentially" increase uncertainty for workers, depending on the width of their availability window.[11] Flemington accepted that, in any particular case, set minimum hours per week might reduce the number of requests to alter either availability or the roster.[12] Anderson declared that she "didn't know" whether availability rostering would result in an increased number of changes.[13] Agostino admitted that if workers had set start and finish times, there would be fewer requested

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11 PN298.

12 PN300-PN303.

13 PN886-896.

changes.[14] He agreed that it was "possible" that if part-time employees were more certain about their hours they wouldn't have to make as many availability changes.[15]

17. Thus, the issues in this proceeding are not the same, nor are they similar, to those in the Casual and Part-time Employment Decision. There can be no suggestion that the changes should simply "flow on" to the FFIA. For these reasons alone, the proposition at [77] of the AIG written submissions must be rejected. The Award cannot fail to meet the modern award objective simply because it does not contain the same clause as another industry, whether in different circumstances or at all. What is "fair and relevant" in one industry is not necessarily "fair and relevant" in another. Some similarity of circumstance must be shown before such bald assertions can be given any substance.

B1.2 The evidentiary foundations are not the same

18. Further, the Casual and Part-time Decision illustrates the paucity of evidence in the present case. It is clear that, in this proceeding, the AIG did not consider it bore any significant evidentiary burden and anticipated that the Tribunal would follow the Casual and Part-time Decision simply because there was a "consent position" as between the AIG and the Shop Distributive and Allied Employees Association (the **SDA**).[16] It was not for the AIG and the SDA to "consent" to an amendment as between themselves. It was always for the Tribunal to be satisfied and such satisfaction cannot be reached merely because the AIG and the SDA assert that it should be so.

19. The evidence called by the AIG is markedly different to that upon which the Tribunal moved in the Casual and Part-time Decision. There, the evidence before the Tribunal included a survey about a strictly factual matter (rather than an expression of opinion) which had 455 full responses.[17] Those responses were from employers that the Tribunal was satisfied were a "representative cross-section" of the industry.[18] In addition, there was direct evidence of the views of employees.[19]

20. Here, the AIG conducted no survey of its members, nor of the employees of its members. RAFFWU does not, contrary to the AIG's submissions in reply (the **AIG Reply)** at paragraph 6(f), imply that a survey is necessary. Rather, it draws attention to the different evidentiary basis on which the

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14 PN1303.
15 PN1358.
16 See [2(a)] of Supplementary Outline Submission in Reply of AI Group 18 July 2018.
17 See [440] and [516] of [2017] FWCFB 3541.
18 [516] of [2017] FWCFB 3541.
19 [480], [481], [486], [487], [494], [495], [496], [498], [499] and two experts [488]-[493] of [2017] FWCFB 3541.

Tribunal is being asked to act and submits that, when the evidence as a whole is considered, there is an insufficient evidentiary basis from which to reach the required state of satisfaction.

21. Further, the AIG witnesses cannot be said, on any measure, to be "representative" of a cross-section of the industry because:

(a) the witnesses who could have spoken to, or on behalf of, large employers using the Award elected not to do so;[20] and

(b) some witnesses did not have sufficient experience to give probative evidence and spoke to few, if any, people actually operating stores;

(c) much of the evidence was unqualified opinion of little assistance to the Tribunal; and

(d) the two witnesses applying the Award represent only two employing entities operating ten Hungry Jack's outlets between them.[21]

22. The AIG witnesses spoke to a limited number of people actually operating stores. Flemington spoke to six franchisees but could only remember the names of three.[22] All six were also members of the Franchise Advisory Council.[23] Flemington did not know how many employees worked in the franchises operated by the six franchisees he consulted.[24] Flemington couldn't recall how many outlets the six franchisees operated (it could be as few as 6 from 567 stores in total).[25] Flemington did not know whether any member of the Franchise Advisory Council (the members of which were consulted briefly) applied the Award.[26] Further, while it was contended that the issues were discussed at the FAC, Flemington's evidence was that the issue was raised by the company in the context of enterprise bargaining.[27] There was no evidence that any franchisee raised the issue unilaterally, whether during bargaining or otherwise,[28] and it was not discussed at the Oporto FAC at all.[29]

23. Anderson spoke to six licensees and two or three restaurant managers, operating between them about 28 stores (being Anderson's "rough estimate"), covering only two states – New South

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20 PN223-PN226.
21 AIG9, AIG10.
22 PN158.
23 PN 157 – 159.
24 PN164.
25 PN157.
26 PN189-PN191.
27 PN196.
28 PN194-197.
29 PN197.

Wales and Western Australia.[30] Anderson's evidence was based on this limited investigation and much of her evidence proved to be without any proper basis.[31] Further, Anderson's evidence, to the extent based on her "experience" is limited by reason of her inexperience – at the date of affirming her affidavit, Anderson had been employed in the industry for fewer than 10 months. Anderson's immediate past employment was with the AIG. Further, Anderson is not employed in a senior managerial role with McDonald's – rather, she manages a team of employee relations employees who operate the McDonald's employee relations hotline.[32] This may explain why Anderson, despite being chosen to represent an employer with more than 100 000 employees employed in the industry, did not know:

(a) the number of full-time employees, if any, she had spoken to in preparing her affidavit;[33]

(b) the number of part-time employees, if any, she had spoken to in preparing her affidavit;[34]

(c) the number of casual employees, if any, she had spoken to in preparing her affidavit;[35]

(d) how many workers are covered by the Award;[36]

(e) how many delivery drivers employed by McDonald's are part-time;[37]

(f) how many delivery drivers are employed by McDonald's;[38]

(g) whether delivery drivers were covered by the Award prior to the 2016 variation;[39]

(h) the proportion of 18-year-old workers or younger that are engaged on a casual basis;[40]

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30 PN787.

31 See for example, PN885 & PN1010, wherein Anderson's affidavit evidence that the Award provisions would make 'rostering extremely difficult' was exposed as hyperbolic opinion evidence based on no probative evidence at all.

32 PN943.

33 PN793.

34 PN794.

35 PN796.

36 PN801.

37 PN805.

38 PN806.

39 PN810, PN812.

40 PN813.

(i) the proportion of Level 3 staff employed by McDonald's that are non-casual;[41]

(j) whether having staff paid junior rates is an important part of the McDonald's business model;[42]

(k) the frequency of manager's disagreeing with requests for availability changes;[43]

(l) whether each store has a rostering manager;[44]

(m) the occasions a rostering manager takes account of the cost of a staff member;[45]

(n) whether a rostering manager uses software to do the crew roster[46] and whether a single system is used by rostering managers to link wage cost with availability in rostering;[47]

(o) whether the structure used by McDonald's for processing and managing availability changes was mandated by the enterprise agreement;[48]

(p) whether McDonald's uses any other systems other email, face-to-face or telephone to contact employees to offer them additional hours;[49]

(q) the frequency of changes despite giving evidence that "hours worked by a part-time employee *often* differs from the rostered hours";[50]

(r) whether additional hours agreed between an employee and their manager are eventually recorded in writing by McDonald's, or whether they are allocated to the worker;[51]

(s) how much personal carer's leave part time employees use, including on a macro level;[52]

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41 PN816.
42 PN819.
43 PN834.
44 PN837.
45 PN846.
46 PN848.
47 PN849.
48 PN863-PN864.
49 PN904.
50 PN914.
51 PN935-PN937.
52 PN944-PN945.

(t) whether McDonald's had conducted any analysis on the cost of paying overtime;[53]

(u) whether McDonald's could easily manage the agreeing and recording of additional hours worked in writing;[54]

(v) whether there are any other sectors where being asked to work back after shifts doesn't result in overtime rates;[55]

(w) whether McDonald's had done any analysis of the cost of recording additional hours in writing,[56] having not asked anyone;[57]

(x) whether McDonald's had done any analysis of the benefit of abolishing Award rights to a set roster at the start of employment and otherwise overtime rates[58] having not asked anyone;[59]

(y) whether McDonald's could have surveyed its staff;[60]

(z) whether a part-time employee is more likely to attend a shift than a casual employee;[61]

(aa) what analysis McDonald's had done of the length of service of its casual employees;[62]

(bb) whether there had been any analysis by McDonald's of the financial benefit of casual employment allowing McDonald's to roster younger staff as they get older,[63]

24. Anderson purported to give evidence of what McDonald's would do if the Award clause applied[64] but:

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53 PN948.
54 PN985.
55 PN989.
56 PN1017-PN1018.
57 PN1019.
58 PN1020.
59 PN1021.
60 PN1027.
61 PN1041.
62 PN1086.
63 PN1099.
64 AIG3, [90]-[94].

(a) is not in a position of authority within McDonald's;

(b) has no direct or first-hand experience of the issue; and

(c) does not identify the source of her opinion.

25. Montebello-Hunter commenced employment in May 2017 with Hungry Jack's having not worked in the fast food industry prior to that time.[65] She could not (or, given the argumentative nature of her oral evidence, would not) say how many stores she visited.[66] She did not speak to any franchisees[67] and could not give any evidence about their systems.[68] While assuming there were coordinated meetings with franchisees,[69] Montebello-Hunter did not participate in any discussions with franchisees.[70]

26. Montebello-Hunter also revealed a lack of understanding of basic industrial concepts. She did not know if the Award required a system of recording availability, despite "availability" being a concept that does not find expression in the Award.[71] Despite not knowing this basic fact, Ms Montebello-Hunter argued that a change in availability "means that there's a roster change" under the Award[72] and that "a roster can't be put"[73] despite that being the actual term of the Award (that is, a roster is agreed at the commencement of the employment and the employee works to that roster.) Her opinion was wrong as a matter of fact and law. Ms Montebello-Hunter also incorrectly asserted that additional hours need to be put and agreed in writing prior to overtime being worked and paid.[74] Having worked in the fast food industry for a mere 10 months at the time she swore her affidavit, this is unsurprising and directs attention to why the AIG considered that her evidence was of sufficient probative value to assist the Tribunal

27. In addition, Montebello-Hunter was a difficult and obstructionist witness. She played the role of advocate rather than provide objective factual evidence. Her evidence should be treated cautiously. Further, the AIG did not call readily available evidence from stores applying the Award. Flemington did not speak to any franchisee operating one of the 84 Oporto stores under the Award,[75] and no evidence from any such person was called. This is despite Flemington's evidence

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65 AIG7, [1]-[3].
66 PN1498-PN1500.
67 PN1490.
68 PN1518.
69 PN1509.
70 PN1506-PN1508.
71 PN1522.
72 PN1648.
73 PN1650.
74 PN1662-PN1663.
75 PN162.

that a large number of Oporto stores operate under the Award.[76] No evidence was called from Dominos, despite Dominos being the largest employer group to which the Award applies and all Dominos stores applying the Award.

28. The evidence from employers actually applying the Award is limited to the evidence of Mr Sullivan and Mr Chapman. Between them, Mr Sullivan and Mr Chapman employ 301 employees, representing less than 0.1% of the industry. Further, Mr Sullivan and Mr Chapman provided no empirical evidence at all, nor any data analysis. Their evidence was little more than assertion unsupported by facts.

29. Neither the AIG nor any of the witnesses conducted any form of survey and the AIG witnesses frequently chose not to obtain empirical data even where it was available. For example, Flemington conceded that he made no attempt to obtain from franchisees age data,[77] employment category data[78] and no attempt to look at actual data, take a survey or to take sample.[79]

30. There is no evidence from a large number of enterprises covered by agreements, including KFC (and its various franchisees), Subway (and its many franchisees) and Pizza Hut (and its many franchisees).

31. The only evidence put from entities operating under the Award (that of Chapman and Sullivan) relates to three enterprises operating 10 Hungry Jacks outlets. This leaves more than 20 000 other enterprises, employing tens of thousands of staff, in relation to which there is no evidence before the Tribunal.

32. There is no genuine agitation for the proposed variation from those to whom the Award applied. Three of more than twenty thousand does not make the case for change. The failure to produce relevant evidence should be seen as acknowledgement the current system works. That conclusion is readily drawn in light of the evidence of Agostino that if he was to apply Award in his business, nothing would change.

33. The evidence contained no analysis of the proportion of hours worked by casual staff as compared to non-casual staff. It cannot be inferred that the number of workers is representative of the number of hours worked.

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76 AIG1, [14].
77 PN222-223.
78 PN224-226.
79 PN287-PN296.

34. The evidence called was of enterprises representing less than 10% of all enterprises in the industry. More than 22 000 enterprises have not been heard at all.

35. Further, and critically, the AIG and its witnesses spoke to few, if any, employees. Anderson spoke to "about six" employees of more than 100 000 workers employed by McDonald's.[80] Of the "about six" that she did speak to, Anderson did not know if they were full-time, part-time or casual.[81] Agostino spoke to no employees, other than his general manager, for the purposes of preparing his affidavit and forming the opinions expressed therein.[82] In relation to paragraphs 48 and 49 of his affidavit, Agostino allegedly spoke to 10 unnamed employees.[83] Nothing is known about who those employees were, their positions in the business, their employment status or their tenure. Montebello-Hunter could not say definitely, nor even give an estimate of, how many employees she spoke to.[84] Montebello-Hunter did not know whether these unknown number of employees were full-time, part-time or casual.[85] Flemington conceded that he did not undertake a survey of employees[86] and that no employees were directly consulted.[87] Nothing on the face of the affidavits filed by the remaining witnesses suggests that any employee was spoken to, either about their experience of the Award or their experience of any workplace agreement that covered and applied to them.

36. Thus, it can be seen that the evidence in the present case is not comparable to that which was called in the Casual and Part-time Decision and is manifestly deficient (whether standing alone, or in comparison).

37. Recognising these differences, the AIG has resorted to a contention that the claim does not require probative evidence because it is one of "industrial merit".[88] That phrase was used in the Penalty Rates Decision.[89] There, in discussing the task of the Commission in the conduct of the four-yearly review, the Full Bench said:

> Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes **are obvious as a matter of industrial merit** and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be

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80 PN896.
81 PN1022.
82 PN1229 – PN1233
83 PN1375.
84 PN1491 – 1496
85 Ibid.
86 PN166.
87 PN207.
88 Supplementary reply submissions of AIG dated 18 July 2018 at [2(a)] and [4].
89 [2017] FWCFB 1001 at [269], point 2.

> supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

38. This is not a case in which the proposed change is 'obvious as a matter of industrial merit'. Nor was the proposed change in the Part-time and Casuals Case one of "obvious industrial merit". The proposed change here is significant and merit is reasonably contestable. The draft clause removes from part-time employees the benefits of:

    (a) set start and finish times;

    (b) access to overtime for hours above their agreed ordinary hours of work; and

    (c) the security and certainty resulting from changes being recorded in writing.

39. It imposes on part-time employees the detriments of:

    (a) increased uncertainty as to when work is to be performed;

    (b) greater uncertainty in planning for carer's commitments; and

    (c) reduced access to additional hours of work (because a worker cannot nominate for additional hours unless they are available for work in that bracket each week).

40. These outcomes occur in the context of an industrial framework in which employers have access to three modes of employment (full-time, part-time and casual) to accommodate the alleged variances in labour demand that are said to underpin the proposed changes. As such, the proposed change should be supported by an analysis of the relevant legislative provisions and probative evidence.

41. Moreover, the proposed changes represent a radical departure from the position advanced by the Full Bench in the *Casual and Part-time Employment Case.*[90] There, the Full Bench recalled and affirmed the decision in the *Personal Carer's Leave Test Case - Stage 2*[91] where in it was said that two matters needed to be considered in the development of "fair and equitable" part-time work provisions. The first was that it was necessary to ensure that part-time employees were provided with pro-rata entitlements to the benefits available to full-time employees, including equitable access to training and career path opportunities.[92] The second was that:

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90 [2017] FWCFB 3541

91 (1995) 62 IR 48.

92 [2017] FWCFB 3541 at [93], citing the Personal Carer's Leave Test Case – Stage 2.

> … part-time work needs to be clearly distinguished from casual employment. While the provision of pro rata benefits is one means of providing such a distinction other measures are also needed. In particular part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked. Regularity in relation to hours worked is an important feature of part-time employment. In the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. For example, if hours of work are subject to change at short notice it can create problems for organising child care as these arrangements generally require stable hours and predictable timing...[93]

42. Those principles have underpinned the drafting of part-time provisions since they were first introduced. As the Full Bench observed in the *Casual and Part-time Employment Case* the part-time employment provision established for the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* as a result of the *Award Simplification Decision* became a model clause adopted in many awards.[94] In the case, the Full Bench recalled the description of its features in a Full Bench decision issued as part of the award modernisation process conducted pursuant to Part 10A of the WR Act as follows:

> The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime.[95]

43. In the *Casual and Part-time Employment Case*, the Full Bench recalled the Full Bench decision in the *Award Modernisation Case* in which it was observed that:

> There are a number of common features for the use of part-time employees and that, to begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers.
>
> …
>
> The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying award, but these seem not to be used in relation to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility.[96]

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93 Ibid, citing the Personal Carer's Leave Test Case – Stage 2.

94 [2017] FWCFB 3541 at [94].

95 [2017] FWCFB 3541 at [94], citing section 1.01 *Award Modernisation Decision* [2009] AIRCFB 826.

96 [2017] FWCFB 3541 at [95].

44. The Full Bench further recalled that in relation to the establishment of 3 modern awards as part of the award modernisation process, the Aged Care Award, the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010*, the Full Bench said:

> We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. **However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates.** From the submissions of the employers this is a major cost saving and used widely.
>
> Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38-hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforeseen circumstances on the day.[97]

45. The Full Bench further recalled the decision in *Appeal by Leading Age Services Australia NSW – ACT*[98] in which an earlier Full Bench had pointed to the requirement in the award for part-time employees to have "reasonably predictable hours of work" and said that the requirement for reasonable predictability in hours of work stemmed from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work.[99] The Full Bench went on:

> Thus, the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred. Part-time employment has been treated as peculiarly suitable for those with major family or other personal commitments in their lives, and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.[100]

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97 Ibid.

98 [2014] FWCFB 12.

99 [2017] FWCFB 3541 at [96], citing *Appeal by Leading Age Services Australia NSW – ACT* [2014] FWCFB 12 at [19].

100 [2017] FWCFB 3541 at [97].

46. In circumstances where, in addition to the industrial merit being contestable and not at all obvious, the proposal represents a radical departure from Commission dicta on part-time employment, the application must be supported by probative evidence. It is not and, for that reason alone, should be dismissed.

C. THE PRESENT APPLICATION

47. The AIG's central contention is found in paragraph [75] of its written outline. Its central proposition that the Award does not meet the modern award objective rests on two the factual contentions being:

(a) that the current clause "acts as a disincentive to the engagement of part-time employees and to the use of part-time employees to work additional hours"; and

(b) that the current clause "imposes an impractical administrative burden on employers (in the form of the requirement to reduce to writing the agreement to work additional hours)".

48. The evidence before the Tribunal – on which it must act – does not support either proposition. If neither proposition supporting the application is established, the application must be dismissed. There is no alternative basis which, on the evidence, the application could be granted – and the attempts to suggest otherwise, as at paragraph 6(c) of the Reply Submissions – must be rejected.

C1. A disincentive?

49. There is no probative evidence that the existing clause is, in fact, a discouragement to the engagement of part-time employees, or to those employees being offered additional hours.

50. The AIG witnesses, with one exception, who operate stores applying an Agreement that contains so-called "flexible part-time" provisions gave no probative evidence about what would occur if the Award clause was applied in their businesses. Rather, they expressed opinions based on nothing more than supposition and speculation. No witness had conducted a financial assessment of the impact of applying the Award clause. No witness had considered the relative merits of part-time employees or casual employees having proper regard to the accepted and acknowledged advantages obtained from employing part-time employees[101] such as better attendance, greater commitment, better training, higher skill levels and a greater commitment to the business.

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[101] AIG1, [51], [55]; AIG3, [86], [88]; AIG7, [41], [43]; AIG9, [41]; AIG11, [50], [52]; AIG12, [43]; AIG13, [49].

51. The exception was Agostino, a McDonald's licensee. Agostino's frank and forthright evidence under cross-examination was that if the Award clause applied there would be no change in his business.[102] Making that concession required Agostino to depart from his sworn affidavit.[103] He did so readily and with commendable honesty. His concession was maintained, and strengthened, in re-examination.[104]

52. Anderson's evidence that applying the Award would make "rostering would be extremely difficult" is unqualified opinion made without any analysis or assessment of the actual impact and was based on conversations with a limited number of licensees.[105] It is also contrary to basic reason, and contrary to the evidence of Agostino.

53. There is no evidence at all that more casuals are employed in stores applying the Award. Flemington's evidence was that the employment category breakdown was the same for all stores – whether applying the award or the agreement.[106] Flemington had no information about the number of additional hours allocated to casuals as opposed to part-time employees.[107] Flemington was not able to quantify, or support with any data, his assertion that, in stores applying the Award, casuals were engaged in preference to part-time employees.[108]

54. In the case of Domino's Pizza, the Award covers and applies to all Domino's employees, of which 46.8% are non-casual.[109] No evidence was called from Dominos. Further, no evidence was called from any Oporto store applying the Award – of which there are many – despite Flemington being called to give evidence and being aware of the Oporto stores applying the Award.

55. The evidence of Chapman and Sullivan represents less than 0.1% of the industry and was speculation and assertion. It had no probative basis.

56. Conversely, there is also no evidence that more part-time employees would be engaged (or that fewer part time employees would be engaged for the agreement covered stores) if the Award was varied in the manner contended for by the AIG.

57. Flemington's evidence was that for the Craveable Brands stores using an agreement with so-called "flexible part-time provision" there is nonetheless a preference for casual employees.[110]

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102 PN1371; PN1404.
103 AIG6, [47].
104 PN1413 – PN1415.
105 PN1000 – PN1010.
106 PN227 – PN233; PN238.
107 PN467.
108 PN469.
109 F17 Statutory Declaration In Support of Application by Domino's Pizza Enterprises Ltd In AG2018/442.
110 PN320-PN324.

That is to say, even stores using a so-called "flexible part-time" clause prefer to use casuals as their first option in the case of short-term vacancies.

58. Further, Anderson gave unqualified opinion evidence that stores would "probably stop offering additional shifts" to part-time employees, allegedly "because of the requirement to get the agreements in writing".[111] That evidence is meaningless. First, Anderson uses the term "probably". That is a vague and unqualified term that is devoid of any meaning at all outside of a statistical analysis (which Anderson did not offer). It speaks to the uncertainty and vagary of the true position. Second, Anderson's evidence on this point was not consistent with evidence of an actual licensee (Agostino). Third, the evidence reveals McDonald's to be an employer with sophisticated systems for recording matters connected to employment in writing, and which exerts a substantial degree of control over the rostering arrangements of its employees by electronic means. That evidence stands at odds with the assertion that recording an agreement in writing is a burdensome task. Finally, Anderson gave evidence despite McDonald's not having conducted any form of analysis of the costs associated with recording an agreement in writing (a practice it not does currently engage in).[112]

59. Montebello's opinion evidence was expressed without her knowing whether or not her employer had done any assessment of the costs.[113] Her evidence was nothing more than an unqualified expression of opinion from a witness who has been involved in the industry for less than 14 months (9 months at the time of make the statement.)[114]

60. As noted above, Agostino admits that nothing would change if he had to use the current Award clause.[115] Agostino also accepted that availability change notifications that occur with notice can be readily managed[116] and that it is the "on the spot ones" that are more difficult.[117] "On the spot" changes take about five minutes to make.[118]

61. Ms Gulik does not give any evidence that she would change the current approach of employing part-time staff. The true impact Ms Gulik identifies is that the current agreement provides a substantially lower cost compared to the minimum safety net established in the Award.

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111 PN1035.
112 PN946.
113 PN1620.
114 AIG7, [1].
115 PN1370 – PN1371.
116 PN1329.
117 PN1329.
118 PN1135 – PN1340.

62. Further, none of the employers with existing so called "flexible" part-time arrangements gave evidence that they would employ ***more*** part-time employees. These employers already have the "flexibility" that the AIG seeks to mandate.

63. Moreover, the central position does not reflect the business model being employed in larger businesses, nor the true motivations for seeking the change. All employers who were cross-examined acknowledged the benefits of engaging part-time workers, including stability, better training, longer service, better performance and greater commitment to the business.[119] The truth is that the AIG wants to secure to its members the benefits of part-time employees without providing to those employees the benefits attaching to those employees. This was effectively admitted by Agostino who gave evidence that his primary concern was having to pay part-time employees overtime rates if they work additional hours,[120] and that he wanted the benefit of part-time workers but with the right to roster them on a weekly basis and to roster additional hours without any casual loading.[121]

64. Anderson gave evidence that the cost an employee is taken into account when preparing rosters at McDonalds, at least some of the time,[122] and that McDonald's aim is to staff its stores with the most "capable, available and least expensive employees".[123] Agostino gave evidence that one of the reasons that part-timers are preferred in stores with an agreement in place is because they are cheaper than casuals (because overtime does not apply).[124] Agostino admitted that his major concern was paying overtime,[125] and that he supported the clause because it would allow him to roster up to 38 hours (in fact, 37.5) per weeks without paying any overtime, while still obtaining the benefits of part-time employees.[126]

65. Critically, Agostino agreed that age was a "critical determinate" for rosters,[127] and that he relied on being able to roster younger workers.[128] He agreed that as workers get older he needed to be able to replace them on the roster with younger, and therefore cheaper, workers.[129] Agostino agreed that in order for him to be able to roster an employee to work fewer hours as that worker got older and more expensive, the worker needed to be casual to begin with.[130] Martinoli's

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119 Anderson at PN1081; Flemington at PN451-PN454; Chapman at [23].
120 PN1397.
121 PN1399.
122 PN845-847.
123 PN850.
124 PN1345.
125 PN1397.
126 PN1397.
127 PN1276.
128 PN1283.
129 PN1285.
130 PN1295; PN1287 – PN1294.

evidence was that all high school students – likely to be younger than 18 years - are engaged on a casual basis.[131]

66. Thus, the evidence before the Tribunal is that:

(a) the evidence of current practice in Award covered stores:

(i) is that Oporto stores have the same proportions of employment category irrespective of which industrial instrument applies;

(ii) is absent any evidence from Domino's Pizza – the largest employer in the industry to whom the Award applies;

(b) for stores with an agreement containing a "flexible part-time provision":

(i) in at least one store casuals are preferred to part-time employees, irrespective of the flexible part-time provisions in place under the relevant agreement; and

(ii) age-based rostering requires young employees to be casual in any event;

(c) the evidence of likely future practice is:

(i) the evidence of Agostino that nothing would change if he was required to apply the Award clause;

(ii) the evidence of two Award covered employers who simply assert that they would employ more part-time employees, with no analysis of any kind about why that it so;

(iii) Anderson's concession that casuals would be employed at McDonald's in any event, but that she could not quantify the differential.[132]

67. Moreover, the question of a "disincentive" was dealt with by the Tribunal in the 2009/2010 award review process. In [2010] FWAFB 379, the NRA and the AiGroup proposed amendments to the Fast Food Industry Award part-time provisions relying on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request which provided that "the

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131 AIG11, [11]-[12].

132 PN1039.

Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

(a) offering additional hours of work to part-time employees; and

(b) employing part-time employees rather than casual employees."

68. **The** NRA and AiGroup proposal was to remove the requirement in the Award that overtime is payable for all hours worked by a part time employee in excess of the agreed number of hours. The Tribunal rejected that proposal, finding that the appropriate means of responding to the request was to "make clear that overtime is not payable to part-time employees when they agree in writing to work additional hours within the other limits on ordinary hours".

69. In conducting this review, it is appropriate that "the Commission take into account previous decisions relevant to any contested issue" and "proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made".[133] This issue was expressly considered by the Tribunal in 2010. There has been no material change in circumstance. The clause met the objective when it was made, having regard to the submissions made on this precise issue of whether there is a disincentive. The evidence in this case provides no reason to depart from the conclusions of the Tribunal expressed in [2010] FWAFB 379.

C2. **Time and administrative burden**

70. As to the allegation that the existing clause imposes an impractical administrative burden, the issue identified by the AIG is the *time* and *administrative burden* of recording the change in writing.[134]

71. As to the time, there is no reliable evidence before the Tribunal of how long it takes to record the agreement in writing, as distinct from the question of how long it takes to *reach agreement*. This latter issue was not the subject of complaint by any witness and is not the basis on which the AIG has advanced its case.

72. Flemington's evidence was that recording the agreement in writing takes 10-15 minutes.[135] Flemington had not, before giving that evidence, asked any franchisee who actually records changes in writing how long it takes.[136] As to the 10-15 minute estimate, Mr Flemington conceded

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133 [2017] FWCFB 3541, [11] point 3.

134 See [25], [26] of *Amended Findings Sought by AIG dated 9 July 2018*.

135 Flemington at [61].

136 PN353.

that this included the time taken to contact the employee, engaged in dialogue about the additional hours, reach agreement about the additional hours and to then document it.[137] Flemington conceded that he did not know how long documenting the agreement takes.[138] His evidence on this point was unqualified opinion evidence of no probative value at all.

73. The estimate by Gulik of time to record in writing,[139] cannot be given any weight as Gulik does not currently record variations in writing, nor does she have any relevant experience that would permit her to make an accurate and reliable estimation.

74. Flemington agreed that the only difference in the process adopted by Craveable Brands stores presently using an agreement with a so-called "flexible part-time provision" and the procedure laid down by the Award is the requirement to record in writing.[140] Flemington accepted that if the acceptance in writing was by email, text or online it would take a very short period of time.[141]

75. Flemington's evidence was representative of the broader issue with the evidence on this point. The issue having been squarely defined by paragraph 75(b) of the AIG submissions, the witnesses conflated the time taken to find a replacement employee – which is incurred by all employers now – with the time taken to record the agreement in writing after the employee is identified and agrees to perform the work. As set out above, no complaint is made about the process of arranging an alternative employee and the AIG does not press the claim on that basis. The claim has not been advanced, nor responded to, on this basis.

76. Anderson's evidence was that it takes a "significant period" to record the agreement in writing,[142] which under cross-examination she clarified meant "a long period of time".[143] Under cross-examination, it became clear that Anderson was referring to the cumulative time taken for all requested changes, and not any one change.[144] Anderson conceded that the process currently followed to obtain a replacement employee – irrespective of whether the agreement was recorded in writing[145] - when needed takes fewer than 10 minutes in total.[146] Anderson did not know how long it would take to record an agreement in writing if the method of recording was

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137 PN355-356.
138 PN357.
139 AIG13, [54].
140 PN383.
141 PN385-387.
142 AIG3, [91].
143 PN990.
144 PN991.
145 PN902 – PN907; PN925-PN930.
146 PN993.

by way of a pro-forma document or a smart-phone app.[147] Further, Anderson didn't know whether McDonald's had done any assessment of the cost of recording agreements in writing.[148]

77. Agostino gave evidence that if the Award applied, his company's process for contacting replacement workers would remain the same, and he agreed that the only difference between the current situation and the award is the requirement to record the agreement in writing.[149] Agostino agreed that recording the agreement in writing could happen very quickly with a pro-forma document.[150]

78. Chapman – who operates stores applying the Award - simply asserts that it would be "more time consuming" to also document the agreement in writing but makes no effort to quantify the time it would take.[151] Sullivan gave evidence that taking "several minutes" "several times a week" to record an agreement in writing is burdensome.[152] On no sensible view could this be considered burdensome.

79. What emerges from the evidence is that many of the AIG witnesses were operating businesses that employed high levels of electronic data collection and employee monitoring, and with sophisticated attitudes towards such systems. It further emerged that there are fast, simple and effective means of recording agreements in writing.

80. As to the first of those propositions, Anderson gave evidence that McDonald's uses two electronic data collection and management systems: myJob for employees and myRestaurant for managers.[153] This sophisticated technology sees all rostering requests, approvals and allocations moved online. The system is used for changes to the roster as well as general availability.[154]

81. This technology is already in place and is used across all McDonald's corporate stores and in its franchises.[155] The system in place at McDonald's was development and implemented by the company – it is not mandated by the Award and there is no suggestion that it would change as a consequence of the proposed variation. Anderson's gave evidence that all changes at McDonald's

147 PN998.
148 PN1017.
149 PN1326.
150 PN1331.
151 AIG10, [20].
152 AIG9, [39(d)].
153 PN820; Anderson Affidavit [29]
154 PN875.
155 Anderson PN860 – PN862; Agostino at PN1251.

are managed electronically.[156] The McDonald's witnesses accepted the benefits of having changes recorded in writing.[157]

82. Agostino accepted that all availability changes requested by employees – both temporary[158] and permanent[159] are requested in writing. Agostino's evidence was of a "smart clock" finger print (biometrics) system that records employee hours of work and permits a manger to authorise changes using their fingerprint.[160]

83. Flemington gave evidence of Craveable Brand's use of the ZUUS system, in which all roster requests and amendments are recorded.[161] Flemington accepted that recording amendments in writing has significant benefits.[162] Montebello-Hunter gave evidence of the JEDI system[163] employed for recording availability and the Macromatix system used for rostering.[164]

84. The witnesses subject to cross-examination agreed that the requirement to record the agreement in writing could be achieved by:

(a) roster amended and initialled;[165]

(b) text message;[166]

(c) emails;[167]

(d) electronic system;[168]

85. One McDonald's licensee uses a closed Facebook page.[169]

86. It follows from the above that there is ample evidence that the large employers giving evidence:

(a) have sophisticated online administrative systems for capturing information in writing;

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156 PN960-965.
157 Anderson at PN880-PN882; Agostino PN1262.
158 PN1259.
159 PN1262.
160 PN1441.
161 AIG1, [30]-[34], PN257.
162 PN266-PN271.
163 PN1553 – 1557.
164 AIG7, [19].
165 Anderson at PN1012; Agostino at PN1390.
166 Anderson at PN1013; Agostino at PN1391.
167 Anderson PN1014; Agostino at PN1392.
168 Anderson PN1015; Agostino PN1393.
169 PN1320 (Agostino).

(b) have dynamic systems that allow electronic responses to be given to electronic requests;

(c) use these systems to control and manage labour demand;

(d) use these systems as a mechanism for supervising employees;

(e) almost universally direct employees to record requests and roster changes in writing (but seek to be relieved of this obligation themselves).

87. All of the witnesses who were cross-examined agreed that recording requests in writing has advantages,[170] including providing certainty for both the employer and the employee.

88. This evidence undermines the position advanced by the AIG that recording an agreement in writing is "burdensome" and a "disincentive" and reveals that the AIG's true concern is to secure to its members the administrative advantage of rostering part-time employees in the same manner as casual employees along with the financial advantage of depriving part-time employees of overtime payments for working additional hours up to 38 per week.

C3. Consideration: the section 134 factors

89. The factors in paragraphs 134(1)(b), (da), (e), (g) and (h) are neutral considerations.

90. As to the factors in paragraph 134(1)(a) and 134(1)(c), the proposed clause 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.

91. 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.

92. 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

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[170] Anderson at PN879-PN882; Agostino at PN1262; Montebello-Hunter at PN1555-PN1557.

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.

93. As to paragraph 134(1)(d), the clause refers to flexible **modern** work practices. There is nothing modern about the proposed amendments. 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 an important protection for part-time employees (being the requirement that changes are recorded in writing). 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 a substantial part of the relevant class.

94. As to paragraph 134(1)(f), there is no probative evidence before the Tribunal of the matters in this paragraph. While it is accepted that this factor is relevant to the Tribunal's task, there is no probative evidence on which the Tribunal can act.

C4. Conclusions

95. It follows that the AIG has not made good the central propositions – set out in paragraph [75] of the AIG Submissions, on which its application rests. The application should be dismissed on this basis alone. RAFFWU's specific responses to the AIG's amended proposed findings are in Annexure 1.

96. The submissions by the AIG – at [76] – that the Award does not meet the "contemporaneous" circumstances of the industry must be rejected. The AIG submissions emphasise this submission.[171] It is not suggested that circumstances must have changed in order for the Commission to form the view that the Award is not "fair and relevant". However, the AIG submission obscures that there is nothing "contemporaneous"– cf paragraph [76] – about the issues raised by the AIG. The Tribunal is entitled to have regard to the lack of any evidence at all that the "circumstances" relied on by the AIG are in any way new or have changed since the Award was made in 2010. While not a necessary pre-condition to the exercise of discretion, it is a relevant consideration.

97. The AIG submission – at [77] - that the existing part-time clause in the FFIA is ineffective as it fails to contain a clause modelled on the clauses found in the Hospitality Award, the Restaurant Award

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171 AIG written outline of submissions at [76].

and the Club Award has been dealt with above. It is worth re-iterating that the question of whether a clause is "fair and relevant" in one industry does not answer the question of whether it is "fair and relevant" in another. In circumstances where the basal issues and the evidentiary foundations are different, is a submission without content and without meaning.

98. The submission at [78] – that the clause will meet the contemporaneous circumstances of the industry, including the unpredictable fluctuations in customer demand and the need for "speedy and easy decisions" on, and implementation of, staffing decisions, rests on the premise that recording an agreement in writing with part-time employees is neither "fair" nor "relevant". For the reasons given above, there is no probative evidence that the requirement to record an agreement in writing is a disincentive to engaging part-time employees. For that reason alone, this argument must be dismissed. More importantly, the submissions fail to engage with the history and purpose of part-time provisions, as elucidated in the Casual and Part-time Employment Decision described above in paragraphs [41] - [45].

99. The application seeks a radical departure from the principles outlined by this Tribunal in that decision. It seeks to inject serious instability and uncertainty into the rostering arrangements of part-time employees who, this Tribunal has long recognised, are more likely to have family and carer responsibilities. Despite that, the AIG does not engage at all with the history of part-time provisions and the importance of part-time provisions being "suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work".

100. The application should be dismissed.

D. THE PROPOSED CLAUSE

101. If the Tribunal decides to amend the existing award clause, the precise terms of the proposed clause must be given careful attention.

102. Clause 12.1 shifts part-time employees to availability rostering. This is a serious, significant step, not expressly sought in the application or addressed in the evidence and which should be firmly rejected. There is no probative basis at all for removing the requirement for part-time employees to have set start and finish times. This feature of part-time employment is critical to the stability and certainty required by part-time workers. Set start and finish times is not addressed in paragraph [75] of the AIG Submissions and does not feature in the evidence before the Tribunal. There is no basis on which the Tribunal could conclude that it is necessary to amend the clause to remove this vital protection from part-time employees.

103. While the AIG suggests that the requirement that part-time employees be rostered a minimum of 8 hours per week is a "benefit" to part-time employees (who might otherwise be rostered only the minimum shift-length of three hours), there is no evidence before the Tribunal of how many, if any, part-time employees have minimum hours of fewer than 8 per week. It is likely that this "benefit" is illusory, with part-time employment being the likely means of employment for regular hours in excess of eight per week in any event.

104. Clause 12.2 injects serious instability into the lives of part-time employees. "Availability" rostering is inherently more uncertain that set start and finish times and is wholly inconsistent with the history and purpose of part-time employment. First, as a matter of practical reality, potential employees who provide restricted "availability" are less likely to be engaged than employees with wide availability. This generates inherent disadvantages for prospective employees with carers' responsibilities. Second, the worker will not know from week to week the days on which they will be required to work, nor the number of hours on that day. The uncertainty that results is inconsistent with the purpose of part-time employment provisions. Third, the "employee's agreed availability" links both the minimum hours per week and additional hours.

105. An employee seeking additional hours must nominate the widest window possible to secure the best opportunity of securing additional hours. Doing so results in greater uncertainty about hours of work and an inability to commit to personal activities in advance. Moreover, because there is no distinction between availability for ordinary hours and availability for additional hours, part-time employees are deprived of any opportunity at all to work "ad hoc" additional hours: unless they are able to commit to the same availability window each week (bearing in mind that they

can change the window only where there is a "genuine and ongoing change"), they are deprived of any opportunity to be considered for additional hours.

106. Consequently, a part-time employee will be faced with two options. The first is to limit their availability to the dates and times on which they can be certain to be available from week to week, and thereby limit their opportunity to secure additional hours. The second is to nominate wide availability, resulting in an inability to plan ahead and the difficulties that attach to making short notice arrangements for family and carer responsibilities.

107. The desire to be able to access part-time employees for cheap overtime is not a sound basis for abandoning set start and finish times entirely. It is telling that the AIG offers no explanation at all for why abandoning the security and stability of set start and finish times is necessary nor can it point to the evidence that supports the need for such a radical change.

108. If there is any doubt, the impact on workers of such a change is illustrated by the evidence of Ms Swan at paragraphs [25] and [26]. It is also illustrated by the curious evidence of Flemington that this level of uncertainty gives part-time workers "greater flexibility around their lifestyle"[172] but still "provides them with access to the number of hours that they may receive". Exactly what the "greater flexibility" is was not revealed. Flemington ultimately conceded that this method of rostering might "present them with some challenges".[173] The insipid concession is meaningless because the proposition is self-evident.

109. Clause 12.6 introduces significant and detrimental restrictions for part-time employees that do not currently exist under either the Award clause, nor any relevant workplace agreement.[174] First, there is presently no Award requirement, nor industry standard, that permits an employee to alter their availability only where there is a "genuine and ongoing change". All of the witnesses called by the AIG had systems in place permitting employees to alter their availability from week to week, and none complained of this practice The AIG provides no explanation at all of why, in that circumstance, the ability of an employee to make changes to their availability should be severely restricted in the manner proposed.

110. Second, as noted above, "availability" applies to both the minimum hours and additional hours. An employee will not, under the proposed clause, be offered additional hours unless the hours fall within their "agreed availability". This means that employees cannot be considered for ad hoc or week to week additional hours unless they can commit to those hours on an ongoing basis.

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172 PN407.

173 PN411.

174 See for example, McDonald's - Anderson at PN1052 – PN1053.

This is severely restrictive for part-time employees who may need to secure childcare on a week to week basis, or who can only afford child care when they are guaranteed to be offered paid work.

111. Clause 12.7 also introduces significant and detrimental restrictions for part-time employees that do not currently exist under either the Award clause, nor any relevant workplace agreement. An employee who accepts additional hours must accept them permanently, subject to the right to give 14 days' notice that the hours cannot be worked. This is severely restrictive for part-time employees who have carers restrictions that mean they can accept additional hours in one week, but not two consecutive weeks. This restriction is anathema to the history and purpose of part-time employment. No explanation at all is offered for why such a clause is necessary, and no evidence at all has been called from employees to whom the restrictions will apply.

112. Clause 12.7 also removes overtime payments entirely for hours up to 38 per week – see clause 27.4 and 27.5 as renumbered. There is no justification at all for the change, other than cost savings for employers. This result can be achieved under the current Award clause if the employer obtains the consent of the employee to working the additional hours at ordinary time rates. The existing model provides a balance – permitting employees to decide what is in their interests. The proposed model removes any prospect that the employee will be offered overtime for hours above their agreed weekly hours. The AIG fails to explain at all why it is that both employers and employees should be deprived of this choice.

113. Further, clause 12.7 is devoid of any content as to how additional hours may be offered. At least one witness was of the opinion that a roster could simply be posted with the recording of the additional hours on the roster operating as the "offer" and the employee's silence for a period of more than 24 hours after the roster was posted constituting "acceptance" and therefore "agreement".

114. Thus, the proposed new clause:

(a) abolishes set start and finish times with no explanation at all;

(b) permits employers to roster part-time employees in the same manner as casuals, but without paying them any additional sum;

(c) injects greater instability and uncertainty into the working arrangements of part-time employees;

(d) reduces the ability of part-time employees with personal commitments to access additional hours of work;

(e) introduces greater restrictions than exist in the Award or any agreement for variations to availability.

115. The clause goes well beyond what is addressed in the AIG application or its evidence. If a change is to be made, it should go no further than is necessary to advance such of the issues advanced by the AIG as are accepted by the Tribunal and no further. This is not a case where, the clause being a dead letter, a wholesale rewrite of the clause is appropriate. Any changes should be limited, moderate and consistent with the application made and the evidence given.

E. APPLICATION TO CHANGE THE END TIME OF NIGHT SHIFT

116. RAFFWU opposes the application by the AIG to introduce a "facilitative provision to change the end time of night shift".

Retail and Fast Food Workers Union

26 July 2018

Annexure 1: The Contested Findings

1. The proposed findings at paragraphs [1]-[5] are contested. First, the AIG, in paragraphs [13]-[20] and [26] of its amended submissions dated 23 February 2018 but amended on 12 July 2018 incorrectly defines the fast food industry. For this reason, its proposed findings 1-5 are contested. The AIG submissions are based on the false premise that the takeaway food services industry – on which MFI-1 is based represents the fast food industry. It does not.

2. The *Fast Food Industry Profile* that is MFI-1 does not identify the number of workers in the industry, nor their characteristics. Rather, the profile is based on an analysis of a statistical cohort undertaken to identify *key characteristics* which are purported to be a *clean fit* for the fast food industry. This, the information contained in MFI-1 information can be used for the purpose of identifying a *clean fit* of proportional representation within the fast food industry for characteristics such as the age and study status. This was articulated in [2017] FWCFB 1001.

3. Further, it is readily identifiable that there are many more employees in the fast food industry than those identified in MFI-1. In [2017] FWCFB 1001 the Full Bench of the Fair Work Commission accepted there were 24 564 enterprises across Australia in the Fast Food Industry in 2015.[1] The Full Bench also accepted McDonald's and Hungry Jacks made up 5% of those enterprises.[2] The Full Bench held that it was "common ground" as between the applicant in that case and the Commission that there were 214 265 employees in the Fast Food Industry in 2014.[3] The findings of this Tribunal in [2017] FWCFB 1001 are the best evidence of the number of enterprises and employees in the fast food industry in 2018.

4. Thus, to act on the premise that the takeaway food services industry represented the whole of the fast food industry would be in error because that proposition is wrong as a matter of fact and the premise has the effect of overstating the proportion of the industry represented by the AIG and its clients. Even when including the other employers involved in giving evidence for the applicant, the proportion of enterprises represented remains well below 10% of enterprises in the Fast Food Industry.

5. The AIG submissions must be considered in the context of the fast food industry as a whole, which is larger than the AIG admits and is constituted by participants not acknowledged by it.

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1 at [1238].
2 at [1238].
3 at [1242].

6. The proposed finding at [8] is not contested, however, the vague and imprecise nature of the proposed finding means that it is of no probative value. That "some" Hungry Jack's franchised stores have high numbers of employees engaged on a casual basis is uninformative.

7. The proposed finding at [9] is contested. The figures are estimates. Actual data was available, but the AIG elected not to obtain it. Where actual data is readily available, the Commission should not be satisfied by unquantified "estimates".

8. The proposed finding at [10] is contested. The term "large number" is vague, imprecise and of no assistance to the Tribunal. It does not permit any proper conclusions to be drawn. That is equally so of the term "some". It too is vague. The paragraph as a whole is so seized of vagueness as to be of no probative value. Even if the finding was made, it could not assist the Tribunal. The Tribunal would err if it relied on findings of such imprecision that they are more likely to distract than to assist.

9. The proposed findings at paragraphs [18] to [22] are contested on the basis they seek a finding for the "the fast food industry" generally, rather than for the limited outlets identified in evidence. For such findings to be made in relation to the whole of the "industry", such findings must first be made for the specific outlets identified. If such findings were made, the Commission must then identify a proper basis for extrapolating from those findings to the whole of the fast food industry. The findings sought for the limited outlets noted in evidence are of low or no relevance to the proceeding because they cannot be said to be representative of the industry as a whole.

10. The finding at paragraph [18] is contested to the extent it purports to identify all the factors, or the main or primary factors, considered in the preparation of crew rosters. In fact, the factors identified are not all, nor necessarily the major or main, factors that are considered in the preparation of crew rosters. It is not permissible to make the finding in such absolute terms.

11. The proposed finding at paragraph [20] is contested, for the reasons developed in the body of the submissions to which this document is annexed. There is no real evidence of these matters. Further, there is no evidence that the fluctuation is "significant". To the contrary, the evidence suggests the variability is routine, and primarily connected to mealtimes.

12. The proposed finding at paragraph [21] is contested because it uses the unqualified term "commonly". There is no evidence of that fact, nor is the word "commonly" of assistance because it is vague and imprecise. The paragraph as a whole is so seized of vagueness as to be of no probative value. Even if the finding was made, it could not assist the Tribunal. The Tribunal would err if it relied on findings of such imprecision that they are more likely to distract than to assist.

13. The proposed finding at paragraph [22] is contested because of the use of the word "many". There is no evidence of that fact, nor is the term "many" of assistance because it is vague and imprecise. The paragraph as a whole is so seized of vagueness as to be of no probative value. Even if the finding was made, it could not assist the Tribunal. The Tribunal would err if it relied on findings of such imprecision that they are more likely to distract than to assist.

14. The proposed findings in paragraphs [24], [25] and [26] are contested for the reasons developed in the submissions to which this document is annexed.

15. The proposed findings at paragraphs [27] to [29] seek a finding for "some" employers in "the fast food industry". Such a finding is of low or no relevance to the proceeding because the term "some" is vague, imprecise and not capable of quantification. The paragraph as a whole is so seized of vagueness as to be of no probative value. Even if the finding was made, it could not assist the Tribunal. The Tribunal would err if it relied on findings of such imprecision that they are more likely to distract than to assist.

16. The proposed findings in paragraphs [27]], [28] and [30] are contested because of the use of the word "some". There is no evidence of that fact, nor is the term "some" of assistance because it is vague and imprecise. The evidence is that "three employing entities which employ 301 employees representing less than one fifth of one percent of employees in the industry" have expressed this opinion". If the finding is to be made, it should be made in these terms. If made in these terms, it is irrelevant and unable to assist the Tribunal.

17. The proposed findings at paragraph [31(b)], is, for the reasons developed in the submissions to which this document is attached, contested because the "flexibility" alleged is in fact greater insecurity and instability in ordinary hours of work, coupled with serious restrictions on the existing flexibilities enjoyed by part-time employees.