IN THE FAIR WORK COMMISSION

AM2021/7

IN THE MATTER OF:

APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

SUBMISSIONS ON DRAFT DETERMINATION AND PROVISIONAL VIEWS (RAFFWU)

A. INTRODUCTION

1. The Retail and Fast Food Workers Union Incorporated ("**RAFFWU**") made submissions in the earlier hearings of the matter.

2. This Submission is responsive to the decision in [2021] FWCFB 2820.

3. We submit the observations in [2015] FWCFB 6847 pertaining to TOIL are not entirely appropriate to apply to the current matter. The circumstances applying to TOIL when overtime is worked are substantially different to the arrangements for the agreed regular pattern of work of an employee.

4. We submit the Modern Award objectives are not met where an employee is not provided a copy of the ***new varied*** agreement (as proposed at [18].) We submit there is no evidence of any purported burden on employers pursuant to this issue. To the contrary, employers now have many and varied mechanisms to provide such agreements to employees concordant with the express requirement in clause 10.7 (which we note met the Modern Award objective very recently.)

5. We submit the Modern Award objectives are not met where an agreement to vary the clause 10.5 arrangements can be made ***after work has commenced*** and reduced to writing at a later time ***before the end of the varied shift***. This change would mean genuine overtime could be represented as a shift variation – including where work is performed for a short period at the end of a shift which ***would never have been offered as work to an employee engaged on a casual basis***.

6. That is, an employer foreseeing that a busy day will take 30 minutes to finish and close could direct an employee to do that work, have an employee accept they will do that work (in most sectors recognized as undertaking reasonable overtime) and

then have the employee accept through some electronic record they finished at the new time. A copy of the record would not be provided to the employee unless they requested a copy. In the industrial reality the hurdles before an employee to prove such conduct was overtime are immense.

7. Industrial parties involved in dealing with the Award accept agreement must be reached before the shift commences and that agreement must be reduced to writing. That structure met the Modern Award objectives very recently. The structure is not broken and there is no evidentiary basis for a change.

8. Any regulatory burden has not been made out on evidence nor has there been a forensic consideration of the impact on workers of the systematization of unpaid overtime that the provisional view at [19, second dot] would entrench.

9. At [35] the decision proposes a structure that would provide one place in the Award for part-time roster variations. We see merit in that approach but submit this is a new approach and it should include all current protections for part-time employees.

10. In particular:

(a) 10.10 (c) and 15.9 (i) do similar but different work. 10.10 (c) carries no "intention" requirement and refers to 'award entitlements' as distinct 'payment of… benefits'. On the other hand, 15.9 (i) carries an intention test but applies to 'applicable benefits'. Importantly, 15.9 (i) carries a structure for what occurs if the roster is changed contrary to the requirement. This carries a substantial benefit to employees beyond the ordinary declaratory relief or penalties of a court. These benefits ought not be displaced for part-time employees. We submit 15.9 (i) can be sensibly added to the end of 10.10 (c). Alternatively, the currently proposed 15.9 (i) in Attachment A to the decision does not appear to exclude part-time employees which has the same effect as proposed by RAFFWU above.

(b) 10.10 (a) and 15.9 (e) carries some ambiguity but the practice in the sector is that the benefit of 15.9 (e) is applied to workers. That is, the entitlement to 14 days notice and disagreements being discussed under the dispute

procedure (15.9 (f)) are applied to part-time workers. We submit this carries little impediment to employers and substantial benefit to workers and should be maintained in the new clause 10 structure. We note greater notice and systems of dispute resolution are of particular benefit to women and those with carer responsibilities who are more often engaged as part-time employees.

11. We make no further submission at this time on the agreed additional hours structure proposed at Attachment A, 10.11. We reiterate our earlier submission that such structures are appropriate and while RAFFWU would prefer a structure of 'election' and dispute arbitration we recognise the provisional view structure is new.

12. We note the structured clarification to daily 'guaranteed hours' appears to resolve the difference in views expressed by some parties as to the application of clause 10.5.

13. We note the proposal to make the determination on the papers. We reiterate our submissions above and are available to participate in any conference or hearing listed by the Fair Work Commission.

Retail and Fast Food Workers Union

31 May 2021