

IN THE FAIR WORK COMMISSION

AM2020/20 Application to vary the Fast Food Industry Award 2010

OUTLINE OF SUBMISSIONS OF THE RETAIL AND FAST FOOD WORKERS UNION INCORPORATED

A. Introduction and Summary

1. By application dated 1 May 2020, the AiG seeks a variation to the Fast Food Industry Award 2010 (the **Award**). The proposed variation undermines the minimum terms and conditions of young, vulnerable and low-paid part-time and casual employees. In the absence of any evidence that the viability of employers in the industry who are not eligible for the Commonwealth Government's JobKeeper program is threatened, the variation operates to reduce the wages of part-time and casual employees to preserve employer profits. It is inimical to the modern awards objective.
2. The Commission has power to make a determination varying the Award if, and only if, the Commission is satisfied that making the determination is necessary to achieve the modern awards objective. While the jurisdictional fact is the state of satisfaction, that satisfaction must be formed on the basis of the evidence before the Commission. Moreover, due attention must be given to the requirement that the variation is 'necessary' to achieve the modern awards objective. It is not sufficient for the Commission to merely be satisfied that the variation 'might' or 'could' achieve the modern awards objective. The touchstone of 'necessity' demands a higher standard.
3. The AiG application is advanced on the basis that the flexibilities sought are directed to 'maintaining the viability of employers'.¹ That is the burden the AiG has assumed for itself: to demonstrate that the current situation is threatening the viability of employers, such that employment benefits must be 'traded off' in favour of 'operational flexibilities'.² The AiG has called not a skerrick of evidence to discharge that burden. Rather, it relies on generalised assertions and aggregated data that obscures the true position. Perhaps it is for this reason that the AiG's submissions do not confront the evidence, or lack thereof, on the question of viability.
4. The consequence of the AiG's failure to call any meaningful evidence in support of its application, and to manifestly fail to demonstrate that the viability of any employer in the industry (not being an employer eligible for JobKeeper) is threatened, has the consequence that there is no material before the Commission sufficient to found the necessary state of satisfaction.

¹ AiG Outline of Submissions (13 May 2020) [36].

² *ibid.*

Equally fatal is the failure of the AiG to call any meaningful evidence to demonstrate how the particular proposed variation is necessary to meet the modern awards objective.

5. But in any case, the evidence filed by RAFFWU puts beyond doubt that the conditions for making the variation do not exist. Collins Foods, a major franchisee of brands including KFC and Taco Bell, reports that, excluding the net effect of food courts, the remainder of its KFC network (predominately drive-thru restaurants) traded positively through April, with **+4.0% same store sales growth** compared to 2019.³ It also reported increased drive-thru and home delivery sales more than offset any negative impact from the current Government restrictions banning dine-in transactions.⁴ After an initial decline in sales, Taco Bell has had a positive recovery with sales over the last few weeks of FY20 **returning to pre-COVID levels**.⁵ Dominos Australia Limited reported late in April that while there were significant changes in individual store performances, both positive and negative, **same store sales for Australia remained consistent post-COVID-19 at a national level**.
6. The Commission cannot be satisfied of the need to vary the Award to achieve the modern awards objective, nor can it be satisfied that, even if such a variation were necessary, the proposed variation achieves that objective. The jurisdictional fact giving rise to the power to vary is not enlivened on the evidence and, consequently, the Commission has no power to grant the application. The application must be dismissed.

B. The Statutory Task

7. In discharging its statutory function, the Commission must consider:
 - (a) the terms of proposed variation and its effect; and
 - (b) whether the proposed variation is **necessary** to ensure that the Award provides “a fair and relevant minimum safety net of terms and conditions”.
8. The Commission must take into account the criteria prescribed by s 134 of the FW Act. It must act on evidence. Whatever concessions the present circumstances might warrant as to the form and extent of the evidence, it remains that the jurisdictional fact enlivening the Commission’s power to vary the Award is its state of satisfaction and that state of satisfaction must be supported by a minimum threshold of probative evidence. Supposition, assumption and speculation are not sufficient.

³ Statement of Josh Cullinan (14 May 2020) [53].

⁴ Statement of Josh Cullinan (14 May 2020) [53].

⁵ Statement of Josh Cullinan (14 May 2020) [53].

9. In discharging its functions, the Commission should disregard the claims of both the AiG⁶ and the Minister for Industrial Relations⁷ that there exists a 'regulatory gap', the closing of which is achieved by the proposed variation. There is no 'regulatory gap'. There is only policy choice.
10. The JobKeeper scheme aims to assist entities that have a significant decline in turnover due to the economic impacts of Coronavirus.⁸ The Commonwealth set the benchmark for eligibility for the benefits contained in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* at 30% for businesses with turnover of less than 1 billion and 50% for businesses with turnover of more than 1 billion.
11. The requirement that larger businesses need to have a greater decline in turnover than smaller businesses to satisfy the basic decline in turnover test is said to recognise the 'greater capacity of larger businesses to withstand the economic impacts of the Coronavirus'.⁹ By implication then, the lower threshold was also set at a rate that the Commonwealth determined reflects the capacity of smaller business with a lower decline in turnover to withstand the economic effects of the Coronavirus.
12. The thresholds reflect a deliberate, and presumably considered, policy choice by the Commonwealth. The thresholds do not create a 'gap'; instead, they carve out an area of regulatory choice. If the Commonwealth now considers that business with a downturn of less than 30% (or 50%, as the case may be) ought to be eligible for JobKeeper, the regulations can be amended accordingly. However, the Commonwealth does not presently propose to make such a change.
13. The Commission should not, therefore, be drawn on this false equivalence. The Commonwealth determined that businesses with a downturn of less than 30% have a sufficient capacity to withstand the economic impacts of the Coronavirus. It cannot now suggest that this deliberate policy choice creates a 'gap' which should be filled by low-paid workers forgoing income in order to sustain employer profits.

C. The proposed variation and its effect

14. The AiG submissions devote significant attention to the terms of the proposed variation,¹⁰ but little to its effect. As will be seen, while directed to part-time employees, the proposed variation also has significant consequences for casual employees.

⁶ AiG Outline of Submissions (13 May 2020) [39].

⁷ Outline of submissions of the Honourable Christian Porter, MP, Minister for Industrial Relations (13 May 2020) [5].

⁸ Explanatory Statement, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.

⁹ *ibid.*

¹⁰ AiG Outline of Submissions (13 May 2020) [37]-[80].

15. As to part time employees, the effect of the proposed variations is to:
- (a) remove the requirement to provide part-time employees with set hours of work; and
 - (b) remove the requirement to provide part-time employees with fixed starting and finishing times; and
 - (c) remove the requirement to pay part-time employees overtime for hours beyond their set hours of work.
16. The effect of the clause is to create a sub-class of part-time employees who are, in effect, minimum hour casual employees. This class of worker is entitled to a minimum of 8 hours per week (which may be significantly less than their existing entitlement) but is otherwise subject to the vagaries of casual employment. They do not know from week to week the number of hours they will be offered, the days on which they will be asked to work those hours or the start and finishing times of their shifts. They must offer wide 'availabilities' to maximise the prospects of securing work and plan to provide safe care for their children and loved ones throughout those windows in order to hold themselves ready to work hours that may never eventuate. These workers are not compensated for the disabilities attaching to casual employment by way of casual loading, but nor are they entitled to overtime for hours worked in excess of their minimum agreed hours of work.
17. While directed to part-time employees, the variation also has consequences for casual employees. The clause allows employers to (with consent, a concept addressed below) convert casual employees to part-time employees, relieving them of the burden of paying casual loading but without assuming the liability of paying overtime, while retaining the rostering flexibilities that attach to casual work.
18. In short, the clause permits the creation of a class of worker who has all of the uncertainty of casual employment, but without the offset of casual loading and with all the obligations of permanent employment, but without any entitlement to overtime.¹¹
19. It is no answer to the above criticisms that the proposed variation requires 'consent'. 'Consent' is illusory in an industry where more than 50% of the affected workers are children and where the pressure to be 'flexible' in order to secure casual hours is well known. Concerns of this kind were recognised by the Full Bench in a recent attempt by employer bodies to casualise part-time work in this Award when it said:

It is no answer to this criticism to suggest that the employee exercises control over their working arrangements by specifying their availability. **We do not doubt that as a practical matter, employees**

¹¹ See [2019] FWCFB 272 at [143].

would feel some pressure to maximise their stated availability in order to obtain employment. Further, the capacity for an employee to alter their 'agreed availability' **is significantly constrained** by the proposed clause, which is the second general observation which we wish to make.¹²

20. The vulnerabilities described by the Full Bench are only exacerbated by the uncertainty created by the present economic environment. Self-evidently, the pressure on employees to maximise their stated availability to obtain hours is greater the fewer hours that are available. And, it is to be observed that some classes of worker are more vulnerable than others. Workers who do not hold permanent residency are particularly vulnerable. It is highly unlikely that workers on insecure visas would refuse a request by their employer to casualise their employment.
21. As such, the 'consent' contained within the proposed variation is illusory. The clause lacks any meaningful protection for the majority of workers to whom it will apply. The illusion of consent should not be allowed to disguise the impact of the clause on vulnerable people.

C. The Evidence

22. In support of its application, the AiG has filed a single witness statement. The evidence falls well short of establishing that the proposed variation is necessary to ensure that the Award meets the modern awards objective. In particular, it fails to establish that:
 - (a) any downturn in business is not adequately addressed by the JobKeeper scheme;
 - (b) the impact of the downturn in business would be ameliorated by lowering the terms and conditions of part-time employees; or
 - (c) the proposed variation would provide a "fair and relevant" minimum safety net.
23. The lack of meaningful evidence is significant. The AiG describes "detailed and extensive discussions"¹³ and "very difficult negotiations"¹⁴ between Ai Group, the ACTU and SDA, while in a press release issued on 13 May 2020, the SDA said that it accepted the "trading realities submitted by the AiG". Presumably, the AiG did not commence this application without giving due consideration to the facts. Indeed, it is to be inferred from the fact of the application that the AiG had sufficient information to conclude that the proposed variation was necessary to ensure that the Award met the modern awards objective and that there was a sufficient evidentiary basis to enliven the Commission's jurisdiction. But the facts that occupied the "detailed and

¹² [2019] FWCFB 272 at [144].

¹³ AiG Outline of Submissions (12 May 2020) [2].

¹⁴ AiG Outline of Submissions (12 May 2020) [46].

extensive” discussions with the SDA and the ACTU or which detail the “trading realities” which satisfied the SDA have not been placed before the Commission.

24. The lack of meaningful evidence called by AiG is compounded by the evidence of Mr Josh Cullinan, RAFFWU Secretary. As set out above, Mr Cullinan identifies that large employers in the industry are in some cases reporting increased sales on a same store sale basis, and in others an observable recovery to pre-COVID19 levels.¹⁵ This publicly available data cautions against any attempt to extrapolate from the evidence of Mr Newlands, and directly undermines the AiG’s assertion that change is required.
25. At the very least, it suggests that the time for action has passed. That is consistent with the various announcements by the states and territories as to the staged reopening of the economy.

The industry

26. The evidence establishes that the fast food industry is dominated by the quick service retail major chains.¹⁶ Those chains employ about 86 per cent of the roughly 214,265 workers employed in the fast food industry.¹⁷ More than 70% of all workers in the fast food industry are employed on a casual basis.
27. Approximately 46% of all fast food industry employees are employed in McDonald’s stores.¹⁸ As at February 2018, McDonald’s and its franchisees employed 103,058 workers¹⁹ in stores of which:
- (a) 54 208 (or 53%) were under 18 years of age;
 - (b) 82 598 (or 80%) were under 21 years of age;
 - (c) less than 7% were employed on a full-time basis;
 - (d) 22% were employed on a part-time basis; and
 - (e) more than 71% were employed on a casual basis.
28. On average, McDonald’s employed 106 employees per store, of whom an average²⁰ of:
- (a) 75 were casual workers;
 - (b) 24 were part time workers; and

¹⁵ Statement of Josh Cullinan (14 May 2020) [xx].

¹⁶ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1266].

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ Statement of Josh Cullinan (14 May 2020) [9].

²⁰ Statement of Josh Cullinan (14 May 2020) [10].

- (c) 7 were full time workers.
29. In the statement of Mr Cameron Newlands (the **Newlands Statement**) a new picture emerges of the employment characteristics of McDonald's employees. Now the average outlet has 108 employees of whom an average of:
- (a) 86 are casual employees;
 - (b) 17 are part time employees; and
 - (c) 6 are full time employees.

The impact of COVID-19

30. The only industry-specific evidence of the impact of COVID-19 is found in the Newlands Statement, which is cast at such a high level of generality that it does not assist the Commission in its statutory task.
31. First, the Newlands Statement fails to distinguish between:
- (a) the impact on McOpCo restaurants; and
 - (b) the impact on franchise restaurants.
32. That failure is material. Franchise operators are eligible for JobKeeper if they have a GST downturn of 30% or more, while McOpCo itself is eligible only if it is likely to experience a downturn of more than 50%. Despite that, each data point in the Newlands Statement is aggregated, such that the Newlands Statement does not distinguish between the two classes.
33. That difficulty is consequential because Mr Newland's evidence does identify that the impact will not be uniform. Among other things, McOpCo owns fewer of the stores most impacted by the pandemic.²¹ For example, McOpCo operates 135 stores, of which 113 are freestanding stores. These stores are the least affected, suffering an average reduction in trade of 9.4%.²² Conversely, McOpCo operates only 8 food court restaurants,²³ which are the most affected stores. As such, the impact on McOpCo is likely to be less significant. This may explain why McDonald's has declined to quantify its present trading situation. It has failed to disclose the downturn it has experienced, and the impact on its profitability.
34. Second, the Newlands Statement does not disaggregate the data as between franchise operators who have experienced a 30% downturn (and are therefore eligible for JobKeeper) and those who have not (and would therefore be eligible for the proposed flexibilities).

²¹ Statement of Cameron Newlands (12 May 2020) [9].

²² Statement of Cameron Newlands (12 May 2020) [7].

²³ Statement of Cameron Newlands (12 May 2020) [27].

Consequently, the data in, for example, charts 1-5 does not inform the Commission about the class of franchise to whom the variation is directed – being those franchises who have experienced a downturn of less than 30% across their businesses – nor the classes of employees – which include employees of franchise operators not eligible for JobKeeper, along with certain classes of employees of franchise operators who are eligible. Nor does the Newlands Statement provide any basis from which data relevant to the affected class can be inferred or extrapolated.

35. Third, and consequently, it is not possible to determine how many franchise operators are likely to have experienced a 30% downturn and who are therefore likely to be eligible for JobKeeper assistance, and how many are not. The Newlands Statement identifies that McOpCo is not eligible for assistance through the JobKeeper scheme. But as to its franchise operators, Mr Newlands says only that he “expects” that “some” franchises are eligible for assistance.²⁴ Mr Newlands does not explain the basis for his “expectation”.
36. Fourth, the failure to disaggregate the data also means that evidence of the measures taken to address the impact of COVID-19²⁵ is of no assistance to the Commission, because it fails to identify whether these measures affect franchise operators who are eligible for JobKeeper, or franchise operators who are not (or both).
37. In short, it is not possible to determine from the data the number of franchise operators affected, nor to the degree to which they have been affected. Nor is there any data from which the effects can be extrapolated. The failure to call evidence about the financial situation of franchisees is unexplained. It can be inferred from the generalised datasets that have been provided that McOpCo is able to present its data on a franchise basis. It has failed to do so and has provided no explanation for that failure. In the absence of any evidence from McDonald’s that it is unable to disaggregate the data, it should be inferred that McDonald’s made a conscious choice to aggregate the data such that the Commission cannot readily distinguish between the impact on McDonald’s stores and franchise stores.

The impact of the proposed part-time variation

38. Not only does the AiG fail to provide any evidence that supports the need for such a variation, it manifestly fails to demonstrate that the proposed variation would address any such need. In that regard, it is important to emphasise that the Commission has recently determined that the one part of the proposed variation ‘would not provide a fair and relevant minimum safety net of terms and conditions’.²⁶ This finding serves to emphasise the need for a clear link between the

²⁴ Statement of Cameron Newlands (12 May 2020) [34].

²⁵ Statement of Cameron Newlands (12 May 2020) [35]

²⁶ [2019] FWCFB 272 at [148].

present circumstances and the 'flexibilities' in the proposed variation. The evidence falls well short of establishing that clear link.

39. First, there is no evidence before the Commission as to the characteristics of McDonald's franchise operators. The Commission does not know, for example, the average number of stores owned by franchisees. It does not know the average profit margin of a franchise operator. Absent information of this kind about any employer in the sector, the Commission is unable to assess whether or not measures of the kind in the proposed variation are **necessary** in order to provide a fair and relevant set of minimum terms and conditions.
40. Second, the proposed variation is targeted at part-time workers who make up a fraction of all workers in the industry and all hours worked. The evidence before the Commission establishes that approximately 15.5% of workers are part-time. The AiG has called no evidence at all of the number of hours these workers are engaged to work. Under the Award, the hours may be as few as 3 per week and as many as 37. The evidence of Mr Cullinan is that it is likely that many part-timers are employed on a minimum number of hours that is significantly less than 37 per week. Consequently, it can safely be inferred that the 15.5% of workers who are part time perform substantially less than 15.5% of the available hours of work.
41. The claim that McDonald's currently has "many" part-time and full-time employees that "cannot" be "genuinely usefully"²⁷ employed for all of the hours they have been employed to work is not supported by any evidence at all. It is difficult to see how a store operating with this employment profile can have suffered a revenue downturn of less than 30% and be unable to usefully employ one fifth of its workforce performing fewer than one fifth of all hours.
42. In such circumstances, it is difficult to see how it can be said that there is "simply no need for part-time employees to work all of their previously agreed hours",²⁸ unless what is meant is that it is cheaper to allocate these hours to casual workers.
43. Third, and relatedly, McDonald's has available to it the flexibilities of casual employment for 79.3% of its workforce. There is nothing in the evidence that explains why the challenges associated with unpredictable levels of demand cannot be adequately addressed using the flexibilities available to McDonald's for almost 80% of its workers.
44. Fourth, the changes to employee availability described in paragraphs 48-52 of the Newlands Statement can all be accommodated within existing cl 12 of the Award. As such, these changes to employee availability cannot constitute the basis for the 'necessity' that justifies the proposed change. Moreover, there is no evidence at all before the Commission that McDonald's, or its

²⁷ Statement of Cameron Newlands (12 May 2020) [44], [58].

²⁸ Statement of Cameron Newlands (12 May 2020) [58].

franchisees, have utilised the existing mechanisms, much less utilised them and found them lacking.

45. As such, Mr Newland's description of the Award conditions for part-time employees as "very inflexible" is informative. The conditions of work Mr Newlands relies on in support of his conclusion that part-time employees have "very inflexible" conditions are the foundations of part-time work: set dates and time of work. It is this very permanency and regularity that distinguishes part-time employees from casual employees.
46. Equally, the proposition in paragraph [59] that there is no 'ability to agree with the part-time employee' that they will work different hours more flexibly is false. The existing Award arrangements, and in particular the terms of cl 12, allow McDonalds and its employees to make changes by agreement. The "ability" that Mr Newlands claims is lacking exists now. As noted above, there is no evidence at all that McDonald's has sought to utilise this existing mechanism and found it lacking. And, it is to be remembered, that McDonald's has the full flexibilities that attach to casual employment available to it in relation to almost 80% of its workforce.
47. What Mr Newland's evidence reveals is a desire on the part of McDonald's to create a sub-class of insecure work which provides McDonald's with the rostering flexibilities and pay structure of casual employment, but without the cost of casual loading, while retaining the employee obligations that attach to part-time worker (such as the obligation to work). It is instructive that during the period from February 2018 to March 2020, McDonald's reduced its full-time workforce by 1264 (18%) and its part-time workforce by 6213 (27%) while simultaneously increasing its casual workforce by 12310 (17%). It is this cost that the application attacks.
48. That this is in fact McDonald's real intention is exposed by paragraph [63] of the Newlands Statement. Despite the assertion that the proposed variation is intended to prevent part-time employees from being made redundant, Mr Newlands reveals that in fact McDonald's will use the variation to engage **more** part-time employees. Almost certainly, those employees will be sourced from the existing casual workforce. Consequently, McDonald's is looking to convert part of its existing casual workforce to its new sub-class of employee, who has all of the roster uncertainty that attaches to casual employment, but without casual loading to compensate for it, and without access to the overtime rates that would usually attach to permanent employment.
49. Tellingly, McDonald's has called no evidence of its current overtime payments. That is because, contrary to what is said at paragraph [64], McDonalds has the capacity to avoid paying overtime now, by offering the additional hours in accordance with cl 12 of the Award. In this context, it is difficult not to conclude that widespread utilisation of this clause would result in a fresh application for these changes to be made permanent – an application rejected by the Commission in 2019.

50. The AiG has called no evidence to suggest that the franchisors who dominant the industry have exhausted their capacity to assist franchise operators. There is no evidence that McDonald's – with revenue of 1.9 billion and profit of more than 240 million per annum²⁹ – has provided franchise operators with relief from franchise fees, nor offered financial assistance by way of, for example, franchise loans. And there is no evidence of any such practice in the industry more generally. Absent such evidence, the Commission cannot conclude that the proposed variation is 'fair'.
51. It is difficult to see how "fairness" requires that part-time employees should accept a reduction in wages and conditions of employment to prop up the profits of franchise operators who have suffered a downturn of less than 30% in circumstances where both the Commonwealth and the large franchisors (taking McDonald's as a representative example) have declined to provide those operators with financial relief, or at the least decline to provide evidence that they have done so. So much is true of the particularly vulnerable employees who are not eligible for JobKeeper despite their employer being eligible.

The impact of the proposed annual leave variation

52. There is no evidence at all that the proposed annual leave variation is necessary. Most importantly, there is no evidence that employers in the industry have asked employees to take annual leave using the existing statutory framework and that such employees have refused to take leave. The Newlands Affidavit provides nothing more than generalised assertions unsupported by any empirical data.
53. There is no evidence before the Commission that details the number of hours in excess of two weeks that employees have accrued. In light of the high turnover rates and rate of casualisation, it seems that the figures are unlikely to be substantial. But in any case, there is simply no evidence at all from which the Commission could conclude that the change is 'necessary'.
54. The proposed variation is also not 'fair' in any event. As detailed in RAFFWU's earlier submission, the proposed variation may lead to unfair outcomes for employees. For example, the proposed variation permits:
- (a) an employer to press a vulnerable worker who is not entitled to Job Keeper, to reduce their annual leave accrual while replacing them with workers for whom an employer is funded with Job Keeper; and
 - (b) an employer to press any part-time worker, not entitled to Job Keeper, to reduce their annual leave accrual while replacing them with cheaper younger workers.

55. Such outcomes are not 'fair' and, for the reasons given above, there is no evidence that they are 'necessary'. Absent evidence that the viability of employers is threatened, these are changes that are directed to giving employers opportunities to protect profits. The proposed variations are not necessary to provide a fair and relevant set of minimum conditions.

The impact of the proposed close down variation

56. The proposed close down clause is entirely unnecessary. First, the FW Act provides a scheme for stand downs that adequately covers the current situation. The AiG alleges 'significant complexity' in the operation of s 524 of the FW Act, but fails to identify what that complexity is. The AiG also fails to identify the circumstances in which s 524 of the FW Act would not be engaged, but the proposed variation would be. Presumably, the AiG has identified a specific need underpinning the proposed variation and determined that s 524 is inadequate to address it. But there is no evidence of what that specific need is, and no evidence of why s 524 falls short.
57. Under the current scheme, employers who wish to allow their employees to take annual leave can do so. Thus, the true effect of the proposed close down variation is to expand the circumstances in which an employer can close down their operations and force its employees to reduce their annual leave accruals during that period. It is also to place more expensive workers into partial closures, while allowing the employer to replace them in other parts of a business with younger, cheaper, workers. There is not a shred of evidence to suggest that the right to do this is 'necessary' to achieve the modern award objective.
58. Moreover, the evidence before the Commission is that stores are reopening.³⁰ There is no evidence at all that any employers are presently faced with a decision about whether to shut down or not.

D. The Section 134(a) Considerations

59. As to s 134(1)(a), the proposed variation has a material detriment for already low paid workers. For part-time workers, it reduces their minimum hours of work. It creates substantial insecurity of income. It has the potential to greatly increase childcare costs, because part-time workers will be forced to make such arrangements to cover a vast window of 'availability' for hours that might never eventuate. It will reduce their income by removing their rights to overtime. The proposed variation will also operate to reduce the income of casual employees by depriving them of the right to casual loading.
60. It also has the potential to force workers to use annual leave, compounding the difficulties these workers experience in balancing caring and work commitments.

³⁰ Statement of Cameron Newlands (12 May 2020) [16]-[20].

61. As to s 134(1)(c), the proposed variation also does nothing to promote social inclusion. The proposed variation will not increase workforce participation. It will only increase insecurity and fear in existing workforce participation. In that sense, the clause is destructive of social inclusion. It is inimical to the promotion of it.
62. As to s 134(1)(d), the proposed variation does not promote flexible work practices or the efficient and productive performance of work. That is evident from the findings of the Commission in See [2019] FWCFB 272.
63. As to s 134(1)(da), the proposed variation actively undermines these considerations. It strips both part-time and casual employees of the penalties that attach to overtime and unsocial, irregular and unpredictable hours.
64. For the reasons given above, there is no evidence that demonstrates that the considerations in 134(1)(e)-(h) are advanced by the proposed variation.

E. Conclusion

65. There is no evidence on which the Commission could reasonable be satisfied that the proposed variation is necessary to achieve the modern awards objective. The application must be dismissed.

Siobhan Kelly
Castan Chambers

Josh Cullinan
RAFFWU

IN THE FAIR WORK COMMISSION

AM2020/20 Application to vary the Fast Food Industry Award 2010

Statement of: **Joshua James Cullinan**

Address: [REDACTED]

Occupation: Secretary

Date: 14 May 2020

I Joshua James Cullinan, Secretary, of [REDACTED], affirm:

Background

1. I am the Secretary of the Retail and Fast Food Workers Union Incorporated (**RAFFWU and the Union**) and I am authorised to make this statement on RAFFWU's behalf.
2. Prior to becoming Secretary of RAFFWU, I was employed as a Senior Industrial Officer, Industrial Officer and National Industrial Officer at the NTEU from 2005 to 2016. Prior to 2005 I was employed as a Research and Industrial Officer at the CFMEU from 2002 to 2005.
3. I hold a Bachelors Degree in Science majoring in Physiology and a Masters Degree in Commerce (Human Resources Management).
4. In my role I am responsible for overseeing a team of nine staff and implementing the campaigns, activities and services of RAFFWU.
5. RAFFWU was launched on 21 November 2016 and has thousands of members employed across Australia. The Union has hundreds of members employed at fast food outlets.
6. In my role I have led bargaining for RAFFWU as bargaining representative for members. I have led bargaining at McDonald's in 2018 and 2019 as well as other fast food employers such as Domino's Pizza.
7. In my role I have also taken and responded to hundreds of enquiries from workers in the fast food industry and their parents. These include many enquiries from members of RAFFWU. Those enquiries require consideration of the application of industrial instruments including the Award and enterprise agreements.

8. In my role I have also advocated in previous Fast Food Industry Award review cases such as the review in 2018 which resulted in the decision in [2019] FWCFB 272 in February 2019.
9. In that case, the AIG put evidence from McDonald's senior manager Ms Annabel Anderson with affidavits dated 23 February 2018. That evidence at [22]-[24] of the affidavit of Annabel Anderson can be summarised that as at February 2018, McDonald's and its franchisees employed:
 - (a) 103,058 workers in 972 stores;
 - (b) 54 208 or 53% were under 18 years of age;
 - (c) 82 598 or 80% were under 21 years of age;
 - (d) Less than 7% (6 849) were employed on a full-time basis;
 - (e) 22% (22,856) were employed on a part-time basis; and
 - (f) Over 71% (73,018) were employed on a casual basis.
10. I can extrapolate this information to identify the average McDonald's outlet at the time had:
 - (a) 106 total employees;
 - (b) 56 employees under 18 years of age;
 - (c) 85 employees under 21 years of age;
 - (d) 10 employees 25 years of age or older;
 - (e) 7 full-time employees;
 - (f) 24 part-time employees; and
 - (g) 75 casual employees.
11. In the statement of Mr Cameron Newlands, Mr Newlands describes a very different and much more casual workforce. I have prepared a chart using the information above and the information in Mr Newlands statement identifying the number of employees for each mode of employment. That chart is below as Chart 1.

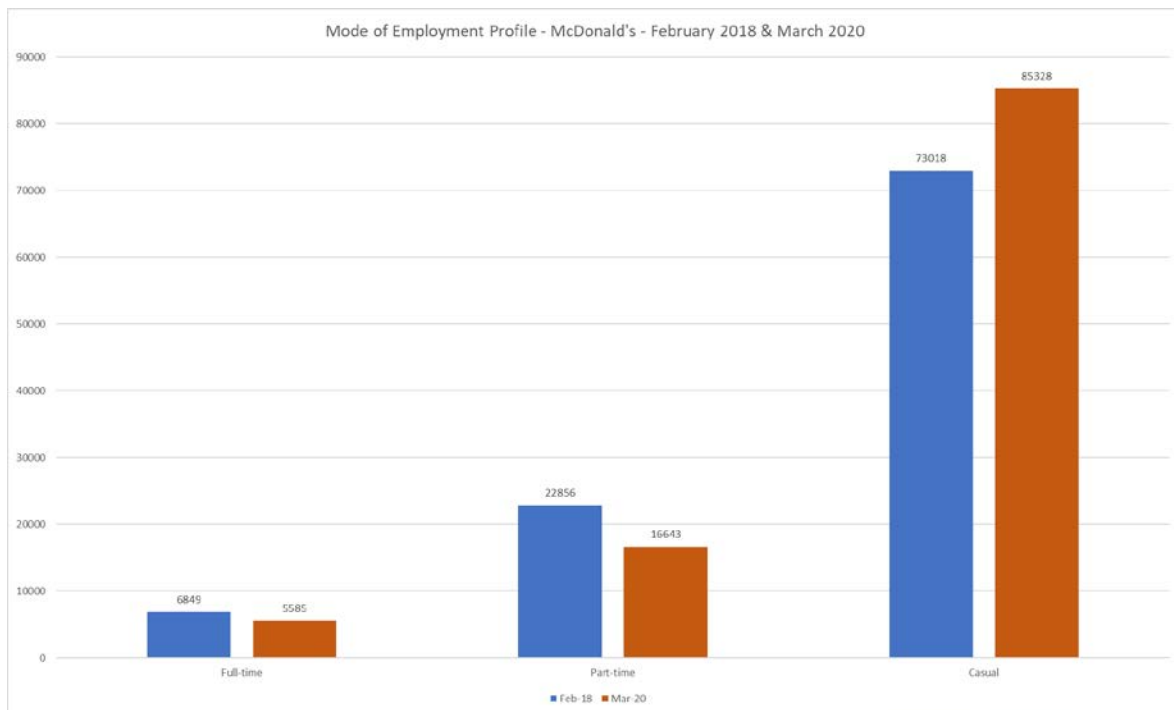


Chart 1

12. I was also the lead advocate for RAFFWU as bargaining representative of Xzavier Kelly in his application to terminate the 2013 McDonald's agreement in favour of the Fast Food Industry Award 2010 (**the Award**). This application was successful in December 2019 and the Award applied from 3 February 2020.
13. The Award introduced a large number of benefits for workers at McDonald's, including penalty rates on weekday nights and penalty rates on weekends. It also introduced set shifts for part-time workers. Until February 2020, McDonald's was permitted to roster its purportedly part-time workers on a weekly basis albeit for a minimum of 10 hours per week. This was akin to casual employment without the casual loading.
14. In December 2019, the Union started receiving many enquiries from workers being asked to commit to new employment arrangements which were to set the shifts for part-time workers in accordance with the Award requirement that part-time workers have set shifts with agreed start and finish times.
15. I was concerned by the representations made by managers at McDonald's because many workers believed they had to agree to a single set shift per week *because of the Award*. I understand from the very many contacts we had that the vast majority of part-time workers at McDonald's entities agreed to new arrangements which specified a single set shift of between 3 and 5 hours duration per week.

16. I encouraged members of the Union to not accept those arrangements and instead insist on agreed set shifts, commensurate with their contracts of employment (at least 10 and for some 15 or more hours). Those members of the Union who pressed for agreed outcomes were generally met with a range of form responses including that:
- (a) only one shift could be set;
 - (b) the shift must be on a weekday;
 - (c) workers would be guaranteed additional hours but those guaranteed additional hours wouldn't be set;
 - (d) the worker was being difficult and it was unhelpful;
 - (e) if the worker wanted didn't agree they would be made casual; and
 - (f) the worker was required to agree with what was originally proposed immediately or within a few days or become casual.
17. Despite these representations, I am aware a significant number of workers (less than 100 to my direct knowledge), followed the advice of the Union and pressed for a better outcome. They generally secured 2 or 3 shifts at times they wanted to set those shifts.
18. I believe the vast majority of part-time employees – more than 90% - agreed to a single set shift per week or became casual. I believe this because of the experience I have that vulnerable young workers are more likely to follow the direction of their manager and avoid conflict and also as a result of the direct contacts that I had with workers in the period I describe above. In my experience most workers would have agreed to the first proposed set shift arrangement or became casual and the majority of those who asked for a fairer arrangement would have ultimately agreed to one of these under pressure.
19. Some of the material I received from members in January 2020 was used by RAFFWU in highlighting these issues at the time:

About
 Private event by Tania Coweyin
 Coolangatta McDonalds

If you are Part-Time or Full Time or a Crew Trainer it is essential you attend one of the 3 sessions to pick up your Letter of Offer . This will give you the opportunity to ask any questions. If you can't make one of them you must let Tania know
 Pls drop in anytime between 17-20 to see Tania
 If we don't have offers returned by February 3rd, you will be employed on a casual basis

Responses
Threatening adverse action is unlawful
#fightbackwithRAFFWU
#maccasrevolution www.raffwu.org.au

← Posts

Tania Cowey Admin **Niecon McDonalds**

Part-Timers, Full Timers and Crew Trainers reminder I will be at Cavill tomorrow from 19.30-22 and Niecon 16-19 you can pop in and read / sign / ask questions re Letters of Offer

If you don't pick up and return your LOO by 30/1, then we will assume moving to casual. Or if Crew Trainer , not taking up the Crew Coach position – with [redacted] and 16 others.

Like Comment

20. In preparing this statement I contacted a member of RAFFWU working at a major McOpCo outlet on a major road which predominantly services passing traffic. I have not named the member for privacy reasons.

21. I asked that member whether the store had a decline in sales and whether part-timers were still working their set shifts. The member responded by saying:

“Yes all set shifts are being worked by Part Timers”

“Most McOpCo stores are fine. It’s just a few including the highways”

“But we’re picking up sales again and they’re adding shifts”

“Yeah my store manager literally told me “we’re getting busier again, we’re adding hours”, for the past week or so it’s been that way.”

“Most of the Part-Timers at my store are day crew who do mornings and they’re ALWAYS our busy time of the day. Often it will just be us Part-Timers with our set shifts starting and then as the shift goes on there is another person starting”

22. The member also told me:

“At it’s worst, the store was down 35% to 50% I believe. Labour was down from just under 1500 hours per week to about half that.”

23. I have read the statement of Mr Cameron Newlands in this proceeding.

24. I refer to [34] in the statement of Mr Cameron Newlands. In my experience, including from reviewing the contract arrangements for very many McDonald’s workers, I understand part-time workers are employed by the franchisee or McOpCo rather than a particular store. I have reviewed many ‘letters of offer’ from franchisees which explicitly state a worker may be required to work at other locations.

25. I refer to [36] in the statement of Mr Cameron Newlands. In my experience, including through discussion with members, each McDonald’s store has a minimum staffing at various times called the “skeleton crew”. I understand that this skeleton crew often includes casual employees. I understand few if any stores have additional part-time employees rostered for set shifts at the same time as other permanently employed skeleton crew on set shifts.

26. In my experience the vast majority of employees at McDonald’s are engaged as crew members and are required to work across their skills and competence. I am not aware of

any part-time crew members who are only engaged, and who are only able to be engaged, in a kiosk or dining room role.

27. I have explained above why I believe the set hours in set shifts of part-time staff are very low.
28. I refer to [45] in the statement of Mr Cameron Newlands. I have spoken to members who have told me that demand is returning in stores where there previously was reduced demand. Other members have informed me that records in sales are being achieved.
29. I refer to [48] – [52] in the statement of Mr Cameron Newlands. In my experience the majority of employees are required to have or choose to have very wide availability at McDonald's in Australia. This occurs because employee access to shifts as casual employees depends on them being available. Narrow availability limits the shifts made available to them. Members have reported to me that in order to maximise the opportunity for shifts to be rostered, they must offer a wide availability. This was recognised by the Full Bench in the last attempt to casualise part-time work when it said (in [2019] FWCFB 272):

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

30. That is, employees are under significant pressure to maximise their availability to secure casual shifts and to secure additional part time shifts (which are almost always worked at ordinary rates.)
31. Changing availability is a simple function which is managed by restaurants every day of every week. It is one of the costs of having a workforce of which 75% are engaged on a casual basis.
32. Many employees rely on working additional hours to the set shifts and it is entirely unsurprising that some employees are wanting to work additional hours. This has been an important feature for a long time at McDonald's and has only been exacerbated by the representations in January and February relating to set shifts.
33. Some employees are requiring changes due to personal circumstances. We help members with such issues by encouraging them to negotiate with the employer or making a request under s.65 of the Fair Work Act. Unless there is an entitlement at law, the employer does not have to agree to alter availability.

34. It follows that an employee not able to work or not wanting to work can negotiate under the current arrangements for changes. This might be unpaid leave, paid leave, altered hours of work, different times of working, different work locations or other approaches to dealing with the issue. None of these are prohibited and occur in a large employer network like McDonald's every day of every week of every month in every year. These may be simply contractually agreed changes, exercising of workplace rights such as to leave, negotiated Individual Flexibility Arrangements or requests for a Flexible Working Arrangement.
35. Clause 12.3 and clause 12.5 of the Award specifically provide for arrangements for employers to agree to change the hours of a part-time worker for a set shift, a week of set shifts or permanently for set shifts. These arrangements were changed in 2019 following the Award Review decisions, including [2019] FWCFB 4679.
36. I refer to [59] in the statement of Mr Cameron Newlands. As explained above, I have spoken to workers who have explained that the meTime application operated by McDonald's for rostering issues proposed shifts to part-time workers who can accept them and be paid ordinary rates for them. These additional shifts are worked in accordance with clause 12.
37. I refer to [67] – [69] in the statement of Mr Cameron Newlands. RAFFWU often receives contact from members and their parents about annual leave at McDonald's. A common experience is the use of annual leave without the consent or agreement of a staff member when they were not rostered for their minimum hours under the agreement that was in place before 3 February 2020.
38. Another common experience is the requirement to use annual leave well before it reaches 2 weeks of accrued leave. For example, a major franchisee in Brisbane, Tantex Holdings Pty Ltd, posted demands on its Facebook Groups for the use of annual leave on employees. At annexure JJC-1 is a set of screenshots of those demands.
39. I refer to [71] in the statement of Mr Cameron Newlands. On 6 May 2020 I attended the Knox City Shopping Centre in Wantirna, Victoria. I walked through the food court area. I did not spend much time in the food court area, but I did observe all the food outlets other than McDonald's were closed. In the minute or two I was in the vicinity I observed about 15 to 20 customers ordering and waiting for products. It appeared to me that the outlet was benefiting from all the other outlets having closed as customers only had that outlet to purchase from in the food court.
40. I have reviewed a range of public sources to assess the financial position of the major employers in the Fast Food industry. A number of employers have made public ASX announcements about the COVID-19 impact on their business.

41. McDonald's Australia Limited is not a publicly listed entity in Australia but rather a wholly owned subsidiary of its parent company in the United States. That parent company has not disaggregated its financial reports to identify the specific market returns in Australia. I was able to find a media article in the Sydney Morning Herald at the link <https://www.smh.com.au/business/companies/why-global-giant-mcdonald-s-stole-shamelessly-from-its-aussie-arm-20190501-p51j33.html> from 1 May 2019 which stated:

Accounts for McDonald's Australia for the 2018 calendar year showed revenue soared by almost \$100 million to \$1.7 billion, while profit was up almost \$15 million to just under \$260 million.

42. I understand that McDonald's operates about 135 outlets of the almost 1000 outlets in Australia itself and Domino's Pizza operates about 60 of the 660 outlets in Australia. The others are operated by franchisees.
43. Domino's Pizza Enterprises Limited is a publicly listed company in Australia with a market capitalisation on 13 May 2020 of \$4.9 Billion. Domino's Pizza outlets became covered by the Award on and from 23 January 2019 after RAFFWU assisted member Casey Salt terminate the extant agreement. Before McDonald's in February 2020 it was by far the largest employer group in Australia to whom the Award applied.
44. The Domino's Pizza 2019 reports identified revenue of \$1.4 Billion and a net profit for the entity of \$116 Million. I accessed the reports at the link: <https://investors.dominos.com.au/annual-reports/2019/8/21/2019-annual-report-financials-1>
45. Domino's Pizza also issued COVID-19 updates to the market. At the time of writing this statement, the most recent update was dated 24 April 2020. That statement included a reference to Australian sales during COVID-19 stating:

Australia and other European markets

Same Store Sales for Australia has remained consistent post-COVID-19 at a national level. However, this includes significant changes in individual store performances that closely reflect local trading conditions, both positive and negative.

This has meant a higher number of stores require short-term assistance than in an ordinary period, where sales growth is more evenly distributed across the business.

46. KFC in Australia operates through a series of franchisees including a number of very large employing entities. For example, the KFC Australia website states over 640 outlets are operated in Australia but only 50 are operated by KFC. Rather than other franchisees operating fewer than 50 franchisees (which I understand is the case with McDonald's and Domino's Pizza), some franchisees are much larger.

47. I understand the largest franchise operator of fast food outlets in Australia is Collins Foods Limited which is a publicly listed Australian company. Its financial reports are available on its website. It states it operates 233 KFC outlets in Australia and also other outlets like Taco Bell. Collins Foods Limited has a market capitalisation of \$871 Million and its half yearly financial report for the 2020 half year identified \$359.5M in revenue for the 233 outlets with a 4.9% growth in same store sales and an EBITDA margin of 22.1% (and an EBIT margin of 14.6%.)
48. The EBIT margin helps identify the margin an entity has as a function of the earnings over revenue and is more useful than simply assessing revenue. It does not assess financial capacity or exigency, but it is more useful than revenue in assessing performance.
49. For example, with an EBIT margin of 14.6% an entity would need to suffer a decline in 'earnings before interest and tax' of 14.6% before it had no margin. This would generally require a decline in revenue of far greater than 14.6% as EBIT will not include many of the costs of doing business but is rather a measure of operating profit.
50. Collins Foods Limited has also made announcements on the impact of COVID-19.
51. On 30 March 2020 it announced:

KFC Australia and Taco Bell pro-actively closed their in-restaurant dining areas and shifted their focus to take-away, drive-thru and delivery. For KFC Australia these channels represent at least 80% of total sales. As of Monday, 23 March 2020 the Australian Government had limited all restaurants to take away (including drive-thru) and delivery. In Europe, the Netherlands is operating take-away, drive-thru and delivery; while in Germany in addition to take-away, drive-thru and delivery, in-restaurant dining remains open at reduced opening hours as directed by the Government. Same store sales performance over the first 20 weeks of the second half of FY20 from 14 October 2019 until 1 March 2020 were strong:

- KFC Australia same store sales growth of 3.5%;*
- KFC Germany same store sales growth of 5.6%; and*
- KFC in the Netherlands was showing early signs of recovery with same store sales of -3.6%.*

Since the recent introduction of restrictions on in-restaurant dining, overall sales in KFC Australia have declined, with sales in the last week being -8% versus prior year. As expected, drive-thru restaurants have performed stronger than Food Courts due to the latter's reduced mall traffic.

52. Then on 5 May 2020 it announced:

KFC Australia has continued to show improvements in sales trends during this difficult period. Over the last five weeks of FY20, same store sales (SSS) were down marginally at -0.9% versus prior year. The KFC Food Courts have been heavily affected due to the significant decline in shopping mall foot-traffic. Excluding the net effect of Food Courts, the remainder of the network (predominately drive-thru restaurants) traded positively, with +4.0% SSS growth over

prior year. Increased drive-thru and home delivery sales more than offset any negative impact from the current Government restrictions banning dine-in transactions.

In Germany, the Company's KFC restaurants continue to trade through take-away, drive-thru and delivery channels whilst certain Government restrictions have reduced the dine-in sales. SSS for the five-week period was -28% which is nonetheless a sizeable improvement over the initial sales drop at the onset of COVID-19, with sales continuing to strengthen over the last couple of weeks.

In the Netherlands, while still allowing take-away, drive-thru and delivery, the Government has banned dine-in transactions. SSS for the last five-week period was -40%. The Netherlands' KFC business has been particularly affected by the number of in-line restaurants in city centres. Excluding in-line city centre restaurants from the overall sales numbers, the drive-thru restaurants have performed comparatively well, with SSS around -15% over the last five weeks of FY20.

After an initial decline in sales, Taco Bell has had a positive recovery with sales over the last few weeks of FY20 returning to pre-COVID levels.

53. Hungry Jacks is not a publicly listed Australian company and neither is the owner of Red Rooster, Craveable Brands. There is very little market information available online regarding the financial performance of these entities or the outlets they operate.

Sworn / Affirmed by the deponent)
at)
in Melbourne)
on) Signature of deponent
Before me:)

.....
Signature



Chris Tantex Holdings ▶ **Myer 2**


McDonalds Crew

 16 April · 

Annual leave
Ben Fox (4 days available)
Sophie Sherman (4 days available)
Chiara Staines (5-6 days available)

Can you guys please submit some dates for annual leave, can easily give you guys a week off to take a break so let me know so we can organise the rosters.

 Like
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Chiara Staines
 I thought i'd already taken leave? back in march?

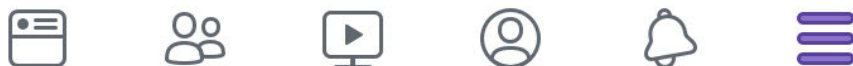
25 w Like Reply




Chris Tantex Holdings
 Hmm
 Did you get paid your annual leave? How much is left on your



 Write a comment...
 






  **Chris Tantex Holdings** ▶ **Myer 2** 
McDonalds Crew
16 April · 





 I thought i'd already taken leave? back in march?
25 w Like Reply

 **Chris Tantex Holdings**
Hmm
Did you get paid your annual leave? How much is left on your last payslip?
25 w Like Reply

 **Chiara Staines**
my bad, i've still got just over 5 days. i'll sort out the dates and get back to you:)
25 w Like Reply

 **Chris Tantex Holdings**
Chiara Staines thanks 😎
25 w Like Reply

 Write a reply...

 Write a comment...   



Chris Tantex Holdings ▶ **Myer 2**



McDonalds Crew

 28 May · 

 Annual Leave 


- Chiara Staines** (6+ days)
- Ben Fox** (5+ days)
- Mason Otto** (3+ days)
- Tayla Mills** (3+ days)
- Owen Jones** (2+ days)

You guys all have annual leave to use up - please submit your dates in the comments and fill in the book instore so we can plan ahead for the next few months. You each have a week off you can take and we need to be able to plan to have you replaced when your off.

 Like
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Chiara Staines

 i'm taking a week off in july (it should be in the na book) and i'm happy to use my leave for that



 Write a comment...
 






Telstra 9:47 am 70%

< Search in Myer 2 McDonalds C... i

About Discussion Announcements Photos

 **Tiahna Geeman** 3 August · 



  SICK CALLS  

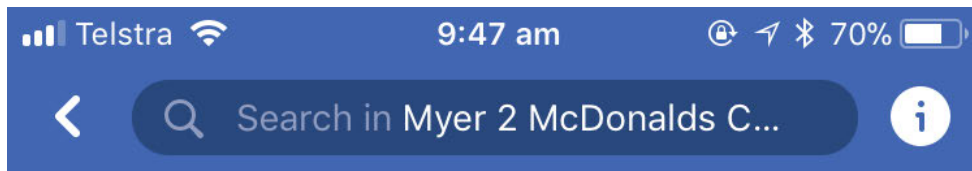
I would just like to remind you guys of the policy regarding sick calls/not being available for your shifts - please comment that you have read and understand!

If you are sick and do not think you can work, please give the store enough notice (at least 4 hours) so we can organise a replacement. You do this by calling the store (3221 0569) AND posting on the crew page. DO NOT message me or the other managers via messenger or text - this isn't professional and your managers do have lives outside of work and are not always in the store or on our phones to see your messages.

For part time employees you are required to provide a medical certificate and are to fill in an annual leave form if you calling in sick will result in you not making your 10 hours.

If you are unavailable to make a shift that you have accepted and is within your availability it is YOUR responsibility to fill it, your managers yes can help you fill but ultimately either you fill or you work. I



About Discussion Announcements Photos

give the store enough notice (at least 4 hours) so we can organise a replacement. You do this by calling the store (3221 0569) AND posting on the crew page. DO NOT message me or the other managers via messenger or text - this isn't professional and your managers do have lives outside of work and are not always in the store or on our phones to see your messages.

For part time employees you are required to provide a medical certificate and are to fill in an annual leave form if you calling in sick will result in you not making your 10 hours.

If you are unavailable to make a shift that you have accepted and is within your availability it is YOUR responsibility to fill it, your managers yes can help you fill but ultimately either you fill or you work. I completely understand that sometimes other commitments do come up and some circumstances will be accepted but please remember your job is also a commitment that you have made. If you do no show to a shift you will be required to have a meeting with me.

Thank you.

7 7 comments Seen by +45

