Fair Work Commission

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

(Please provide the name of the person lodging the submission)

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Organisation

(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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Modern Award Review Stream:

Arts and Culture:	☐
Job Security:	☒
Work and Care:	☐
Usability of awards:	☐

BEFORE THE FAIR WORK COMMISSION

Modern Award Review – Job Security

AM2023/21

OUTLINE OF SUBMISSIONS IN REPLY OF RAFFWU

1. The Retail and Fast Food Workers Union Incorporated ("**RAFFWU**") is a union of workers employed in the retail and fast food industries throughout Australia.

2. The predominant awards covering members of RAFFWU are the General Retail Industry Award 2020 (**GRIA**) and the Fast Food Industry Award 2020 (**FFIA**). Other awards covering members of RAFFWU include the Pharmacy Industry Award 2020, the Vehicle Repair, Services and Retail Award 2020 and the Miscellaneous Award 2020.

3. This submission responds to the proposals of employer representatives for specific changes to the GRIA and FFIA. The submissions of ABI appear to document the specific proposals of employer representatives for changes to the GRIA and FFIA as distinct from broader commentary.

Question 1

4. The ABI Submission makes a number assertions which we respond to below:
    a. **Types**
        i. We allege the assertion at [104] is not grounded in fact. We allege there is no demand from employees for forms of work which are not permanent.
        ii. We allege the assertion at [106] that casual employment is important in facilitating flexible work arrangements is not grounded in fact. To the contrary, casual employment diminishes the ability to access or implement flexible work arrangements.
        iii. We allege the assertion at [107] that 'flexibility in choice' in employment modes exists. The vast majority of casual workers have no choice in their

employment mode – either by way of contract or by way of reliance on minimum Award wage loadings.

b. Rostering

i. We note the concluding sentence of [115]. In our experience the consultation provisions are not applied by employers to whom the GRIA or FFIA applies.

ii. In light of this, the assertion at [120] that any permanent change can occur to a regularly worked roster with 7 days notice is fundamentally unfair and contrary to secure work aspirations or job security.

iii. In relation to [121], we note the "guaranteed hours" and the specific hours (including zero) are agreed to be worked on a specific day of the week.

iv. We note there are a number of rostering restrictions which apply to all employees under the GRIA which are important in driving job security.

c. Payment of Wages

i. We don't understand any commentary or proposals are made in relation to GRIA or FFIA.

d. Agreement Work Hours for Part-Time Employees

i. ABI claims there are important terms in the HIGA and RIA which are relevant to service industries.

ii. We reject any proposal to expand such arrangements to the GRIA or FFIA.

iii. The FFIA includes important provisions which require part-time hours are agreed and cannot change without agreement. Of course, workers to whom the FFIA applies do agree on occasion to changes. The structure of part-time work is a fundamental and base safeguard of the job security of part-time workers in fast food.

iv. Those arrangements have been actively implemented by Domino's Pizza. When it commenced paying penalty rates and casual loadings to over 10,000 delivery drivers in 2018 following the termination of extant zombie agreements[1], in less than one week over 10,000 Domino's delivery drivers were converted to part-time employment from casual employment. We believe this was the greatest securitisation of employment in the Fast Food sector in Australian history.

v. This occasion is instructive for two reasons.

[1] Pursuant to a RAFFWU campaign.

1. The employers, faced with additional cost they had not previously paid, ***chose*** to securitise work.
2. The Award provisions in relation to part-time work were readily implemented by the employers.

vi. The FFIA part-time arrangements serve employees well by guaranteeing when hours will be worked unless agreement is reached with an employer. Those steps help place workers on a more equal footing with their employer. They drive security in employment.

vii. Casual employment in the GRIA and FFIA does nothing for the job security of casual employees. Those workers are more vulnerable to exploitation and unsafe work practices. These workers are less likely to organise their workplaces and drive fairer and appropriate wages for their labour, safer workplaces and just conditions. Of course, this is one reason why employers favour casual employment. These consequences also mean casual employment undermines the job security of all workers.

e. Minimum Engagement

i. We note the assertions at [153]. We submit there is little use of shorter engagements and the Commission ought consider the abolition of the term.

ii. We submit the proposal at [156] ought be rejected. Undermining minimum engagements only serves to lessen the job security of workers by providing cheaper alternative labour.

f. Other terms

i. We note the ABI submission fails to recognise the importance of junior rates in undermining job security. Some employers such as McDonald's in Fast Food and Kmart in retail, operate systems to *churn* their younger employees as they get older. We submit this is fundamentally connected with casual or other forms of insecure employment. The entire system relies on replacement to maintain a forever young workforce capable of being paid junior rates. We submit this is anathema to job security and must be acted against. This is dealt with later in this submission.

ii. The ABI submission refers to the casual loading and we note for completeness that the casual loading (albeit not at its current level) is a critical term.

Question 2

5. While we don't understand that ABI proposes additional specific award provisions for GRIA and FFIA, we note the proposed arrangements don't appear on their face to improve job security.

Question 3

6. We agree there are aspects of the current GRIA and FFIA which are not consistent with the new objective, however disagree with the identification of ABI.
7. In fact, the two proposals of ABI would diminish the job security of employees. It is repugnant that employers would rely on marginalised workers to make its case for shorter minimum engagement periods. In relation to the claim at [187], we note the cost of diminished minimum engagement periods is currently the subject of judicial determination in the RAFFWU supported Domino's Pizza class action.
8. The proposal at [188] to [199] involves the mass casualisation of part-time work and abolition of genuine overtime. These changes would drastically reduce the job security of hundreds of thousands of low paid workers.
9. We submit alternative proposals should be explored and implemented.
    a. Firstly, junior rates should be abolished. They are used as a scheme to forever keep workers paid low rates. Their existence entices employers such as McDonald's and Kmart to turnover their employees as they get older. This was exposed at McDonald's in previous Award reviews. This cause a manifest, measurable and demonstrable improvement to the job security of workers. It will also lead to higher wages and reduced vulnerability. It would improve workplace safety. The case for junior rates as a mechanism to reduce youth unemployment is from a bygone era. The arrangements now bestow upon young workers in their early years of employment a computation that their workplace value is derived from paying them less. Their reward each birthday is fewer hours of work. Their employer views them through the lens of a cost because, in a very real sense, tomorrow they won't be working there any longer. The cost to young workers[2] is over $8000 per year and a young worker will lose over $50,000 due to junior rates before they secure GRIA or FFIA 'adult' rates. Much more can be said but we reiterate one of the greatest improvements to job security can be achieved through the abolition of junior rates.

[2] See report *The Problem With Junior Pay Rates, Explained*, McKell Institute, February 2020, https://mckellinstitute.org.au/research/articles/the-problem-with-junior-pay-rates-explained/

b. Secondly, the casual loading should be raised to 50%. It is a much more suitable reflection of the actual value of insecure employment. It also would help reflect the lost opportunity to secure improved conditions when securely employed. It would drive securitised work. We know this from the Domino's Pizza experience where avoidance of the increased labour cost led to mass conversion to secure employment. A low casual loading is not consistent with job security.
c. Thirdly, rostering arrangements for full-time workers in the GRIA and FFIA do not provide a guarantee of regularity and work arrangements. It is fundamentally incongruous that a full-time worker in fast food, who may have worked the same roster for decades, could be given no notice (albeit following consultation) to radically change their hours. For example, a Monday to Friday 9am to 5pm role could be made Thursday to Sunday, 10pm to 6am with no hope of recourse. There are some limited protections in GRIA but the capacity to substantially change the roster, including the days of work, for full-time employees remains. These do not meet the job security objective.
d. Fourthly, part time arrangements in the GRIA should be strengthened to replicate the FFIA and prevent changes to the start and finish times of work without agreement. In the very least, binding arbitration following consultation should be a measure to protect employees from the excesses of employers. Similarly, the right for workers to apply to increase their hours based on the actual hours worked over the preceding period should be replicated from the GRIA into FFIA.
e. Fifthly, too often the consultation machinery for major changes and roster changes are used in a perfunctory way or not at all. A compulsory consultation process of a minimum of 6 weeks post the provision of information in writing should be instituted. Clarity should be given through notes to explain that a "definite decision" does not mean a decision incapable of change. We note the jurisprudence on the importance of proper and thorough genuine consultation for employees. A note should be added to the rostering provisions throughout the GRIA (and under the modified FFIA to include rostering rights) that roster changes can only be pursued following thorough genuine consultation.
f. Sixthly, roster changes should be subject to binding dispute arbitration before the Fair Work Commission. That is, where a worker disputes a roster change under the GRIA or FFIA, the dispute should be referrable for determination by the FWC. This (arbitration) should not be subject to agreement of the employer or any other party.

An explicit statement should be included in the dispute term guaranteeing the previous roster is maintained until the dispute is resolved.

g. Seventhly, perhaps controversially, the abolition of casual work should be considered by the Fair Work Commission. It is "antithetical" to secure work. If not abolished, its use should be structurally limited to specific, defined and limited circumstances. Fast food giant, McDonald's, has 85% of its workforce engaged in casual employment. On average, only 15 employees at an entire McDonald's outlet will be employed on a non-casual basis. There is no justification for this. Simple but substantial limits on casual employment are an appropriate mechanism to achieve job security.

Questions 4 & 5

10. In addressing the response of ABI to question 4, we start by noting [219] of the ABI submission which makes the case for why casual work is important:

> *However, casual work or some form of it (labour hire) is a necessary part of the employment landscape to meet demand changes; without it e**mployers would systematically employ and terminate certain classes of employee which is antithetical to secure work.***

11. We consider this a frank admission that *casual work* is antithetical to secure work. Casual work is employment which systematically involves employment and termination. We note our 7th alternative proposal above.

12. We consider the submission at [225] disappointingly outrageous. To suggest that the meagre casual loading should be reduced further when providing some limited leave benefit is ludicrous. Claiming such a reduction (and presumably therefore any new benefit) won't be supported by workers paid poverty wages is tilting at windmills.

13. However, ABI goes further at [226] to offensively claim it is 'lack of capability' or 'bad work history' which lands workers in casual employment. This exposes an abysmal lack of understanding of the workforce, work environment and imbalance in power of the modern Australian workplace.

14. Tailing this claim with the baseless claim that any workers to whom the Award applies desire casual employment as a form of employment is nonsense. Workers paid poverty wages want higher wages. They also want job security.

15. Holding out that casualising part-time work is a solution must not be given oxygen. The meagre job security held by ongoing workers as compared to casual workers must be strengthened – not diminished.

16. We have proposed systems for achieving that at [9] above.

17. In relation to Question 4 and 5, there should be an expansion of leave to apply to all casual workers and this should be done in the GRIA and FFIA. In the very least this should include personal leave and compassionate leave. The Fair Work Act already provides structures for payment such as at s.106BA(1)(b). That said, they should be strengthened to provide for average payment for the past given period in relation to extending to other forms of leave.

Question 6

18. We disagree with ABI. IFAs do undermine job security. In our experience they are used to avoid breaks and similar entitlements. In so doing, workplace safety is compromised and workers are less able to maintain employment.

19. Examples include at Bakers Delight where IFAs were a condition of employment and abolished all paid breaks.

20. At McDonald's, unpaid meal breaks were abolished under IFAs and it was commonly accepted that it was a condition of employment as a manager or supervisor to agree to such an IFA.

Questions 7 & 8

21. We note the submission of ABI at [232] to [264]. Much of this restates various provisions. We disagree with the characterisation of the dispute terms in the GRIA and FFIA at [249]-[252].

22. ABI does not propose any changes to the standard clauses. We submit ABI has failed to grasp the significant impact the standard terms have in limiting access to secure work and can have in enhancing access to secure work.

23. We disagree with the proposal of ABI for no change. At [9] above we have outlined a range of changes to the GRIA and FFIA which would go some way to redressing the negative

impacts of some of the standard terms on job security and provide greater access to those vulnerable to insecure work.

24. IFAs should be limited.

25. Consultation should have minimum notice of at least 6 weeks, clarity that definite decisions are capable of change through genuine consultation and no changes to be implemented until genuine consultation has occurred. Helpfully, the 5 member full-bench neatly summarised propositions which may be drawn from significant cases on consultation in *Construction, Forestry, Maritime, Mining and Energy Union & Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [108]:

> • the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation
>
> • a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account
>
> • the consultation needs to be real; it must not be a merely formal or perfunctory exercise
>
> • even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences
>
> • the party to be consulted [must] be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon
>
> • while the word 'consultation' always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility
>
> • a right to be consulted, though a valuable right, is not a right of veto
>
> • the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal

• an ordinary understanding of the word "consult" would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on the subject for consultation. Consultation is not an exercise in collaborative decision-making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made

• the requirement to consult affected workers would … not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made

• genuine consultation would generally take place where a process of decision-making is still at a formative stage

• the opportunity to consult must be a real opportunity not simply an after thought

• consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal

• there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there 'consultation'

• it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic

• any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his Honour's words, consulted about the decision in any meaningful way.

26. They went on at [109]:

> **[109]** The list set out above does not purport to be an exhaustive statement of the elements underpinning the content of an obligation to consult. We also observe that some industrial instruments and the model consultation term provide that the trigger for an obligation to consult is the making of a definite decision. As we note below, the specific requirement to consult is determined by the context.

27. Then, at [196]-[198]:

> **[196]** Second, the relevance of a failure to consult to the assessment of the reasonableness of a direction is not determined by the *likelihood* of the success of further consultation, it is sufficient if the failure to consult denied the Employees the *possibility of a different outcome*. As the High Court held in *Stead v State Government Insurance Commission*, in the context of a denial of natural justice:

'… if the Full Court is properly to be understood as saying no more than that a new trial would probably make no difference to the result, their Honours failed to apply the correct criterion. All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.'

[197] In *QR Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia* (*QR Ltd*) the Full Federal Court considered the consequences of a failure by QR Ltd to consult with employees as required by clause 36 of the *QR Limited Traincrew Union Collective Workplace Agreement 2009* (the QR Agreement). The requirement to consult arose from an announcement by the Queensland Premier that the group of government-owned rail corporations would be partially privatised. Clause 36.2 of the QR Agreement provided, relevantly, that 'The Company will consult with affected employees and, at the employees' election, their nominated representatives, over any proposed changes that will have an impact on employees' terms and conditions of employment'. The proceedings in the Federal Court sought the imposition of pecuniary penalties under s.546 of the FW Act for contravention of the obligation to consult. The primary judge upheld the claim. On appeal Keane CJ and Marshall J held:

'… the exigencies of implementing that [privatisation] decision necessarily gave rise to matters for decision by the appellants which fell within the scope of the consultation obligation …

the employees were entitled to an opportunity to urge a different approach to the implementation of the privatisation decision. There may have been little likelihood that the QR employers would be persuaded to take a different position, given the attitude of their shareholders, but cl 36.2 is not concerned with the likelihood of success of the consultative process. It is concerned simply to ensure that consultation occurs, before a decision is made to implement a proposal.'

[198] Their Honours went on to observe that a requirement to consult employees 'constitutes an intrusion upon the managerial prerogative of employers; but the legitimacy of such intrusion and the importance attached to such provisions has long been recognised', citing Murphy J in *Federated Clerks' Union (Aust) v Victorian Employers' Federation,* where his Honour said:

'During this generation, there has been an accelerating trend towards concentration of economic power in fewer and fewer persons. The growth of the great national corporations, their mergers and expansion into transnationals have transformed the methods of production, distribution and exchange. The power of the greatest corporations transcends that of most governments. A reaction to the submergence of the individual worker is the demand by organized workers for some share in deciding what work is to be done, by whom and when, where, and how it is to be done. The thrust of the demand is not merely the improvement in existing pay and conditions. It extends to the protection of jobs, for themselves treated as more than wage-hands — to be treated as men and women who should be informed about decisions which might materially affect their future, and to be consulted on them. It is a demand to be emancipated from the industrial

> serfdom which will otherwise be produced by the domination of the corporations; a demand to be treated with respect and dignity.'

28. It is timely that these decisions be honoured through specific guidance in the GRIA and FFIA. Retail and fast food workers must be "emancipated from their industrial serfdom".

29. Dispute resolution should be expanded to provide compulsory arbitration and status quo rights.

30. These go tandem with other changes we have proposed at [9] above.

31. In relation to the submissions of other unions, we are supportive of all submissions which align with the proposals of RAFFWU in these submissions.

32. We look forward to participating in the consultation process.

RAFFWU

20 February 2024