FAIR WORK COMMISSION

AM 49 of 2017

2014 FOUR YEARLY REVIEW
STAGE 4
FAST FOOD INDUSTRY AWARD

SUPPLEMENTARY OUTLINE OF SUBMISSION IN REPLY OF AUSTRALIAN INDUSTRY GROUP

RAFFWU Cross Examination

1. The Australian Industry Group ("**Ai Group**") has prepared this section of the outline to respond to some of the issues likely to arise from the cross examination by the Retail and Fast Food Workers Union ("**RAFFWU**") of witnesses called by the Ai Group.

2. RAFFWU appears to criticise the limited evidence in support of the application, including the limited consultation by the witnesses with current operators of stores in the fast food industry (such as Mr Flemington consulting with only six Craveable Brands operators managing ten stores (see Flemington Cross Examination (29 June 2018, PN 157, PN 198)) and attending two franchisee advisory council meetings (see Flemington Cross Examination (29 June 2018, PN 156, PN 198)), or Ms Anderson consulting with only six McDonald's licensees operating 28 stores (see Anderson Cross Examination (16 July 2018, PN 786 to PN 788, PN 838, PN 885, PN 893, PN 910, PN 1002), as well as the lack of a survey of operators or employees (see Flemington Cross Examination (29 June 2018, PN 165, PN 166, PN 170), Anderson Cross Examination (16 July 2018, PN 798, PN 1027), Agostino Cross Examination (16 July 2018, PN 1232, PN 1376); Montebello-Hunter Cross Examination (16 July 2018, PN 1500)), in gathering evidence in support of the application. However:

    (a) The application (insofar as it related to the part-time flexibility clause) proceeded (until the late involvement of RAFFWU in March 2018) as a consent application (with the support and endorsement of the SDA) (see Ai Group outline of submissions dated 23 February 2018, par 3; SDA outline of submissions dated 16 March 2018, pars 4, 5, 8, 10, 12, 14, 15; see also par 20).

    (b) The application is based on industrial merit, including the adoption of a standard clause that encompasses adequate protections for employees but retains flexibility for employers, as well as the encouragement of part-time employment in circumstances where casuals are often used to work additional hours (see Flemington Cross Examination (29 June 2018, PN 329); Sullivan Affidavit (Exhibit AiG 9), par 41; Chapman Affidavit (Exhibit AiG 10), pars 20, 22, 23, 29), and there is no (or a limited) need for evidence in support of an application based on industrial merit.

(c) There is no need for survey evidence in support of an application.

(d) There is no need for employers or franchisors to consult widely with employees or franchisees as part of gathering evidence in support of an application.

(e) There is no evidence that RAFFWU has consulted with employees in the fast food industry in its opposition to the application.

(f) There is no suggested or logical basis for a difference in rostering practices between stores applying an enterprise agreement and stores applying the Fast Food Award, particularly when:

(i) rostering practices are common across each of the businesses (see Flemington Affidavit (Exhibit AiG 1), pars 30 to 38; Flemington Cross Examination (29 June 2018, PN 246, PN 247, PN 249, PN 250); Anderson Affidavit (Exhibit AiG 3), pars 64 to 72; Anderson Cross Examination (16 July 2018, PN 860, PN 861, PN 862); Agostino Cross Examination (16 July 2018, PN 1250 to PN 1252); Montebello-Hunter Affidavit, pars 24 to 29; Montebello-Hunter Cross Examination (16 July 2018, PN 1517)) and across the large players in the fast food industry (see Flemington Cross Examination (29 June 2018, PN 248));

(ii) rostering practices in each of these businesses do not depend upon industrial instruments (see Flemington Cross Examination (29 June 2018, PN 253 to PN 257); see also Anderson Cross Examination (16 July 2018, PN 866, PN 867); Agostino Cross Examination (16 July 2018, PN 1254, PN 1255); and

(iii) stores in each of the businesses have the same or similar trading patterns (see Flemington Cross Examination (29 June 2018, PN 227 to PN 231)).

(g) In the absence of a preference clause, there is no suggested or logical basis for a difference in practices of employers on using casuals to work additional hours (and there is no preference clause under the McDonald's Agreement, the Hungry Jack's Agreements or the Chicken Treat Agreement).

(h) There is no basis to suggest the evidence of the witnesses is inaccurate.

(i) It was not suggested to the witnesses that the evidence was inaccurate.

(j) RAFFWU has led no evidence from any employee at all, let alone evidence that disputed the evidence or showed that the evidence was inaccurate.

(k) The evidence of one of the witnesses was based on discussions at Quarterly State Meetings (attended by the majority of franchisees for a brand) (see

Flemington Cross Examination (29 June 2018, PN 201); Flemington Re-Examination (29 June 2018, PN 532)) and with two heads of operations (see Flemington Cross Examination (29 June 2018, PN 206, PN 287, PN 288)).

(l) The discussions at Quarterly State Meetings the subject of the evidence of one witness included a discussion of the complexity of using part-time and casual employees at the moment (see Flemington Cross Examination (29 June 2018, PN 205); Flemington Re Examination (29 June 2018, PN 513, PN 516, PN 517, PN 531)) and the need for greater flexibility (see Flemington Re Examination (29 June 2018, PN 513)).

(m) One of the witnesses regarded the evidence as representative (see Flemington Re-Examination (29 June 2018, PN 528)), particularly as the operators had managed multiple restaurants over long periods of time (see Flemington Cross Examination (29 June 2018, PN 159)) and the evidence was based on common patterns referrable to other fast food workplaces (see Flemington Cross Examination (29 June 2018, PN 172)).

(n) One of the witnesses had personal experience in managing restaurants over a six-year period (see Flemington Cross Examination (29 June 2018, PN 172); Flemington Re-Examination (29 June 2018, PN 525, PN 526)) and the evidence is based on that experience (see Flemington Cross Examination (29 June 2018, PN 524, PN 525)).

(o) The evidence of a second of the witnesses was also based on speaking with two to three restaurant managers (see Anderson Cross Examination (16 July 2018, PN 786, PN 791, PN 838)), as well as seven to ten rostering managers (see Anderson Cross Examination (16 July 2018, PN 1010); Anderson Re-Examination (16 July 2018, PN 1137, PN 1138)) and providing advice to licensees and restaurant managers (see Anderson Cross Examination (16 July 2018, PN 943 (see also PN 839, PN 841, PN 885))).

3. RAFFWU emphasises that the consultation with operators was for operators that applied an enterprise agreement rather than the Fast Food Award (see Flemington Cross Examination (29 June 2018, PN 162, PN 212, PN 326, PN 353, PN 437)). However, there is no demonstrated, let alone suggested, difference between rostering practices between stores applying an enterprise agreement and stores applying the Fast Food Award and there is evidence establishing that rostering practices are common across the business and do not depend upon industrial instruments (see paragraph **[2]**(f) of this outline)).

4. RAFFWU focuses on a lack of financial analysis of the impact of the changes sought to the part-time flexibility clause (see Flemington Cross Examination (29 June 2018, PN 167, PN 168, PN 169, PN 388 to PN 391, PN 401, PN 466, PN 482, PN 483), Anderson

Cross Examination (16 July 2018, PN 946, PN 1017 to PN 1020, PN 1037), Agostino Cross Examination (16 July 2018, PN 1394, PN 1395); Montebello-Hunter Cross Examination (16 July 2018, PN 1617 to PN 1622)). However, the application is not based on cost but rather industrial merit (see paragraph **[2]**(b) of this outline) and, in any event, it is axiomatic that labour costs involving overtime rates are higher than labour costs involving ordinary rates.

5. RAFFWU seeks to suggest that part-time employees would benefit from set rosters being used in fast food stores (see Anderson Cross Examination (16 July 2018, PN 887; Agostino Cross Examination (16 July 2018, PN 1303)). However, set rosters are impracticable for fast food stores, given the:

   (a) constant fluctuation in sales (see Flemington Affidavit (Exhibit AiG 1), par 40; Anderson Affidavit (Exhibit AiG 3), par 25(a), 73; Anderson Cross Examination (16 July 2018, PN 1001); Agostino Affidavit (Exhibit AiG 6), pars 28, 29; Agostino Re-Examination (16 July 2018, PN 1433); Montebello-Hunter Affidavit (Exhibit AiG 7), par 30; Montebello-Hunter Cross Examination (16 July 2018, PN 1541, PN 1584, PN 1591); see also Sullivan Affidavit (Exhibit AiG 9), pars 23, 24; Chapman Affidavit (Exhibit AiG 10), par 21; Martinoli Affidavit (Exhibit AiG 11), pars 29, 30, 31; Swan Affidavit (Exhibit AiG 12), par 27; Guilk Affidavit (Exhibit AiG 13), par 40); and

   (b) the continual changes to employee availabilities (see Flemington Affidavit (Exhibit AiG 1), par 41; Anderson Cross Examination (16 July 2018, PN 887, PN 888, PN 892, PN 895, PN 1001); Agostino Cross Examination (16 July 2018, PN 1356, PN 1357); Agostino Re-Examination (16 July 2018, PN 140); Montebello-Hunter Affidavit (Exhibit AiG 7), par 46; Montebello-Hunter Cross Examination (16 July 2018, PN 1541); see also Chapman Affidavit (Exhibit AiG 10), par 17; Guilk Affidavit (Exhibit AiG 13), par 37, 38).

6. RAFFWU endeavours to suggest that there is incongruity in the requirement for writing for initial availability and changes to availability but not for additional hours (see Flemington Cross Examination (29 June 2018, PN 261 to PN 164)). However, temporary changes in availability after the rosters have been posted are often made verbally rather than in writing (see Flemington Cross Examination (29 June 2018, PN 264, PN 276), Anderson Cross Examination (16 July 2018, PN 904); Agostino Cross Examination (16 July 2018, PN 1322, PN 1336); Montebello-Hunter Cross Examination (16 July 2018, PN 1548, PN 1552, PN 1588, PN 1586, PN 1600, PN 1616); see also Swan Affidavit (Exhibit AiG 12), pars 35, 36) and there is no suggestion that the verbal alterations causes any difficulties for employees or has led to any exploitation by employers. Additionally:

   (a) The requirement for writing for availability reflects in effect a requirement to record in writing contractual terms (see proposed clause 12.2).

(b) The lack of requirement for writing for additional hours reflects the practical difficulty of arranging a written agreement where the additional hours are arranged at short notice in a busy working environment (see Ai Group outline of submissions, pars 62, 63; see also Flemington Cross Examination (29 June 2018, PN 329); Flemington Re-Examination (29 June 2018, PN 517); Anderson Cross Examination (16 July 2018, PN 1036, PN 1079); Montebello-Hunter Cross Examination (16 July 2018, PN 1599, PN 1600, PN 1614, PN 1615, PN 1639, PN 1659, PN 1666)).

(c) In reality, an employee agreeing to work additional hours as part of a roster will have the protection of writing (in that the roster is written) (see also Flemington Cross Examination (29 June 2018, PN 277); Anderson Cross Examination (16 July 2018, PN 907, PN 983); Montebello-Hunter Cross Examination (16 July 2018, PN 1585)).

(d) In some stores, an employee agreeing to work additional hours after the roster is issued will record the additional hours on the roster (with an annotation from the manager) and so the employee will have the protection of writing (see Montebello-Hunter Cross Examination (16 July 2018, PN 1580, PN 1680 to PN 1682)).

(e) There is no requirement of writing under the McDonald's Agreement (see clause 14.4 of the McDonald's Agreement (Anderson Affidavit (Exhibit AiG 3), p28)) covering over 103,000 employees (see Anderson Affidavit (Exhibit AiG 3), par 21) and there is no evidence of difficulty associated with that lack of requirement.

(f) There is no requirement of writing under the Hungry Jack's Agreements (see, for example, clauses 6(b) and 12(e) of the Hungry Jack's NSW/ACT Agreement, clauses 6.2(d), 6.2(e) and 12(c) of the Hungry Jack's Tasmania Agreement and clauses 7.2(d), 7.2(e) and 13.1(h) of the Hungry Jack's Queensland Agreement (Montebello-Hunter Affidavit, pp17, 23, 71, 75, 96, 101)) covering over 16,000 employees (see Montebello-Hunter Affidavit (Exhibit AiG 7), par 11) and there is no evidence of difficulty with that lack of requirement.

(g) There is no requirement of writing under the Red Rooster Agreement (see clause 9.7 of the Red Rooster Agreement (Flemington Affidavit (Exhibit AiG 1), p20)) and there is no evidence of difficulty associated with that lack of requirement.

(h) There is no requirement of writing under the Chicken Treat Agreement (see clause 11(2) of the Chicken Treat Agreement (Flemington Affidavit (Exhibit AiG 1), p85)) and there is no evidence of difficulty associated with that lack of requirement.

(i) There is no general demonstrated or suggested difficulty associated with a lack of writing for agreement to work additional hours.

(j) Where the additional hours are worked in a store that uses electronic recording of hours worked (such as the use of finger scanning or the use of log-in codes), the additional hours worked will be recorded electronically (see Anderson Cross Examination (16 July 2018, PN 939); Anderson Re-Examination (16 July 2018, PN 1146 to PN 1153); Agostino Re-Examination (16 July 2018, PN 1441 to PN 1445); Montebello-Hunter Cross Examination (16 July 2018, PN 1578, PN 1581, PN 1602, PN 1609); Montebello-Hunter Re-Examination (16 July 2018, PN 1687 to PN 1701)).

7. RAFFWU appears to assert that there is greater potential for dispute as a result of a lack of writing on an agreement to work additional hours (see Flemington Cross Examination (29 June 2018, PN 265 to PN 271)). However, there is no evidence of a dispute over any rostering arrangement in the fast food industry, let alone a dispute over an agreement to work additional hours, and in any event there is the prevalent use of the electronic recording of hours worked in the industry, including additional hours worked (see paragraph **[6]**(j) of this outline).

8. RAFFWU implies that there is the risk of exploitation of employees by the absence of writing concerning the agreement to work additional hours. However:

(a) There is no requirement of writing under the McDonald's Agreement (see clause 14.4 of the McDonald's Agreement (Anderson Affidavit, p28)) covering over 103,000 employees (see Anderson Affidavit (Exhibit AiG 3), par 21) and there is no evidence of exploitation of employees in light of that lack of requirement.

(b) There is no requirement of writing under the Hungry Jack's Agreements (see, for example, clauses 6(b) and 12(e) of the Hungry Jack's NSW/ACT Agreement, clauses 6.2(d), 6.2(e) and 12(c) of the Hungry Jack's Tasmania Agreement and clauses 7.2(d), 7.2(e) and 13.1(h) of the Hungry Jack's Queensland Agreement (Montebello-Hunter Affidavit, pp17, 23, 71, 75, 96, 101)) covering over 16,000 employees (see Montebello-Hunter Affidavit (Exhibit AiG 7), par 11) and there is no evidence of exploitation of employees in light of that lack of requirement.

(c) There is no requirement of writing under the Red Rooster Agreement (see clause 9.7 of the Red Rooster Agreement (Flemington Affidavit (Exhibit AiG 1), p20)) and there is no evidence of exploitation of employees in light of that lack of requirement.

(d) There is no requirement of writing under the Chicken Treat Agreement (see clause 11(2) of the Chicken Treat Agreement (Flemington Affidavit (Exhibit AiG

1), p85)) and there is no evidence of exploitation of employees in light of that lack of requirement.

(e) There is no general evidence of exploitation by employers in the fast food industry on any issue, let alone concerning working additional hours.

9. RAFFWU seems to suggest that a part-time employee who wishes to change their work on a Monday for childcare reasons will be worse off under the proposed part-time clause than the current part-time clause (see Flemington Cross Examination (29 June 2018, PN 301, PN 419)), due to not knowing from week-to-week when he or she will work. However:

(a) There is no evidence that such a part-time employee has difficulty in planning childcare arrangements due to a lack of knowledge of when he or she will work week-to-week.

(b) Under the current clause, the part-time employee has "reasonably predictable hours of work" (see clause 12.1(b) of the Fast Food Award) which is likely to entail that the part-time employee will be able to plan childcare arrangements.

(c) Under the proposed clause, the part-time employee will have "*reasonably predictable hours of work*" (see proposed clause 12.1(b); see also Flemington Cross Examination (29 June 2018, PN 316)) such that the part-time employee will be able to plan childcare arrangements.

(d) Under the McDonald's Agreement, there is no requirement for days of the week to be worked by an employee, or the number of hours to be worked each day, to be agreed in writing in advance (compare clause 14, especially clause 14.3, of the McDonald's Agreement (Anderson Affidavit (Exhibit AiG 3), p28)) and there is no suggestion, let alone evidence, of difficulties or exploitation associated with the absence of the requirement (despite the McDonald's Agreement operating since 31 July 2013 (see Anderson Affidavit (Exhibit AiG 3), par 15)).

(e) Under the Hungry Jack's Agreements, there is no requirement for days of the week to be worked by an employee, or the number of hours to be worked each day, to be agreed in writing in advance (compare, for example, clause 6, especially clause 6(b), and clause 11 of the Hungry Jack's NSW/ACT Agreement (Montebello-Hunter Affidavit, p17)) and there is no suggestion, let alone evidence, of difficulties or exploitation associated with the absence of the requirement (despite the Hungry Jack's Agreements operating for many years).

(f) Under the Chicken Treat Enterprise Agreement, there is no requirement for days of the week to be worked by an employee, or the number of hours to be worked each day, to be agreed in writing in advance (see clause 11 of the Chicken Treat

Agreement (Flemington Affidavit (Exhibit AiG 1), p85)); see also Flemington Cross Examination (29 June 2018, PN 404 to PN 421) and there is no suggestion, let alone evidence, of difficulties or exploitation associated with the absence of the requirement (despite the Chicken Treat Agreement operating since 6 April 2010 (see Flemington Affidavit (Exhibit AiG 1), par 17)).

(g) Presumably, such a part-time employee will record in their (permanent) availability under the proposed clause that he or she is unable to work on a Monday (see Flemington Cross Examination (29 June 2018, PN 303); see also Flemington Re-Examination (29 June 2018, PN 527)) and so the part-time employee will not be rostered on a Monday.

(h) Under the proposed clause, if the part-time employee has an existing written agreement with their employer for a regular pattern of hours, the part-time employee will be entitled to continue to be rostered in accordance with that agreement (see proposed clause 12.8).

(i) In practice, the changes in availability are managed between the employer and the employee (see Flemington Cross Examination (29 June 2018, PN 303, PN 305, PN 312, PN 411)).

(j) In practice, in some stores, changes in availability are almost always accommodated (see Agostino Cross Examination (16 July 2018, PN 1309 to PN 1314)).

10. RAFFWU contends that there will be less certainty for an employee under the proposed clause than the current clause (in that under the current clause days and hours are specified under the current clause but not under the proposed clause). However:

(a) The proposed clause reflects the standard clause in the Hospitality Award, the Clubs Award and the Restaurants Award.

(b) There is protection in the requirement of the proposed clause that hours be reasonably predictable (see proposed clause 12.1(b) of the Fast Food Award).

(c) There is no suggestion, let alone evidence, of difficulties or exploitation where the industrial instrument does not require days and hours to be specified (including under the Hospitality Award, the Clubs Award and the Restaurants Award and including under the McDonald's Agreement, the Hungry Jack's Agreements).

11. RAFFWU implies that an offer to work additional hours contained in a roster, with 24 hours for an employee to object and an agreement capable of being achieved by silence, is unfair (see Flemington Cross Examination (29 June 2018, PN 370 to PN 374)).

However, such offers to work additional hours and such agreements by silence are capable under both the current part-time clause in the Fast Food Award and the current enterprise agreements and there is no evidence or suggestion in cross-examination that such clauses cause difficulties for employees.

12. RAFFWU seeks to suggest that the primary concern of the Ai Group (as well as McDonald's, Hungry Jack's and Craveable Brands) is financial if there was to be a termination of the enterprise agreements (see Flemington Cross Examination (29 June 2018, PN 395)). However:

    (a) The witnesses denied that the primary concern (see Flemington Cross Examination (29 June 2018, PN 400, PN 492); Anderson Cross Examination (16 July 2018, PN 1078, PN 1079); Montebello-Hunter Cross Examination (16 July 2018, PN 1659, PN 1675)).

    (b) One of the witnesses stated that they were unaware of intended applications to terminate their enterprise agreements (see Flemington Cross Examination (29 June 2018, PN 392)).

    (c) There is no evidence of any foreshadowed applications to terminate enterprise agreements.

    (d) Some of the businesses the subject of evidence have high number of stores operating not under an enterprise agreement but the Fast Food Award (84 Oporto stores (see Flemington Affidavit (Exhibit AiG 1), par 14), 26 Hungry Jack's stores (see Montebello-Hunter Affidavit (Exhibit AIG 7), par 8 and Exhibit AiG 8) and 10 Red Rooster restaurants (see Flemington Affidavit (Exhibit AiG 1), par 16 and Exhibit AIG 2) and so a potential termination of an enterprise agreement is not relevant to those stores.

SDA Cross Examination

13. The Ai Group has prepared this section of the outline to respond to some of the issues likely to arise from the cross examination by the SDA of McDonald's witnesses called by the Ai Group.

14. SDA seeks to suggest that, in terms of varying the end time of the evening penalty rate from 5am to 6am, the process for making an IFA will not be much more burdensome than making a majority employee facilitative provision (see Anderson Cross Examination (16 July 2018, PN 741, PN 765). However:

    (a) The process of explaining the making of an IFA will need to be individualised (to the individual employee) but the process of explaining the making of a majority employee facilitative provision could be done collectively (to the group of

employees all at the same time) and the time taken to explain the process will axiomatically be shorter for collective explanation than individualised explanation.

(b) The involvement of guardians in the making of an IFA will need to be individualised (to the individual guardian) but the involvement of guardians in the making of a majority employee facilitative provision could be done collectively (to the group of guardians) and the time taken to manage the involvement of guardians will axiomatically be shorter for collective involvement than individualised involvement.

(c) The assessment of the better off overall requirement for an IFA need to be undertaken on an individual basis which axiomatically will take a considerable period of time for a potential 12,545 individual employees (see Anderson Supplementary Affidavit (Exhibit AiG 5), pars 5, 8; Anderson Cross Examination (16 July 2018, PN 750)).

(d) The use of a template IFA will not necessarily shorten the time taken to prepare the IFA, particularly given the need to check the IFA closely (see Anderson Re-Examination (16 July 2018, PN 1176)).

15. SDA endeavours to suggest that, in terms of varying the end time of the evening penalty rate from 5am to 6am, there is likely to be no benefit to an employee from a removal of the evening penalty rate between 5am and 6am (see Anderson Cross Examination (16 July 2018, PN 777). However, the variation in end time (and the removal of the penalty rate) may suit the personal circumstances of the employee (such as where they are able to work between 5am and 6am when they might otherwise not be rostered in that period, complete their hours of work earlier in the day and therefore be able to attend to their studies or engage in leisure time earlier in the day (see Anderson Affidavit (Exhibit AiG 3), pars 54(a), 54(b)). Additionally, the variation in end time (and the removal of the penalty rate) may lead to an employee receiving a greater number of hours of work over the week (see Anderson Affidavit (Exhibit AiG 3), par 54(c)).

H J Dixon SC
A B Gotting
Counsel for Ai Group

18 July 2018