

IN

FOUR YEARLY REVIEW OF THE FAST FOOD INDUSTRY AWARD 2010

(APPLICATION BY AUSTRALIAN INDUSTRY GROUP)

OUTLINE OF SUBMISSION IN REPLY

1. On 21 March 2018, the Fair Work Commission directed the Retail and Fast Food Workers Union Incorporated (“RAFFWU”) to file submissions in reply to the Australian Industry Group (“the Applicant”) in relation to its “objection” to RAFFWU being or being treated as a “party principal” in its application to vary clause 12 of the Fast Food Industry Award 2010 (“the Award”).
2. These submissions are to be read in conjunction with our earlier brief outline of submissions in the substantive matter dated 9 March 2018.
3. The Applicant frames its objection on six grounds. Each are dealt with below. The objections are premised on a general control held by the Fair Work Commission over who may participate in s.156 reviews¹.
4. The Act stipulates as an Object at s. 3

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

...

- (e) **enabling fairness and representation at work** and the prevention of discrimination by **recognising the right to freedom of association and the right to be represented**, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

¹ See [4] of AIG Submissions dated 4 April 2018

5. The High Court of Australia recently acknowledged other forms of industrial organisation may have a real interest in ensuring compliance with the Fair Work Act, and that such a conclusion is not inconsistent with the objects of freedom of choice which the Fair Work Act provides². At [50] it stated:

That is not to say that s 540(6) is necessarily limited to registered organisations. It may be that the Dunlop Rubber principle sense of entitlement to represent the industrial interests of persons applies, mutatis mutandis, to other forms of industrial organisation having a real interest in ensuring compliance with civil remedy provisions in relation to a particular class of persons. Contrary to Rex's submission, so to conclude would not be inconsistent with the objects of freedom of choice for which Pt 3-1 of the Fair Work Act provides. They are directed to the rights of an employee to choose his or her representative in relation to a matter affecting the employee. By contrast, as was emphasised in the Explanatory Memorandum[45], s 540(6) is concerned with the standing of an organisation to bring in its own right civil remedy proceedings for contraventions of the Act affecting a designated class of persons in relation to whom the organisation has industrial coverage.

Emphasis Added

6. There are no legislative limitations on the persons who may be involved in the Modern Award processes. Unlike previous incarnations, the Modern Award process no longer involves systems of exclusion – a Modern Award is common rule and not a tool in settlement of a dispute between employers and unions. Modern Awards form part of the statutory underpinning of a “guaranteed safety net of fair, relevant and enforceable minimum terms and conditions.”³
7. All employees covered by the Award have an interest in the Applicant’s application. Those employees have an entitlement to join, or not join, any industrial association of their choice for which they are eligible to join. The vast majority of employees (and employers) covered by the Award, and an even greater proportion of those to whom the Award applies, will not be aware of the Applicant’s application. There has been little publicity of the matter, the application was made very late in the review, and no effort has been made to draw the application to the attention of those directly affected by the application.
8. Turning to each of the assertions of the Applicant:
- (a) RAFFWU members are directly affected by the proposed variation. RAFFWU has a proper interest in acting to improve and protect the conditions of

² Regional Express Holdings Limited v Australian Federation of Air Pilots - [2017] HCA 55

³ See s.3 (b) of the Fair Work Act

employment of members, and to watch over, improve, foster and protect the best interests of members⁴;

- (b) RAFFWU has not and does not hold itself out to be a registered organisation of employees. The extensive legislative obligations imposed on RAFFWU include those in the *Associations Incorporation Reform Act 2012* (Vic) and the *Corporations Act 2001* (Cwth). If Parliament had intended that the only persons who could appear in these matters were registered organisations of employees, it would have legislated as such. It did not, and no such barrier should be created without legislative intent. To do so would be to deny workers their freedom of choice to be represented by other forms of industrial organisation.
 - (c) That RAFFWU has filed no evidence in the proceeding should count in RAFFWU's favour. Our submission puts plainly that the Applicant has failed to establish its case. Further, RAFFWU is entitled to run its case as it sees fit. That includes by way of submissions and cross-examination.
 - (d) RAFFWU confirms it does have members at Domino's Pizza, McDonald's, Red Rooster, KFC, Hungry Jacks, Pizza Hut and other employers in the fast food industry. It is unclear why the Applicant is concerned with large employers.
 - (e) RAFFWU has a number of members at Domino's Pizza.
 - (f) There is no contradictor in this matter. In *Vickers* it was put by the Full Bench that there was a contradictor.
9. All this appears to be moot considering paragraph [7] in the Applicant's submission. As the Applicant readily concedes the Fair Work Commission may receive and take into account contributions by RAFFWU, at this time the only additional action of RAFFWU is to cross-examine the witnesses of the Applicant.
10. The true impact of the objection of the Applicant is to deny RAFFWU the opportunity to cross-examine its witnesses.

⁴ See RAFFWU Purposes in its Rules (2) at Annexure A

11. At the directions hearing on 21 March 2018, Commissioner Lee asked the parties what issues they wished to raise:

THE COMMISSIONER: Here we are. We were to be having a hearing today, but we're not, we are in a conference. There are three things, I think, that need to be discussed.

PN13

The first is the proposed - proposed by AiG and supported by SDA - alteration to the part-time provision and consequential changes to rostering and the overtime provisions. The second thing is - what are we calling it - the facilitative provision to vary the early start, and then there's just programming generally from here. I think that's the agenda for today. **Does anyone have anything else that anyone wants to discuss?**

PN14

MS CRUDEN: No, Commissioner, that's fine.

Emphasis Added

12. Despite RAFFWU having filed submissions, and attended the directions hearing, there was no objection by the Applicant.
13. The Applicant raised its concern with RAFFWU participation after Commissioner Lee took indications on witnesses for cross-examination.

PN95

THE COMMISSIONER: And no witnesses from you, Mr Cullinan?

PN96

MR CULLINAN: That's correct.

PN97

THE COMMISSIONER: Have we got a view about requirements for cross-examination, ideally, you know, length? That might be a big ask at this stage.

PN98

MS BIDDLESTONE: At this stage, Commissioner, the SDA will be requiring three witnesses for cross-examination: Anderson, Agostino and Hossain.

PN99

THE COMMISSIONER: Who is the third one, sorry?

PN100

MS BIDDLESTONE: Hossain - H-o-s-s-a-i-n.

PN101

THE COMMISSIONER: Hossain, all right. You don't require the other seven?

PN102

MS BIDDLESTONE: No, Commissioner.

PN103

THE COMMISSIONER: Mr Cullinan?

PN104

MR CULLINAN: We haven't finalised a view on that, Commissioner Lee. The only other two that we potentially wanted to ask questions of were Flemington and - I'm sorry, I need to check which of the witnesses it was that was Hungry Jack's - sorry, Montebello - - -

PN105

THE COMMISSIONER: Montebello. So the other - so it's Flemington - you want those three, Anderson, Agostino and Hossain, and you also want Flemington and the other - that's the name of the person, is it?

PN106

MS CRUDEN: Yes.

PN107

MR CULLINAN: We don't want Agostino.

PN108

THE COMMISSIONER: Yes, okay.

PN109

MS CRUDEN: **Commissioner, perhaps if I can indicate, Ai Group will foreshadow an objection to the participation of the Retail and Fast Food Workers Union in relation to the matter.**

Emphasis Added

14. That is, the Applicant takes exception to RAFFWU cross-examining its witnesses. It wants to avoid a contradictor. It need not be said that without a contradictor, the Fair Work Commission could fall into error⁵.
15. A relevant, recent and industry example is in the 2016 variation to the *McDonald's Australia Enterprise Agreement 2013* where the Fair Work Commission failed to apply a Better Off Overall Test to the varied agreement despite the terms of the Fair Work Act. A competent contradictor may have avoided such a circumstance which has no doubt cost very many employees dearly.
16. RAFFWU is seeking to be heard, have our submissions considered and examine witnesses already called by the Applicant. Whether that amounts to being a “party principal” or some other form of participant is not of primary concern to RAFFWU. We submit the circumstances of this matter warrant the Fair Work Commission exercising its control to permit that participation.

⁵ See [16] and [22] in [2018] FCCA 577

ANNEXURE A

2. Purposes

The purposes of the association are –

(1) To provide an association for the employees specified in these Rules and generally to do all such things as may from time to time be necessary to promote the rights, interests and welfare of such employees including, without limitation:

(a) to uphold the rights of organised labour;

(b) to improve and protect the conditions of employment of members;

(c) to watch over, improve, foster and protect the best interests of members;

(d) to advance and protect the social and economic interests of the members and of trade unionists generally by industrial, political or other means;

(e) to promote the concept of equal opportunity in employment and to eliminate all forms of discrimination in retail and fast food industries and in all spheres of the Association's activity; and

(f) to support and participate in socially responsible community actions

(2) The Association also has the purpose of doing all lawful things whatsoever:

(a) as are, in its opinion, necessary for, incidental to or conducive to, the attainment of any of the purposes in subrule (1); or

(b) as are, in its opinion, likely to promote or further the attainment of any of the purposes in subrule (1).