Retail and Fast Food Workers Union

Submission

Submission to the Senate Education and Employment References Committee inquiry into Corporate Avoidance of the Fair Work Act

Josh Cullinan, Secretary,
jcullinan@raffwu.org.au and 0416 241 763

1. The Retail and Fast Food Workers Union Incorporated (**RAFFWU**) is a trade union representing workers in the retail and fast food industry. It is registered under the *Associations Incorporation Reform Act 2012* (Vic). Membership is open to eligible workers in the retail and fast food sectors in accordance with its rules. More information about RAFFWU is available on its website www.raffwu.org.au

2. This submission deals with the experience of retail and fast food workers employed in Australia in several workplaces which have enterprise agreements (made under current or former legislation) negotiated by the relevant employers and the Shop Distributive and Allied Employees Association (the **SDA**).

3. Specifically, this submission focusses on three issues:

   (a) a mechanism by which the minimum terms and conditions established by the NES and Modern Awards are being avoided or undermined by enterprise agreements;

   (b) the mechanism by which large voting cohorts are being used to affect the specific rights of smaller groups of workers, with specific reference to the cohort used by McDonald's and SDA to vary an agreement in early 2016; and

   (c) the effect of legacy agreements made under the Workchoices legislation.

4. These matters are specifically relevant to items (b), (i) and (j) of the terms of reference.

> The incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* with particular reference to:
>
> (b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;
>
> (i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;
>
> (j) legacy issues relating to Work Choices and Australian Workplace Agreements;

5. Each of these matters is properly characterised as corporate avoidance. The impact is substantial. In the retail and fast food sectors alone, approximately 500 000 workers are employed under SDA negotiated agreements at any one time. The estimated loss (compared to the minimum remuneration provided by the Award) to workers employed under these agreements is in excess of $300 000 000 each year.

Avoiding or undermining the minimum terms and conditions established by the NES and Modern Awards

6. The Fair Work Commission must not approve an enterprise agreement unless it passes the better off overall test (BOOT). The BOOT requires that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

7. The introduction of the BOOT was a landmark change in Australia's industrial relations legislative framework. The BOOT requires that each and every employee and prospective employee is better off overall under the proposed enterprise agreement than they would be under the relevant award. That scheme highlights the essential purpose of modern awards (and the NES), which is to provide a minimum standard of conditions for employers in a particular sector. It sets a 'floor' below which the legislature has determined wages and conditions of workers in the relevant sector should not be permitted to drop.

8. To assist the Tribunal in reaching that state of satisfaction, rule 24 of the Fair Work Rules 2009 requires each employer that is to be covered by the agreement must lodge a statutory declaration, in support of the application for approval, by an officer or authorised employee. By sub-rule 8(2) the declaration must be in the approved form. That approved form requires the employer to state whether, in its opinion, the agreement passes the BOOT. The employer is also required to draw to the attention of the Commission terms that are less beneficial than terms provided by the relevant modern award.

9. Unions who wish to be covered by the proposed agreement may also submit a statutory declaration stating whether, in their opinion, the agreement passes the BOOT: see rule 24(3). There is no obligation on a union to lodge a statutory declaration, regardless of whether the union wishes to be covered by the agreement. However, if the union wishes to inform the Commission of it position on the approval of the agreement, or to comment on matters contained in the employer's statutory declaration, then the statutory declaration is the mechanism prescribed by the rules for it to do so.

10. Administratively, the Commission is assisted by the Member Support Team ("MST") which analyses agreements against the relevant awards to identify areas in which may leave workers worse off. As part of its analysis, the MST frequently examines 'sample' rosters to determine the impact of the proposed agreement on workers take home pay as compared to the relevant award.

11. The processes described above have failed to ensure that all agreements approved by the Fair Work Commission pass the BOOT.

12. The process is open to manipulation. A recent example is the agreement that was the subject of proceedings in *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887. In that case, the employer (Coles and Bi Lo Supermarkets) proposed an agreement for approval. A statutory declaration was signed that listed a number of benefits to employers over and above the terms of the award and a number of detriments. The statutory declaration contained a declaration that, in the opinion of Coles, the agreement passed the better off overall test. The Coles' statutory declaration was supported by a statutory declaration signed by an officer of the SDA. The application for approval was opposed by the AMIEU.

13. When the application for approval was determined, the Commission identified a number of areas in which employees could be worse off than under the Award, in response to which Coles gave the following undertakings:

    (a) the casual loading will increase from 20% to 25%;

    (b) the percentage pay rate for 17 and 18 year old (non-trades) team members raised to 60% and 70% respectively under the relevant classifications 9; and

    (c) provision of a reconciliation term for casual and junior (non-trades) employees to ensure that the take home pay for any 4 week roster cycle under the Agreement be greater than what they would otherwise be entitled to under the Award. The request was to be made within 28 days of the expiry of the relevant reconciliation period.

14. Coles having given those undertakings, the agreement was approved: see *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2015] FWCA 4136 (10 July 2015). Despite being approved, the agreement did not pass the BOOT. Indeed, it fell well short of passing the BOOT.

15. The mechanism by which the approval was achieved was as follows:

    (a) the proposed agreement contained a slightly higher base rate of pay than provided under the modern award;

    (b) that slightly higher base rate of pay was said to partially compensate workers for the loss of, or substantial reduction in, penalty, overtime, casual, shift and junior rates; and

    (c) the loss of, or substantial reduction in, penalty, overtime, casual, shift and junior rates was then further said to be compensated by reference to non-monetary and/or intangible benefits that did not have any direct impact on workers' take home pay.

16. This mechanism had a number of features. First, the proposed agreement substantially undercut some or all penalty, overtime, casual, shift and junior rates. That is, the wages payable for those classes of work were made less than the wages payable under the "floor" Award. That approach was (and is) permissible because the protection provided by the Act for minimum rates of pay applies only to the base rate of pay – there is no statutory protection for penalty payments, overtime, casual rates, shift rates or junior rates.

17. Second, the agreement included a slight increase in the base rate of pay. Built up rates of this kind are common (and have their genesis in an era in which other benefits, such as superannuation, were payable only on base rates of pay). But they require careful consideration to determine whether they offset the reduction penalty payments, overtime, casual rates, shift rates or junior rates. In the case of the Coles agreement, analysis showed 2/3 of non-casual workers were left worse off in monetary terms under the agreement than under the Award after the undertakings were made.

18. The effect of these first two features was to create two classes of worker. The first was that a class of worker who works their hours primarily during periods to which no penalty attaches: the obvious example being full time day workers. These workers do not suffer any monetary loss from the reduced penalty payments, as these payments don't apply to their hours of work. They do, however, take the benefit of the increased rate of pay. The second class of worker is comprised of those workers who work some or all of their hours in a period that would, under the Retail Award, attract a penalty payment. These workers suffer the detriment of the reduced penalty rates. And, while, they also take the benefit of the higher base rate, that rate is insufficient to make up the difference between what they receive in monetary terms under the agreement than under the Award. In the Coles example, some workers were 25% or more worse off.

19. This practice is common in the retail and fast food sectors. It is commonplace for agreements to contain base rate increases of between 4% and 11% of the Retail Award notionally offsetting very substantial reductions or diminutions in penalty and overtime payments.

20. Third, the proposed agreement included a large number of 'corporate' employment benefits, provision of which was said (at the hearing of the appeal, but not during the approval process) to offset some of the direct financial loss to employees caused by the reduction in penalty and overtime payments. It is permissible to include such benefits in enterprise agreements. Their value is marginal at best, and often only of benefit to very small classes of worker (such as defence services leave.)

21. Analysis of the *Coles Store Team Enterprise Agreement 2014* identified 2 in 3 non-casual workers were worse off. This was after all casual workers were given a 5% increase, and all 17 and 18 year old workers were given up to 9% wage increases, by way of undertakings. This is not unusual. Employers and SDAEA engage in detailed ongoing discussions with the Fair Work

Commission *after* an Agreement is made with employees and submitted for approval by the Commission. Those discussions appear directed at negotiating ***with*** the Fair Work Commission to limit the undertakings which might be extracted from an employer by virtue of the Agreement failing to pass the BOOT.

How does this happen?

22. The mechanism identified above is successful in securing the approval of agreements because of a combination of factors.

23. First, the Tribunal places significant institutional trust in large employers and trade unions. Where both the employer and the relevant union presents a united front to the Tribunal, the Tribunal places significant weight on the information contained in the statutory declarations before it. In that circumstance, where the information is inaccurate or misleading, the Tribunal's capacity to fairly and accurately assess the agreement before it is compromised.

24. In the case of the *Coles Store Team Enterprise Agreement 2014*, both Coles and the SDA signed statutory declarations to the effect that, among other things, the agreement passed the BOOT. Ultimately, the agreement was found not to pass the BOOT. The difference was not one of degree: the agreement manifestly failed the BOOT. There has not been, to RAFFWU's knowledge, any investigation of how or why Coles and the SDA each signed a statutory declaration to the effect that they believed the agreement passed the BOOT in circumstances where it manifestly did not.

25. While the current system is in force (that, is while s 206 applies only to the base rate of pay) there will be, no doubt, cases where the question of whether an agreement passed the BOOT will be one about which reasonable minds may differ. The Coles agreement is not such a case. It manifestly did not pass the BOOT.

26. The Coles case is not unusual. RAFFWU is not aware of any case in which the Commission has enquired in to why an employer and/or a registered trade union have filed a statutory declaration to the effect that they reasonably believe an agreement passes the BOOT when it manifestly does not. And it is notable that the obligation to file a statutory declaration derives not from the statute – but from the rules. It is a mechanism imposed by the Commission.

27. When the appeal against the approval decision came before the Full Bench, detailed statistical analyses of the agreement were provided to the Tribunal. Extensive analysis was provided by RAFFWU secretary Josh Cullinan. That material highlighted the gross financial disadvantage suffered by some workers under the agreement as compared to the Award. But it does not take an actuarial statistician to identify that someone who works most of their hours at times which would earn 25%, 50% or 100% loadings under the Award would be worse off with a flat 11% improvement on their base rate of pay. Indeed, it appears obvious: which leads to the question

of why a sophisticated multi-million dollar employer, armed with significant corporate and legal resources, along with Australia's largest private sector trade union, either were unable to identify the detriment, or knew of the detriment and did not draw it to the attention of the Commission.

28. At the time the Coles agreement was approved, the SDA was well aware of the effect of this approach to enterprise agreements, having been subject to the scrutiny of the Federal Magistrates Court in 2011 in *Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233. In that case, Hungry Jacks and the SDA had negotiated an agreement to cover Hungry Jacks employees in Tasmania. Neither Hungry Jacks nor the SDA applied for certification of the agreement. It therefore operated as an unregistered agreement. Both the SDA and Hungry Jacks treated the agreement as if it had been certified and Hungry Jacks paid its workers as if it had been certified.

29. In 2010 the Fair Work Ombudsman commenced proceedings against Hungry Jacks for failing to pay workers in accordance with the minimum standards provided by the relevant award. The prosecution identified that more than $665 000 was owed to almost 700 workers. That sum had accrued in less than 2 years: almost $1000 per worker.

30. Federal Magistrate Lucev summed up the scenario neatly at [14] and [15] of the judgement:

> Hungry Jack's did not provide to its employees the benefits of the APCS and/or the NAPSA **and did not pay the base rate of pay, overtime, public holiday loadings, casual loadings and the like**. The details of these underpayments are set out in the schedules to the statement of claim in this proceeding and as I have indicated, amount in total to over $665 000.
>
> It is common cause that **if the SDA agreement had in fact been certified, Hungry Jack's would not have contravened any of the industrial instruments** of the Regulations.

31. That is: if the agreement negotiated by the SDA has been approved, workers would legally have been paid less than the award minimum.

32. Second, as noted above, the MST routinely assesses "sample typical rosters". These are obtained from the employer. There is no means by which the MST, or the Commission, can assess the accuracy of the sample typical rosters. There is no means by which the MST, or the Commission, can assess whether the sample typical rosters provided by the employer are representative of the circumstances of the employees who would be covered by the proposed agreement.

33. There is significant evidence to suggest that the "sample typical rosters" are anything but sample or typical. The sample typical rosters show that the wages payable under the purported

rosters will be more than the Award. However, the sample typical rosters are frequently drawn from class 1 employees: that is, employees who are better off in real financial terms under the agreement than under the award. They are not representative of class II employees. To take the *Coles Store Team Enterprise Agreement 2014* as an example, Coles submitted a number of 'sample typical rosters' for analysis by the Commission. Those sample typical rosters proposed:

(a) A single full time worker who worked 24 of 34 hours at non-penalty times under the Award;

(b) A part-time worker who worked all 20 hours at non-penalty times under the Award;

(c) A part-time worker who worked 7 of 12 hours at non-penalty times under the Award;

(d) A part-time worker who worked 20 of 28 hours at non-penalty times under the Award.

34. Notably, none of the hours worked at penalty times under the Award were Sunday hours. No Sunday hours were included in the sample typical rosters of non-casual staff. Any single ordinary time hour instead worked on a Sunday would have rendered examples a, c and d above as worse off financially under the Agreement compared to the Award.

35. During the Appeal proceeding, Coles was obliged to provide rosters for each of a metropolitan and a regional Victorian store. Coles chose the stores. Coles chose the smaller of two Northcote Plaza stores, with narrow opening hours and no nightfill workers. Coles also chose the Benalla store.

36. The rosters from Northcote disclosed:

(a) 66% (33 of 50) non-casual staff worked at least 40% of their hours at times when penalty rates applied under the Award.

(b) 29 of those 33 were worse off financially.

(c) Half (25 of 50) non-casual staff worked at least 2/3 of their hours at times when penalty rates applied under the Award.

(d) All 25 were worse off financially.

(e) 20% (10 of 50) non-casual staff worked all their hours at times when penalty rates applied under the Award.

(f) All 10 were worse off financially.

(g) Nobody worked nightfill or otherwise on night shift, unlike many other stores (which we know distorts the analysis in Coles favour.)

37. The rosters from Benalla disclosed:

    (a) 42% (14 of 33) non-casual staff worked more than 40% of their hours at times when penalty rates applied under the Award.

    (b) 12 of those 14 were worse off.

    (c) 10 of 33 non-casual staff worked more than half their hours at times when penalty rates applied under the Award.

    (d) The store had amongst the narrowest opening hours of all Coles stores in Australia, meaning the store was open at much fewer times outside the traditional 7am to 6pm, Monday to Friday.

    (e) Nobody worked nightfill or otherwise on night shift, unlike many other stores (which we know distorts the analysis in Coles favour.)

38. The 'sample typical rosters' were not representative of rosters worked across Coles' business. They did not include rosters for employees who worked their hours primarily at night or on weekends. Employees working such hours comprise a large part of the Coles workforce – even on the basis of the conservative stores chosen by Coles.

39. The Tribunal has generally accepted the accuracy of the 'sample typical rosters' provided by an employer. It has often been only by virtue of external analysis, such as in the Coles case, that the scope of concern shifts beyond the 'sample typical rosters' provided by employers to the actual scope of work required to be performed by workers.

40. There is doubt as to whether such an analysis is needed. A number of Commissioners adopt the view that the agreement can be assessed by reference to its terms: any potential shift pattern that an employee or potential employee can be required to be worked can be assessed by reference to the terms of the agreement. Where such an assessment identifies the potential for an employee to be worse off, an appropriate undertaking must be sought. Such an approach is not universally applied. There have been any number of agreements in which a theoretical shift pattern left workers worse off but which, in the absence of evidence to suggest that such a shift pattern is or might be worked, the Commission elected not to have regard to the hypothetical possibility.

41. But while the Commission continues to adopt the practice of assessing sample typical rosters, it must be noted that time and again proposed agreements are filed with a genuine expectation that an uncritical eye might not identify that the rosters in fact worked by employees are nothing like the "sample typical rosters" submitted by employers.

42. And, that directs attention to the question of the means by which the sample typical rosters are provided. In some circumstances, employers submit "sample typical rosters" with the application for approval. In other circumstances, where no roster material is provided, "sample typical rosters" are provided at the request of the of Commission. For example, in 2011, Coles applied for approval of the agreement that became the Coles Store Team Members Agreement 2011. The Fair Work Commission was concerned that the proposed agreement did not leave employees better off overall compared to the Award. To investigate that concern, the Commission asked for a comparison of 5 rosters from two stores. From the first store, the workers' names were to start with B. From the second store, the workers' names were to start with C. The Commission left the choice of store to Coles. When analysed, the identified rosters showed that all ten workers chosen by Coles were better off. Based on the material on the approval application file, this was sufficient to satisfy the Commission that the more than 70 000 employees who were to be covered by the proposed agreement were better off overall. That was not so. Many thousands were worse off in financial terms.

43. There has not been, to RAFFWU's knowledge, any investigation in to the coincidence that sample rosters provided by employers to the Tribunal all result in a financial benefit to employees while actual working rosters in parts of the relevant business leave workers worse off. It is unlikely to be coincidence.

44. The commonality of agreement approvals where the Commission member has been led into error by virtue of the material filed by employers and the SDA is a national disgrace. An assessment of the likely loss to workers, based on an extrapolation of the wages lost (compared to the Award) at McDonald's, Woolworths and Coles using common rosters known to be worked in these business, approaches $250 million per annum. When other Wesfarmers employers (Officeworks, Kmart, Target, Bunnings, Liquorland), other Woolworths employers (Big W, Dan Murphy's, BWS) and popular fast food outlets (Hungry Jacks, Pizza Hut, Domino's Pizza, Red Rooster, KFC) are included, the loss quickly escalates to well beyond $300 million per annum.

45. It is a common feature of agreements that are approved despite failing the BOOT that employees are not told, in a meaningful way, of the differences between the amount they would earn under the Award compared to the amount they will earn under the proposed agreement. The Act requires that employer inform employees of the *effect* of the proposed agreement. This has been liberally interpreted such that employers are not required to explain the actual impact of the proposed agreement on employees.

46. In the case of the Coles agreement, neither Coles nor the SDA informed employees that many workers would earn less, and in some cases substantially less, than under the Award. Employees were not told that the small increase in the base rate would not offset, in financial terms, the loss or diminution of penalty rates and allowances. The employees were not told that Coles and the SDA had decided to trade off guaranteed take home pay for contingent benefits, such as blood donor and emergency services leave. One effect of this practice over time is that

employees lose institutional knowledge of the penalty rates applicable to them under the Award and cease to be able to readily identify the detriment for themselves.

Conclusion and recommendations

47. These kinds of arrangements are pernicious. They gradually erode conditions in the sector. They are achieved by cooperation between employers and the SDA. They are also not new. Mortimer, D in Management Employment Relations Strategy: The Case Of Retailing (*International Employment Relations Review*, Vol. 7, No. 1, 2001, Pp 81-93) interviewed the Woolworths Employee Relations Manager who explained to the researcher (at page 91):

> This represented an increase in the standing of the Human Resources area, and this was reconfirmed when the General Manager in NSW (one of the area managers on the original management team) **asked the company's auditors to conduct a review of the cost to the company of paying staff under the Enterprise Agreement compared to the State Award. The auditors found an annual saving of 8 per cent of the company's wages bill was obtained by using the Agreement** (about $450 million) (interview: J. De Gabrielle, 1999).

48. A number of things can be done to address this situation.

Strengthen reporting obligations

49. RAFFWU submits that the obligation on employers and relevant unions to draw to the attention of the Tribunal terms that would cause a detriment to workers must be strengthened. Employers and unions should each bear a statutory obligation to draw to the attention of the Tribunal not merely the existence of a term that is detrimental but also the impact of that term. Had such an obligation existed in 2014, both Coles and the SDA would have been obliged to inform the Tribunal not only of the existence of terms that provided lower penalty rates, but that the impact of those terms was that workers would earn less under the agreement than under the award.

50. This new obligation should extend to a specific obligation to inform the Tribunal if workers could earn less under the agreement than under the award, and the circumstances in which that might occur. If the employer and the relevant unions have turned their minds to the effect of the agreement on employees, that should be an easy task. It should not impose any additional investigation burden on the employer: such information should already be known.

Require employers to inform employees that they will, or may, earn less under the proposed agreement than under the relevant award prior to voting

51. Remuneration is a fundamental part of the minimum terms and conditions provided by modern awards. Where an agreement is negotiated that has terms that will or might result in some or all employees earning less under the agreement than under the award, employers should be

required to inform employees of the effect of those terms in language that is readily capable of being understood.

52. Further, where an agreement seeks to compensate employees for this loss of earnings by reference to non-monetary or intangible benefits, the employer should be required to state clearly which benefits offset the monetary detriment.

53. The Act already obliges employers to inform employees of the effect of an agreement prior to employees voting on whether or not to approve it. However, that obligation is often complied with in a general way that does much to obscure the true position for workers. The obligation must be strengthened so that employees understand that actual impact of the proposed terms.

Assess actual, representative, rosters

54. RAFFWU believes it is time for the major employers in our sector to be subjected to unprecedented scrutiny as to the actual rosters worked – and the wages which would have been earned under the relevant Awards compared to the agreements they negotiated with the SDA.

55. RAFFWU recommends that employers be required to provide actual rosters to the Tribunal for assessment as part of the approval process. As noted above, on one view it is not necessary for the Tribunal to assess actual rosters, as the same result can be achieved by comparing the written terms of the agreements and the award. But while the practice of assessing rosters continues, it must be done fairly. That requires that the Tribunal consider both:

    (a) actual rosters worked; and

    (b) representative actual rosters worked.

56. Any such rosters should be accompanied by a statutory declaration from an appropriate officer of the employer stating that they are both the actual rosters worked and that they are representative of the actual rosters worked across the business.

57. In light of the notorious diminution of conditions in the retail and fast food sectors, RAFFWU recommends a comprehensive investigation be conducted by an appropriate agency into the making of enterprise agreements under the FW Act in the retail and fast food sectors. That investigation would identify practices which have undermined the Act by facilitating the making of agreements that undercut the minimum “floor” that should have been created by the NES and modern awards. That investigation would refer relevant prosecutions, where appropriate.

Amend the Act to compensate workers

58. A feature of the current scheme is that, once approved, an enterprise agreement has legal force and effect unless and until the approval decision is overturned. Even when that occurs, workers

do not have a right to back pay – the agreement is treated as having had lawful effect for the period in which it operated. That means where, on appeal or judicial review of a decision to approve an agreement, an agreement is found not to have passed the BOOT, the employer is not obliged to compensate workers for the loss of earnings for the period in which the agreement was in force. In short, employers are able to get away with underpaying workers, even where a court or tribunal ultimately concludes that the agreement should never have been approved.

59. If, as RAFFWU contends, practices like those described above have been used to undercut the minimum standards set by modern awards and the NES, the Parliament should legislate to oblige employers to compensate employees for the difference between the amounts they would have earned under the modern award and the amounts in fact earned under the agreement.

Amend the Act to guarantee no worker will be worse off in real financial terms

60. Today more than half a million workers in the retail and fast food sectors have agreements which pay them less than they would otherwise earn under the relevant award. While this situation continues, the NES and Awards do not provide the minimum floor that the FW Act envisaged.

61. Amending section 206 to provide that the full rate of pay under each enterprise agreement must be at least the full rate of pay under the Award would help to immediately remedy the issues described in this submission.

62. Further, such a change should be made retrospective. The modern award structure, without transitional arrangements, has been in place since 1 July 2014. That is an appropriate point to make retrospective the obligation to compensate workers who have been paid less than the minimum floor that is a key object of the FW Act and which was intended to be created through the NES and the modern award system.

Use of voting cohorts: McDonald's 2016 Variation

63. A second mechanism which permits corporate avoidance of the minimum standards of the FW Act is found in the variation of existing agreements.

64. The FW Act establishes a scheme by which agreements may be varied. By s 211 of the Act, the Commission can approve an application to vary an agreement only where it is satisfied that the agreement, as varied, meets the BOOT. It is necessary that the employees who would be covered by the proposed varied agreement vote to approve the proposed varied agreement. The consequence is that (as with approvals of agreements) employees who are not affected by a proposed variation are invited to vote on the proposed variation. Where there is a significant disparity in the numbers of employees (between those affected by the proposed variation and those not affected) the interests of those not affected by the variation take priority over those whose interests are affected.

65. In late 2015, McDonald's and SDAEA negotiated a proposed variation to the *McDonald's Australia Enterprise Agreement 2013*. At the time the variation was negotiated, the agreement applied to over 600 stores across Australia and to approximately 100 000 workers.

66. The proposed variations included a variation to the scope of the agreement so that it included delivery drivers. The delivery drivers were, at the date of the application to amend covered by the Fast Food Industry Award 2010.

67. The effect of including delivery drivers in the proposed amended agreement was that the delivery drivers would suffer substantial cuts to their take home wages. However, by operation of the FW Act, the voting cohort for the proposed amended agreement was the whole of the McDonald's workforce. At the time of the proposed amendment, the delivery drivers constituted approximately 1% of the McDonald's workforce. Effectively, 99% of McDonald's employee who would be covered by the proposed varied agreement - and who were not affected by the change - were invited to vote on variations that, if approved, would result in wage cuts to 1% of employees – the delivery drivers.

68. The delivery drivers were overwhelmed by the weight of numbers. 99 706 workers were offered a vote. 9 202 voted, 8 233 supporting the variation and the balance opposed. It can be inferred that the 10%, or 969, who opposed the variation were primarily delivery drivers. The views of the delivery drivers – who were the workers affected by the changes – were overwhelmed by the weight of numbers derived from employees who were not affected by the proposed changes. There is nothing on the Commission filed that suggests that the workers were informed, prior the ballot, that the delivery drivers would suffer a significant financial detriment.

69. The employees having voted to approve the proposed varied agreement, McDonalds applied to the Commission for approval of the proposed variation. In that process, neither McDonalds

nor the SDA identified to the Fair Work Commission that the delivery drivers would lose almost all penalty rates and that as a consequence, many delivery drivers, particularly those working weekends, would be worse off in financial terms. The Commission file (inspected by Josh Cullinan) does not include any detailed BOOT analysis conducted by the Commission. If such an analysis was conducted, it should be on the file. It can be reasonably inferred that no such analysis was conducted.

70. As a consequence of the variation, in March 2016 many delivery drivers at McDonalds suffered the shock of substantial reductions in their penalty rates.

71. This conduct was not new – in 2014 and 2015, the SDA negotiated with Coles to include delivery drivers in the notorious Coles agreement. When that agreement was quashed in July 2016, thousands of delivery drivers reverted to the award and, overnight, became entitled to the higher award wages. Some saw 20% increases in pay.[1]

Conclusion and recommendations

72. Using the variation mechanism described above to alter the scope of enterprise agreements is a mechanism by which employers can avoid the remedial provisions available to workers during bargaining: including industrial action, bargaining orders and, most critically, scope orders. The affected employees do not have the benefit of the tools in the FW Act because the variation happens outside the bargaining process. The workers lose their industrial capacity to resist the changes.

73. RAFFWU recommends that, where it is proposed that the scope of an agreement be varied, only those who would be affected by the varied scope (that is, those workers who would be brought within the scope of the agreement) should be permitted to vote on the variation.

[1] http://www.smh.com.au/business/workplace-relations/first-big-pay-boost-for-underpaid-coles-workers-20160813-gqrpbr.html

Workchoices Legacy

74. In the period March 2006 to March 2008 employers enjoyed previously unknown rights to apply for the certification of agreements that undermined award conditions. Many employers took advantage of that right during the short period in which it was available.

75. The transitional provisions that accompanied the *Fair Work Act 2009* (Cth) provide for the continued operation of agreements certified under the *Workplace Relations Act 1996* (Cth). Many such agreements continue to operate, and, based on the current legislative scheme, will continue to operate unless they are replaced or terminated.

76. The FW Act contains a mechanism to ensure that the base rates of pay provided by these agreements are not less than the minimum rates provided by the modern award or the NES (as the case may be). Section 206 of the Act has the effect that when the base rate of pay under the such an agreement drops below the base rate of pay in the relevant award, the award base rate of pay applies. However, section 206 does not apply to other award rights such as casual loadings, weekend penalty rates, weeknight penalty rates, shift penalties and overtime.

77. The effect is that, even where the s 206 mechanism takes effect, some members are paid the award base rate of pay but have no entitlement to the award rates of pay for weekends, weeknights and other times – these rates continued to be governed by the legacy agreement.

78. Thus, there are a great many legacy agreements in which workers are earning the minimum base rate of pay prescribed by the award, but who have either no, or substantially reduced, penalty rates. As the Act is presently structured, these agreements are lawful.

79. A good example is Bakers Delight. While dozens of different industrial arrangements are in place across the Bakers Delight business, many stores apply legacy agreements that contain terms and conditions of employment that are substantially lower than those provided for by the award. Some of those arrangements apply to just one or two franchises - affecting 30 or 40 workers. Others cover dozens or more stores, affecting hundreds of workers.

80. The loss of wages to the affected employees is substantial. RAFFWU has not been able to quantify the value of these lost earnings, but it is likely that they extend in to the tens of millions of dollars.

81. The Act provides a mechanism for the termination of these agreements. However, many workers are unaware of the right to make such an application. In addition, many legacy agreements apply in small workplaces: these workplaces often have a high turnover of employees which affects workers' capacity to bring such proceedings. Workers also face the potential for reprisals. It should be accepted that without a structured approach, many of these agreements will continue to operate.

82. To date, no structured approach has been established to determine whether these legacy agreements should be terminated. The employers have no interest in having to pay the higher minimum entitlements in the relevant modern awards. Without legislative change, it is likely that many of these agreements will continue to operate.

83. This stands in contrast to the award review system, which systematically analysed thousands of awards and condensed them in to the modern award system. A similar approach is needed.

84. The FW Act was introduced in 2009. These legacy agreements have therefore been in operation for at least seven years. Many of them have not delivered a wage increase for the employees working under them for at least that period of time. It is common sense that an industrial agreement that is more than seven years old and which predates the introduction of the modern award system is unlikely to provide fair terms and conditions for workers.

Conclusion and recommendations

85. The Commission should be directed to conduct a review of all agreements certified or approved under the *Workplace Relations Act 1996* (Cth), including agreements approved under the FW Act but to which the WRA applied by operation of the transitional legislation. The Commission should be directed to terminate each agreement unless the relevant employer can satisfy the Commission that it would be contrary to the public interest to do so.

Overall conclusion

86. The organisations engaging in the above conduct are behemoths. Coles, Woolworths and McDonald's are the three largest private sector employers in Australia. Each is worth many billions of dollars. RAFFWU believes that there is ample evidence to raise concern that these and other major Australian employers have engaged in conduct specifically aimed at subverting the objects of the Fair Work Act, and leading members of the Fair Work Commission into error. In the cases identified above, they were assisted by the SDA.

87. It is simply not believable that these organisations – each of which has a sophisticated corporate structure and access to specialist legal advice - did not know what they were doing, or, at the very least, were reckless as to the consequences of their conduct.

88. The result of this conduct is wage theft, on a colossal scale, from the lowest paid workers in Australia. It ought not be permitted to continue. It ought to be retrospectively fixed, through compensation. Those responsible should be held accountable, including those at the SDA.