Retail and Fast Food Workers Union

Submission

Submission to the Senate Education and Employment References Committee inquiry into Fair Work Act (Pay Protection) Bill 2017

Contact: Josh Cullinan, Secretary,

1. The Retail and Fast Food Workers Union Incorporated (**RAFFWU**) is a trade union representing workers in the retail and fast food industry. More information about RAFFWU is available on its website www.raffwu.org.au

2. We welcome the opportunity to make a submission into the Fair Work Amendment (Pay Protection) Bill 2017 and thank the Senate Standing Committee on Education and Employment for its invitation to make this submission.

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

4. RAFFWU is unashamedly supportive of the amendment. We have long advocated for the introduction of the protections which are proposed in this legislation.

5. There are around 400 000 employees in the retail and fast food sectors working under enterprise agreements negotiated with the SDA. This represents about 20% of all employees covered by federally registered enterprise agreements.

6. There is another group of retail and fast food employees covered by federally registered enterprise agreements which appear not to have involved any negotiation with an organisation of employees. We have found these employees are often located in smaller or franchised establishments such as Bakers Delight and IGA stores.

7. In this submission we will use examples to identify situations which require remedy through the *Pay Protection* amendment. Current structural failures have a very substantial impact on the wages earned by workers under retail and fast food enterprise agreements. The estimated loss (compared to the minimum remuneration provided by the Award) to workers employed under such agreements is in excess of $300 000 000 each year.

8. In establishing the Fair Work Act specific objects were laid out. Section 3 (b) established one relevant object as:

> "*ensuring a guaranteed* ***safety net of fair, relevant and enforceable minimum terms and conditions through the*** *National Employment Standards*, ***modern awards*** *and national minimum wage orders*".

9. Currently, by various mechanisms, the Fair Work Act does not *ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES and modern awards*. The current Fair Work Act, by virtue of the section 206 loophole, permits workers to be

paid substantially less than they would otherwise earn under the modern award. This cannot be permitted to continue.

Mechanisms of avoiding NES and Modern Award rights

A. BOOT Avoidance

10. This section (most of [12] through [57]) is replicated from the RAFFWU submission to the Senate Standing Committee for Employment and Education Inquiry into Corporate Avoidance of the Fair Work Act of January 2017. Since this inquiry has its specific focus, the recommendations have been reduced to the recommendation for implementation of the amendment, albeit with retrospective effect.

11. We have included it here as it is relevant, and it also provides some context to our submission that so many current and recent agreements in retail and fast food are paying a full rate of pay less than the full rate of pay which would be paid under the award.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.)

27. 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.

28. At other major retailers and fast food companies, it is even worse. As described later in this submission,

How does this happen?

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

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

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

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.)

44. 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.)

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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 $200 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.

52. 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.

53. 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

54. 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).

55. Today around 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 Act does not *ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES and modern awards*. A fundamental object of the Act is not being met.

56. 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.

57. 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.

B. Legacy, Zombie and Expired Agreements

58. In addition to agreements made under the Fair Work Act and dealt with above, there are also very many agreements which pay employees less than the guaranteed safety net of award wages.

59. The transitional provisions that accompanied the *Fair Work Act 2009* (Cth) provide for the continued operation of collective agreements certified, approved or lodged 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.

Pre-Workchoices

60. In the period prior to March 2006 employers were able to make *certified* agreements with unions and employees under the Workplace Relations Act. Those agreements included union (170 LJ or 170LS) agreements and non-union agreements (170LK). Those agreements persist through transitional legislation. Unless terms of those agreements paid specific ongoing wage increases, it is highly likely section 206 now pays the base rate of pay as the Award base rate of pay.

61. Unless terms of those agreements specifically required penalty, casual, overtime or other rates to be paid on top of the base rate of pay, section 206 fails to provide any protection for workers. For example, it is now likely an agreement which specifies the actual rate on a weekend or the actual casual rate of pay will now, more than ten years later, pay less than the base rate of pay under the award. The entitlement in those circumstances is the award base rate of pay – not the loaded rates of pay.

62. Examples of agreements made prior to Workchoices legislation include the *Delahey Superfresh Pty Ltd Certified Agreement 2005* made as a non-union s.170LK agreement in 2005.

63. That agreement has been used by the *Morgan's IGA Group* in Melbourne's west since 2005. Since it was made, the agreement has been used to cover workers at other stores not covered by the agreement when it was made. The *Delahey Superfresh Pty Ltd Certified Agreement 2005* pays workers a rate purported to cover a specified number of weekend, weeknight and public holiday hours.

64. With the passing of time, the *Delahey Superfresh Pty Ltd Certified Agreement 2005* rates of pay are now substantially lower than the base rate of pay under the Award. Section 206 provides the award base rate of pay applies but the compelled weeknight, weekend and public holiday hours are simply paid at the base rate of pay.

65. RAFFWU conducted a wage analysis of 17 members as part of the application to terminate the agreement lodged at the Fair Work Commission on 14 March 2017. That analysis used rosters, timesheets and pay slips. It identifies an average wage loss of $3 400 per annum or 21% of income. Some staff are losing over $8 000 per annum compared to what should have been the guaranteed safety net of terms and conditions in the award.

66. An example of a section 170LJ agreement is the *SDA Hungry Jack's Victoria Agreement 1999*. While it is unclear how many stores it covers in Victoria, RAFFWU understands it continues to apply to at least some stores in Victoria. The agreement abolished almost all penalty rates and the rates of pay are now substantially lower than the award.

67. By virtue of section 206, it is only the base rate of pay under the award which applies. Hungry Jack's pays at least some staff a small loading in addition to the award wage. This amounts to $1.16 per hour for non-casual 21+ staff and $1.46 per hour for casual 21+ staff. These represent a 6% loading on the award.

68. However, under the award a worker working between 9pm and 12am is entitled to a 10% loading. A worker working on a Saturday is entitled to a 25% loading and a worker on a Sunday is entitled to a 50% loading (50% and 75% for casual workers in lieu of the 25% casual loading). Clearly, anyone working a modest proportion of their hours at these times will be worse off compared to the administrative gratuity paid by the employer - anyone working a single hour at the times will be worse off compared to the enforceable rates paid under the *SDA Hungry Jack's Victoria Agreement 1999*.

69. A basic wage analysis based on store rosters in Victoria identifies most staff are substantially worse off compared to the minimum wages that would be earned under the Award.[1]

Workchoices

70. 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. The early part of this period had *no relevant fairness test* at all.

71. An example of a Workchoices agreement is the *HRO Initiatives Pty Ltd Employee Collective Agreement 2007* which was made without any substantive fairness test and lodged with the relevant agency. The company is a labour hire company providing labour to the retail industry, and potentially other industries. The agreement has been raised at senate inquiries in the past.

[1] See http://www.smh.com.au/business/workplace-relations/sold-out-quarter-of-a-million-workers-underpaid-in-union-deals-20160830-gr4f68.html

72. Despite the agreement expiring in 2012, no action has been taken to terminate the agreement. It pays the modern award minimum wage, without any penalty rates. It pays a casual loading by virtue of its terms. An adult wage on Sunday for a casual employee of the labour hire agency is $24.30 per hour. Under the Award it is $38.88 per hour. Similarly $24.30 per hour is paid on Saturday ($26.24 per hour under the award) and public holidays ($53.60 per hour under the award). Since $24.30 per hour is the minimum 21+ wage under the Award for casual staff, our members working a regular Sunday shift lose $14.58 per hour. A 7.6 hour shift each Sunday of the year results in over $5 700 in lost wages every year. A further $547 is lost in superannuation.

73. Retailer kikki.K contracts most if not all of its frontline sales assistants from HRO Initiatives Pty Ltd (or its successor.) RAFFWU is informed by members that staff wanting to work with kikki.K complete an online form with kikki.K. They attend an interview with kikki.K. They are selected by kikki.K and kikki.K provides a comprehensive explanation of the work involved. All interactions up to the point of being employed are with kikki.K. The new staff member is then directed to HRO Initiatives Pty Ltd to be employed.

74. If the employee had been engaged by kikki.K they would have been entitled to higher weekend and public holiday rates. Until the approval of the kikki.K enterprise agreement in recent weeks, those higher rates *were the minimum terms and conditions* under the relevant award.

75. Relying on labour hire staff to organise the termination of the agreement when employed on a casual basis by a labour hire company is ludicrous. RAFFWU is not aware of how **any worker could be better off** under the *HRO Initiatives Pty Ltd Employee Collective Agreement 2007* than under the Award. The business model of HRO Initiatives Pty Ltd appears to rely on paying less than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* under the relevant award to its staff when supplying labour to its clients. This particular exploitation would be extinguished by the proposed amendment.

Fair Work Act

76. Agreements made under the Fair Work Act had the new *Better Off Overall Test* applied to agreements the subject of applications for approval by the Fair Work Commission. Agreements often pass that test with limited or no future pay increases beyond the expiry of the agreement. Those agreements continue to apply until replaced or terminated.

77. Similarly to Workchoices and other Workplace Relations Act agreements, agreements made under the Fair Work Act operate to the exclusion of Modern Award rights unless those rights are expressly called up in the agreement, including casual rates of pay, overtime rates, penalty rates, shift rates and other benefits which collectively were intended to form the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions*.

SDA Agreements

78. The SDA negotiated agreements approved by the Fair Work Commission, or certified, lodged or approved by its predecessors, are currently maintained. This includes the agreements described earlier in this submission.

79. We have had the benefit of obtaining a simple picture of the scale of minimum wages currently not paid which would largely be rectified by the amendment. This is by way of analysis of rosters, timesheets, payslips and other documentary materials provided by workers or produced as evidence. These do not consider overtime pay not paid. For various reasons, RAFFWU considers these estimates conservative.

(a) In the Coles case[2], Coles was ordered to produce rosters of a Victorian metropolitan store and a Victorian regional store. Coles chose the stores and the stores have fewer hours worked during penalty rate times than many others. Even then, the loss experienced by workers is substantial. In that case, analysis of the conservative rosters at the smaller of two Northcote Plaza stores for non-casual workers showed an average loss of $1 695 per annum for 31 of 49 workers. Extrapolations in that case were never challenged with evidence by Coles or SDA despite the information being readily available to the employer. Extrapolating the loss across all Coles non-casual workers results in a loss of **over $53 million per annum**. This is a conservative estimate because the rosters were of a store with substantially limited penalty rate time work.

(b) At Hungry Jack's, wage analysis of a Melbourne metropolitan store using rosters and timesheets identified an approximate annualised loss amongst two thirds of the staff of over $1 700 per annum.[3] Extrapolating across 18 000 "crew members" results in an estimated loss of **over $20 million per annum**.

(c) At Woolworths, roster, timesheet and payslip analysis of a Melbourne store identified two thirds of workers were earning, on average, over $1 000 less than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* in the award.[4] The store is small and has narrower opening hours than most Woolworths stores. Extrapolating the lost wages across Woolworths stores provides an estimated loss of **over $65 million per annum.**

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[2] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887

[3] See http://www.smh.com.au/business/workplace-relations/sold-out-quarter-of-a-million-workers-underpaid-in-union-deals-20160830-gr4f68.html

[4] http://www.abc.net.au/news/2016-06-01/woolworths-pay-negotiations-in-spotlight-following-coles-deal/7466768 and http://www.smh.com.au/business/workplace-relations/sold-out-quarter-of-a-million-workers-underpaid-in-union-deals-20160830-gr4f68.html

(d) At McDonald's, roster, timesheet and payslip analysis of a Sydney store identified two thirds of workers earning, on average, over $1 000 less than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* in the award.[5] Extrapolating the lost wages across McDonald's stores provides an estimated loss of **over $60 million per annum.**

(e) Investment bank analysis of Domino's Pizza estimates the lost wages at **$32 million per annum**.[6]

(f) Many other SDA negotiated agreements are maintained which continue to pay less than the full rate of pay under the award, and thus do not ensure a *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions under the NES and awards.*

80. When conditions revert from an SDA agreement back to the award, the pay benefits can be substantial. The Tasmanian Hungry Jack's experience is a simple example. Another is the occasion of the quashing of the Coles 2014 agreement which put delivery drivers back on the award. Many drivers experienced substantial wage increases.[7]

81. SDA has a less known practice of cutting junior rates and casual loadings below the award minimum. For example, the Coles 2014 agreement paid 17 year old staff 55% of the adult rate whereas under the award it is 60%. The agreement also paid 18 year old staff 67.5% rather than the award 70%. Casual staff were paid a 20% loading rather than the award 25%.

82. These cuts are common in a number of SDA negotiated agreements. At Coles, the Fair Work Commission extracted undertakings in 2015 which Coles has chosen to keep in place today. The effect of those undertakings was to increase the casual rate to 25%, and the 17/18 year old rates to the award percentage. However, Woolworths has not made any such commitment and continues to pay the lower casual and junior rates, negotiated with SDA below the award percentages, further discriminating against these staff.

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[5] See http://www.smh.com.au/national/maccas-pay-work-with-the-lot-hold-the-penalties-20160519-goyoi4.html and http://www.abc.net.au/news/2016-05-20/mcdonalds-giving-workers-a-rotten-deal,-says-nteu-officer/7431168 and http://www.smh.com.au/business/workplace-relations/hamburgled-mcdonalds-coles-woolworths-workers-lose-in-union-pay-deals-20160518-goycw5.html

[6] http://www.theage.com.au/business/workplace-relations/dominos-pizza-workers-losing-millions-in-union-deal-without-penalty-rates-20160705-gpyzpf.html

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

Partial SDA Arrangements

83. Some employers maintain partial arrangements with SDA while pursuing a non-union route having learned the craft of implementing agreements which cut conditions and maintaining those agreements.

84. For example, IGA has a large number of stores working under SDA agreements while also having a large number of stores working under a non-union agreement. The *Morgan's Group* for example has an SDA agreement purportedly covering at least some of its staff originally employed at its Meadow Heights store, and two other non-union agreements.

85. The IGA network is well aware of the section 206 loophole with the Master Grocers Association boasting in its June 2014 magazine:[8]

> *MGA Legal and HR Services has received many calls from members recently enquiring as to their options regarding their workplace Enterprise Agreement/Collective Agreement which is approaching or has reached the nominal expiry date.*
>
> *The short answer for members is that there is no need to take any action to replace or terminate the agreement.*
>
> ***If your agreement has favourable penalty rates in comparison to the GRIA (e.g. 50% penalty rate on Sundays or no evening penalty rates Mondays to Fridays), then financially you may well be better off to remain with the agreement.***
>
> *Unless your agreement has expired and employees take the necessary steps to have it terminated, there is no obligation to renegotiate or switch across to the GRIA.*
>
> *Members wishing to retain their agreement, after its expiry date, simply need to ensure that the ordinary rates of pay for all employees (including juniors) under the agreement do not fall below the corresponding rates under the General Retail Industry Award (GRIA).*
>
> *Provided the ordinary rates of pay at least match the corresponding rates under the GRIA, you can continue to apply your agreement with respect to breaks, allowances, penalty rates etc.*
>
> *It should be noted that even if you decide to remain under your current agreement, even after the expiry date, an employee may make an application to the Fair Work Commission to terminate the agreement just as you, as an employer, may make a similar application.*
>
> Emphasis added

86. Many similar examples exist in the franchise industries, including Subway where numerous franchises have established agreements which pay less than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions*. These approaches appear to have been learned from earlier SDA negotiated Subway agreements.

[8] See Page 31 at http://www.mga.asn.au/files/ycyriffghy/IR_June_2014.pdf

87. The wage loss identified at Morgan's Group is difficult to extrapolate across IGA as there is no clear information of the employment arrangements in place at the 1400 IGA stores. Many stores have SDA agreements which strip all weeknight and Saturday penalty rates, and halve the Sunday penalty rate. Others strip all penalty rates – arguably for what once may have been a higher base rate of pay but which has been overtaken by the base award rate with time.

88. Even a conservative estimate of 400 stores affected with 25 workers on average losing $2 000 would still result in $20 million per annum in lost wages.

Structured Non-Union Arrangements

89. In addition to the arrangements which rely on or were learned from SDA, a large number of agreements have been made without any organisation of employees involved.

90. 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.

91. A wage analysis prepared by RAFFWU from rosters for a Bakers Delight store comparing the full rate of pay under the award with the wages paid purportedly under a 2011 agreement identified ten of twelve shop assistants were being paid substantially less than the full rate of pay under the award.

92. In our experience, the use of such "zombie" agreements by Bakers Delight and its franchisees is endemic. Many of the agreements follow a similar pattern, including company managed agreements which purport to cover a series of franchisees. RAFFWU has been contacted by many Bakers Delight workers across many stores with similar experiences as those identified in the wage analysis.

93. In our experience, Bakers Delight shop assistant staff are overwhelmingly women, overwhelmingly under 21 years of age and, despite many being employed as non-casual part-time, are overwhelmingly without structured or minimum hours per week. It would appear Bakers Delight relies on these arrangements to avoid action to terminate agreements. That is, it relies on a young and vulnerable workforce to maintain conditions well below the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions*.

94. This "systemic structured approach" would also apply to the use of labour hire firms which essentially only offer the opportunity to employers to engage workers at arms length and at rates lower than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions*.

Overall conclusion

95. The scale of wages lost due to agreements which pay much less than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* is impossible to quantify. It is well over $300 Million per annum and likely to be in excess of $500 Million per annum.

96. To avoid doubt, this submission has focussed largely on paid rates compared to award rates. In reality, many employers pay above the agreement wages where the agreement expired some time ago. For example, Hungry Jack's pays 6% above the award base rate of pay despite the agreement not providing for that salary. Coles continues to pay under its abolished 2014 agreement at 2016 rates. Woolworths has paid administrative increases since its agreement expired. If the true comparator was the actual agreement rates, since it is the enforceable instrument, the *potential* wage loss is substantially higher than the company based estimates in this submission.

97. We know that workers are entitled to a far lower hourly rate of pay on a Saturday or Sunday than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* established in the relevant Award at most, if not all:

    (a) Woolworths, BWS, Big W and Dan Murphy's stores;

    (b) Coles, Kmart, Liquorland, Officeworks and Target Stores;

    (c) McDonald's stores;

    (d) Hungry Jack's, KFC and Red Rooster stores;

    (e) Domino's Pizza outlets; and

    (f) IGA stores.

98. In most cases casual workers are also worse off on weekends. Often weeknight and shift rates of pay are also substantially lower for non-casual workers than award rates of pay.

99. On the basis of known rosters, payslips, timesheets and other documentary analysis we know the wages lost can be over $10 000 per annum.

100. We know that workers are entitled to a far lower hourly rate than the full rate of pay under the relevant award at many other employers. Due to the complex corporate veil and limited agreement information, we cannot identify them all but they include:

    (a) HRO Initiatives Pty Ltd (labour hire to kikki.K and others);

    (b) Bakers Delight outlets; and

(c) Subway outlets.

101. No doubt there are many other employers involved in this practice.

102. Many of 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. The payment of wages at rates lower than the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* established in the award is being inflicted upon some of Australia's lowest paid, youngest, most vulnerable, often women workers.

103. In 2015, the McDonald's agreement covered almost 100 000 workers, 80% of whom were under 21 years of age and 74% were employed on a casual basis.

104. In 2012, a third of Woolworths 96 000 staff were employed on a casual basis, 43% were employed on a part-time basis, one third were under 21 and 60% were women.

105. The arrangements described in this submission also impose an unfair competitive advantage against employers who do ensure the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* established in the award are paid.

106. This exploitation must not be permitted to continue. The Fair Work Act was established with its specific objects and the amendment should be implemented expeditiously to ensure the *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions* applies to these workers.