

9 April 2009

Mr J. Carter
Committee Secretary
Senate Standing Committee on Education,
Employment and Workplace relations
PO Box 6100
Parliament House
Canberra. ACT 2600

Dear Sir

Submission by Yum! Restaurants regarding the Transitional Bill

- 1 Yum! Restaurants Australia Pty Limited ('Yum') seeks to make the following submissions in relations to enterprise award-based instruments dealt with in Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* ('the Bill').
- 2 Yum asks the Committee to recommend the following:
 - 2.1 that an application should be able to be made for the modernisation of an enterprise award from 1 July 2009, not 1 January 2010 as provided in item 4(3)(b) of Schedule 6 to the Bill;
 - 2.2 that the terms of proposed section 143(8) (item 25 of Schedule 6 to the Bill) or section 143A (item 26 of Schedule 6 to the Bill) be amended to make it clear that managerial employees under enterprise awards can be excluded from the modern industry awards;
 - 2.3 that the Minister express the same intentions for the modernisation of enterprise awards that she expressed in relation to award modernisation generally, specifically that there be no increases in costs to employers or disadvantage to employees as a result of the modernisation process; and
 - 2.4 that the same considerations that have applied to award modernisation generally, such as these set out in section 576A of the *Workplace Relations Act 1996* (Cth) ('the Act'), should apply to the modernisation of enterprise awards. In particular, Fair Work Australia ('FWA') should not be required to set conditions in an enterprise award by reference to the modern award or on the basis of competitiveness between employers in an industry (as contemplated by item 4(5)(b) and (f) of Schedule 6 to the Bill).

Yum

- 3 Yum owns two brands operating in Australia: KFC and Pizza Hut. Yum operates some outlets and other outlets are franchised.
- 4 Approximately 32,000 people are employed in KFC and Pizza Hut in Australia.
- 5 Yum and its franchisees, in the main are covered the Pizza Hut SDA National Employee Relations Award and the KFC National Enterprise Award.
- 6 Yum made a submission to the Senate Committee's Inquiry into the Fair Work Bill requesting the ability for these awards to be able to cover all current and future outlets. The Committee in its Report on that Bill notes the Governments commitment to the continuation of such awards (see paragraphs 11.38 and 11.40).
- 7 Yum acknowledges that the Transitional Bill's recognition of enterprise awards and the ability for those enterprise awards to apply across the brand, and views this as a positive step forward. There are a number of aspects of the Transitional Bill, however, that are problematic for Yum and which we believe could be improved.
- 8 Before dealing with these suggestions it is useful to give a background to our enterprise awards.
- 9 KFC and Pizza Hut commenced in Australia in the early 1970s. Quick service food chains were a new industry which was not dealt with in existing awards. There were awards which applied to restaurants and shops but these awards did not reflect the operational requirements of KFC and Pizza Hut or the circumstances of the employees they engaged and trained (mainly young people).
- 10 KFC and Pizza Hut in partnership with the SDA took steps to move towards national awards and agreements and also to effect single union coverage.
- 11 When enterprise based awards and agreements were provided for in Labor's *Industrial Relations Act 1988* (Cth), Yum and the SDA took the opportunity to formally reflect these arrangements in awards and agreements approved by the AIRC. These Awards have always been kept up-to-date and been reviewed by the AIRC in line with legislative requirements. Further, the original instruments and any changes to those instruments have been made with the consent of the SDA.
- 12 Over the years, these awards and agreements have continued to develop into the modern instruments they are today. The point we make is that Yum and the SDA have been ahead of their time with the development of these

enterprise based instruments. These instruments are reflected in, and are integrated with, the business models that have developed and in the way our employees work. These modern ways of working have in turn provided a platform for continued job creation.

- 13 Yum's position was complicated by the changes to the Act in 2006 which meant that when a business changed hands, they would lose coverage of the KFC and Pizza Hut Awards. These businesses were left without award coverage but, as a practical matter, have generally observed the KFC and Pizza Hut Awards. If these businesses are not able to be covered by their brand awards, they may be covered by the modern Fast Food Industry Award being proposed by the AIRC. This award has very different conditions to the enterprise awards and would have to result in these businesses operating in a very different way and at significant cost.
- 14 A further complication arising from these changes is that these Awards could not be extended to apply to any new outlets .Given that Yum intends to continue to expand and plans to employ 5,000 new employees, it does not want to be in a position where it would not be able to employ staff under its current enterprise award arrangements.

Coverage

- 15 Item 25 of Schedule 6 to the Bill seeks to amend section 143(8) of the Fair Work Act. It states:
 - (8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*), or employers in relation to those employees.
- 16 The problem with this provision is that while it excludes enterprise award based instruments from coverage by other modernised awards it does so only in respect for those employees which are covered by these enterprise instruments. This causes two problems for Yum.
- 17 Firstly, those KFC and Pizza Hut outlets that have lost award coverage under the enterprise award due to transmission of business, or that are new outlets, will not be covered by the Award. Accordingly, as at 1 January 2010 they will have to observe the modern Fast Food Industry Award rather than the KFC or Pizza Hut Award.
- 18 We believe that this problem could be addressed by bringing the date for making applications to modernise enterprise awards forward to 1 July 2009.

- 19 Secondly, managers in KFC and Pizza Hut have not traditionally been award covered (having regard to the nature and seniority of their role). These managerial employees may become award covered because the modern Fast Food Industry proposed by the AIRC covers managers. As a result KFC and Pizza Hut outlets may have to observe the different conditions of the modern Fast Food Industry Award in respect of their managers and their enterprise awards in respect of other employees.
- 20 We believe that such a result is unintended and could be rectified by amending proposed section 143(8) (Item 25 of Schedule 6 to the Bill).

Date of Application

- 21 Item 4(3)(b) of Schedule 6 of the Bill does not allow an application to be made for the modernisation of an enterprise award prior to 1 January 2010. We seek that this date be brought forward to 1 July 2009.
- 22 Uncertainty about future industrial arrangements makes it difficult to run a business.
- 23 Most of our franchisees, particularly in Pizza Hut are very small businesses and owner operators who have invested much of their life savings into purchasing the outlet. They generally operate on very low margins and a number have gone out of business over the last few years. The major changes that would be required for them to move from the enterprise award to some other instrument and the costs involved could threaten the viability of many of these franchisees, and weighs heavily upon any decisions about further investment and hiring staff.
- 24 For Yum, it is difficult to plan a major future expansion unless there is certainty about the industrial arrangement applying to new stores.

Managerial Employees

- 25 The KFC and Pizza Hut Awards have never covered managerial staff, and the SDA has never sought that they be covered by the Award, or for that matter any Award, in all of the time we have negotiated and worked with them. We regard our managerial employees as being true managers and not just supervisors. This is reflected in their remuneration arrangements and other conditions of employment, as well as in the responsibility we vest them with.
- 26 We are concerned that an unintended consequence of award modernisation is that award coverage may be extended to our managerial employees. Not only would this disturb current mutually acceptable arrangements, it would create the unsatisfactory result that managers may be covered by the industry award and other employees by the enterprise award

27 Because the enterprise award does not apply to managers, it may be arguable, in the new industrial relations environment, that claims could be made that the industry award would apply to them when it comes into force on 1 January 2010. This is further exacerbated, due to the expression of the enterprise awards exemption provision in proposed section 143A(8) in the Bill. The problem with the expression is that it only limits the application of the modern enterprise award to those employees covered by the enterprise instrument. Given that managerial staff are not 'employees to whom the enterprise instrument applies' there could be a claim that they may not be exempt from industry award coverage. This is likely to increase disharmony in the workplace.

28 Such a result is unlikely to have been the Government's intention having regard to paragraph 2(a) of the Minister's Request that award modernisation not extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This intent is also clear in relation to enterprise instruments. Item 26 of Schedule 6 to the Bill (proposed section 143A(8)) states:

(8) *A modern enterprise award must not be expressed to cover classes of employees:*

who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

29 We ask that the Bill make it clear that the coverage of non-enterprise based modern awards not extend to:

29.1 an employer bound by an enterprise instrument with respect to any employee who is covered by the enterprise instrument; or

29.2 any managerial employee of an employer bound by an enterprise instrument or any employee who would be covered by the enterprise instrument if not for the existence of an exception or exclusion provision within the terms of the enterprise instrument.

30 We believe that this could be achieved by amending proposed section 143(8) or 143A(8) in the Bill.

Modernising "Enterprise Awards"

31 We are concerned that modernising awards will mean that our awards are made so much like the industry award that any practical benefit from having an enterprise award will be lost. For example, in determining the terms of a

modern enterprise award item 4(5)(b) of Schedule 6 to the Bill requires FWA to have regard to modern industry awards and item 4(5)(f) of Schedule 6 to the Bill requires a consideration of competitiveness as between businesses covered by modern industry awards and enterprise awards. Further, rather than stating that it is intended that costs not be increased by modernisation, item 7 of Schedule 6 of the Bill simply provides for the phasing-in of increased entitlements.

- 32 This seems to differ to what was envisaged in the *Forward with Fairness – Policy Implementation Plan*:

Labor understands that enterprise awards have special status. Many enterprises have worked for years to get their enterprise award in a shape that suits their business. Consequently Labor guarantees that enterprise awards will continue. Labor will instruct the Australian Industrial Relations Commission to only review enterprise awards where requested by current parties to the award. (at page 16)

- 33 If ‘modernisation’ meant that enterprise award had to line up with industry awards this guarantee would be compromised.

- 34 Any confusion regarding the meaning of modernisation could be avoided if the modernisation of enterprise awards was subject to the same request as the Minister gave to the AIRC for award modernisation generally, that is the creation of modern awards is not intended to:

- (1) Extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free...
- (2) Result in high-income employees being covered by modern awards;
- (3) Disadvantage employees;
- (4) Increase costs for employers

- 35 There should be no reason why these same considerations should not govern the modernisation of enterprise awards.

- 36 Modernisation in the context of enterprise instruments, should be understood to have its ordinary meaning, that is as comprehending bringing the award up to date and making it contemporary, obliging FWA to ensure that awards are made consistent with the current statutory framework. For example, an enterprise award would have to be modernised by changing it so that it did not deal with matters covered by the NES and otherwise reflected the new statutory scheme

- 37 Award modernisation should not, however, be a means to overcome the consequences of earlier bargains made between the parties to an award or a device available to an award party to avoid the proper burdens involved in bringing a contested application to the Commission for the making or variation of an award in the normal way. This is consistent with the approach of other industrial tribunals when modernising awards: see *Principles for the Review of Awards decision* [1998] NSWIRComm 61 and is consistent with the AIRC's approach to award modernisation generally.
- 38 Federal enterprise awards have been subject to all the same requirements as any other federal award both in terms of legislative requirements and adherence to the AIRC's Wage Fixing Principles. Accordingly, like with modernising federal industry awards, there should be no presumption that there should be any changes to wages and conditions when modernising federal enterprise awards.
- 39 Item 4(5)(f) of Schedule 6 to the Bill is particularly peculiar in the context of a modern economy as it requires FWA to determine how competitive a business under an enterprise based instrument is as compared to businesses under other instruments. As explained in the paragraph 259 of the Explanatory Memorandum to the Bill, FWA will be able to inform itself in such manner as it considers appropriate as to how competitive a business is allowed to be with their industrial instruments including consulting with persons other than these covered by an enterprise instrument. For example:

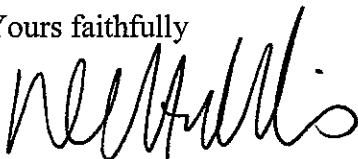
" when considering whether to modernise an enterprise instrument and, if so, the terms that it may include in a modern enterprise award, FWA may consider it appropriate to consult with and receive submissions from other businesses operating in the same industry. "

Awards should not be determined having regard to the level of competition between enterprises in an industry but should simply set a fair safety net of wages and other employment conditions. Further, such a provision seems inconsistent with the general encouragement of enterprise based arrangements in the Government's approach to the legislation.

Conclusion

- 40 Yum regards the Bill as a good step forward in acknowledging the place of enterprise awards in the new legislation and hopes that our suggestions assist the Committee in its consideration of the Bill.

Yours faithfully



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