Retail and Fast Food Workers Union

Submission

Submission to the Senate Education and Employment Legislation Committee inquiry into the provisions of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

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 industries. The Union launched in November 2016 following the exposure of widespread wage theft and rights stripping in the retail and fast food sectors. The Union has approximately 3000 members across the country and employs workers in most states.

2. The Union has been responsible for returning almost a billion dollars per annum in penalty rates, casual loading, higher junior rates, overtime rates and other rights in its short life. RAFFWU has led campaigns and litigation which has fundamentally altered the workplace experience for many retail and fast food workers. In 2020, the Federal Court of Australia found RAFFWU acted in the national interest when it said in *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd (No 2)* [2020] FCA 1644 at [66]:

> *"**Ms Staines and the Union have each well-served the public interest. That is not an abstract concept.** All Australians have an interest in the conduct of industrial relations, including the employment of workers, according to law. Parliament has provided for civil penalties to be imposed for contraventions of the FWA. Under our system of justice, part of Australia's constitutional inheritance from the United Kingdom, the courts are adversarial, not inquisitorial. That means that the power to impose civil penalties where contraventions are proven only falls for its exercise when a proceeding is instituted. Public resources allocated to police the FWA are limited. The financial ability of an individual worker to police a perceived contravention of the FWA is also in most cases limited. Workers, collectively, via a trade union, are thereby better equipped to do this. **The policing by trade unions of compliance with industrial laws is a longstanding, legitimate role of trade unions. This does not just serve the interests of the particular workers concerned, or the trade union. It serves the national interest.** As a study of the judgments of this Court discloses, there are occasions, for cause, when the Court has been adversely critical of the conduct of particular trade unions. **It is just as important and necessary that the service of a trade union of a national interest be noted. For that reason, I conclude these reasons for judgment by recognising the service to the national interest by the Union in the circumstances of the present case.**"*
>
> (emphasis added)

3. That case involved prosecuting a major McDonald's franchisee for coercion of children and established the workplace right for Australian workers to have reasonable access to toilets and drinking water at work.

4. More information about RAFFWU is available on its website www.raffwu.org.au

5. We welcome the opportunity to make a submission to the Inquiry and thank the Senate Education and Employment Legislation Committee for its invitation on 9 November 2022

to make this submission.

6. We note that we have made earlier submissions to the inquiries of senate committees into *Corporate Avoidance of the Fair Work Act*, the *Pay Protection Bill*, *Penalty Rates*, *Unlawful Underpayment of Employees' Remuneration* and the *Omnibus IR Legislation*. Those submissions dealt with many of the common issues affecting workers employed in the retail and fast food sectors.

7. In this submission we build on the investigative work of RAFFWU and lend a critical analysis of how the legislation is targeted at specific issues not identified in the material accompanying the proposed legislation. We implore the Committee to gaze beyond the echo chamber of groupspeak which has perpetuated myths and identify the true basis for the proposed attacks on low wage retail and fast food workers.

8. This submission focuses on critical areas and does not deal with all issues. As noted by many, we have had less than two weeks since the legislation was announced to prepare this submission. We published comments about the changes on 1 November 2022 and acknowledge *some* amendments published late on 9 November 2022 are directed at our comments.

9. This submission attempts to manage the hundreds of pages of proposed legislation for which we had 14 days, and dozens of pages of amendments for which we have had less than 2 days. We acknowledge there simply has not been a fair and reasonable opportunity to properly analyse the legislation and potential impact.

10. The short timeframe also means our capacity to draw on the lived experience of our members is limited. Since so much of the attacks on workers contained within the Bill are directed at retail and fast food workers those workers should have been given much more time to properly inform the Committee, **through** their lived experience, how the Bill will impact them.

11. As well as a range of proposed recommendations, this submission calls for the abandonment of all amendments to the application of the Better Off Overall Test ("BOOT") at the time an Application for Approval of an Enterprise Agreement is made.

Orwellian Title of Bill

12. We note the title of the Bill purports to centre "secure jobs" and "better pay".

13. Despite this, the Bill does nothing positive for workers engaged in casual employment.

The Bill should contain provisions proscribing the use of casual employment by Australian employers.

14. Casual employment should be prohibited. This exploitative form of employment denies workers dignity at work and fairness in conditions.

15. Combined with other forms of workplace exploitation, such as poverty 'junior' rates, casual employment is used to exploit the young. For example, RAFFWU exposed[1] in 2018 that McDonald's relies on casual employment to "churn" its young workforce and maintain a perpetual poverty wage system whereby more than 80% of the greater than 100,000 workforce is under 21 years of age and more than half are child labourers. Massive profits are derived for the wealthy from this exploitation.

16. There is no place for systemic, regularised casual employment in a modern democracy.

17. The exposure by RAFFWU of the exploitative system used at McDonald's occurred in cross-examination by RAFFWU of a major McDonald's franchisee giving evidence for AIG in its attempt to undermine job security in the Fast Food Industry Award.

18. The transcript[2] shows:

PN1276
Isn't age a critical determinate for rosters as well?---Yes.
PN1277
Have you ever heard of the phrase "learn or churn"?---Yes.
PN1278
And what do you understand it means?---I've heard it but I don't really - I don't know, learn or churn. Learn - - -
PN1279
Well, let me put a couple of propositions to you then?---Sure.
PN1280
That the first part of that, learn, is about McDonald's encouraging its employees to learn more about the business and one day take up a role as a manager?---Sure.
PN1281
And the churn is about turning over employees as they get older and more expensive. Is that reasonable? What you understand learn or churn to be?---Sure.
PN1282
The cost of labour is a significant issue isn't it?---Yes.
PN1283
And younger workers are cheaper aren't they?---Yes.
PN1284
And you rely on being able to roster younger workers?---Yes.
PN1285
As they get older you need to be able to roster on younger workers than the older workers?---Yes.

[1] See Transcript in proceeding AM 2017/49 on 16 July 2018 at PN1276 to PN1295 and report of ABC 7:30 Report at https://www.abc.net.au/7.30/mcdonalds-accused-of-churning-and-burning-young/10357384 with video of ABC story available at www.facebook.com/RAFFWU/videos/483931738772472/
[2] See AM 2017/49 on 16 July 2018 at PN1276 to PN1295 available at https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/160718-am201749.htm

…

PN1293
So if a part-timer has set hours of 10 hours a week?---Yes.
PN1294
You just can't roster less than 10?---Correct.
PN1295
So for you to be able to roster fewer hours as they get older they have to have been casual to begin with, don't they?---Yes.

19. Of course, exploitation of workers engaged on a purportedly casual basis takes many forms. The proposed legislation does nothing to address this exploitation and, in fact, introduces new systems of exploitation.

20. Similarly, the Bill will facilitate employers to reduce the real wages of workers. The attacks on BOOT should be entirely abandoned. This is not a Bill which will deliver "Better Pay". The direct opposite will result.

Genuine Capacity to Improve Pay Immediately

21. Parliament can lift the pay of Australia's lowest paid workers through simple, swift action which would overnight return over $3.5 Billion[3] to these workers. Australia's lowest paid workers include an army of young workers – aged 20 or younger – who based on nothing other than their age are paid a proportion as little as 40% of the wage of a person of 21 years of age or older.

22. This rank age discrimination is the worst legislated discriminatory wage stripping in the world. No other nation has a comparable structure.

23. It matters not if the worker is a teenage single mother raising her family or the privileged child of a millionaire. The age discriminatory wage stripping costs the young single mother over $50,000 by the time she turns 21. Over $8,483 per year. The biggest beneficiaries of this wage stripping are some of Australia's largest companies.

24. RAFFWU estimates (based on the analysis of the McKell Institute and our own analysis of member or Fair Work Commission data, information and experience) that the financial windfall derived by junior rates is for:

a) the McDonald's network, over $680 Million per annum;
b) the KFC network, over $290 Million per annum;
c) Coles Supermarkets, over $220 Million per annum;

[3] https://mckellinstitute.org.au/research/articles/the-problem-with-junior-pay-rates-explained/

d) Woolworths Supermarkets, over $270 Million per annum;

e) Kmart (owned by Wesfarmers), over $170 Million per annum; and

f) Hungry Jack's, over $100 Million per annum.

25. These 6 employers/networks alone avoid about half of all wages stripped by "junior rate" exploitation. Immensely profitable companies deriving profit off the exploitation of our youngest workers.

26. The spurious argument that such work is "an opportunity" is easily debunked by comparing the youth unemployment rates in countries which don't have such exploitation. Further, we can only imagine the horror should another discriminatory ground be relied on such as the struggle for workers over 55 to find new work.

27. None of the employers above, and no employer at all in RAFFWU experience, employ *more* workers or engage workers for *more* hours because of junior rate exploitation. Every worker is expected to perform a full amount of work in their paid hours. In fact, often younger workers, notoriously vulnerable, are required to perform ***more work***.

28. In truth, retail and fast food workplaces populate their premises with young workers – not just children – and make enormous profit by way of exploitative wage discrimination. A simple and immediate way to improve wages is to prohibit discriminatory wage payments.

29. We submit the same prohibition on wage discrimination should apply to workers with disabilities with appropriate protections for workers and subsidies for employers to promote employment of workers who are currently subjected to outrageous "Supported Wage Assessments" where the purported productivity of a worker is assessed and their wage diminished simply because they have a diagnosed disability.

30. These two steps could immediately return billions of dollars to Australia's lowest paid workers. A further step would be to direct the Fair Work Commission, through Object and legislative change, to require minimum wages be set at living wages. Nothing in the proposed Bill will improve wages tomorrow or in the near future. Much will reduce the real wages of workers across the coming months and years.

Breaking the Unbroken

31. In May 2015, Josh Cullinan wrote to the Fair Work Commission comprehensively outlining how the *Coles Store Team Enterprise Agreement 2014 – 2017* failed to meet

the Better Off Overall Test. On 31 May 2016 the Fair Work Commission handed down it's decision in the appeal of the approval of that agreement in *Hart v Coles* [2016] FWCFB 2887.

32. That decision did not establish a new precedent or alter the status quo of jurisprudence on the Better Off Overall Test. Far from it. The landmark judgement confirmed the otherwise conspiracy that employers had negotiated agreements with SDAEA which failed the Better Off Overall Test. That was a landmark outcome not because of what it said about the BOOT, but because an individual worker and his representatives had exposed and overturned the greatest wage theft scandal in modern history.[4]

33. In the months after *Hart v Coles*, RAFFWU was launched. Since that time RAFFWU has been responsible for overseeing the replacement or termination of a cascade of agreements which failed to pay workers at least what they would have earned under the equivalent minimum Modern Award and NES.

34. In total, almost half a million workers have had their terms and conditions uplifted from notoriously woeful SDAEA agreements costing employers over $1 Billion per annum.

35. The legislation is entirely directed at returning that $1 Billion to the exploitative employers. This is not polemic or conspiratorial guff. This is the factual situation.

36. The purported "broken system" is anything but broken. In fact, RAFFWU has used that system with maximum effect to deal with the notorious wage theft perpetrated by employers with SDAEA. No agency, authority or Parliament has acted to deal with the wage theft. All action has been pursued by workers and their union in RAFFWU.

37. For example, at Woolworths where the company had deliberately altered its evidence to the Fair Work Commission to disguise workers were worse off and the 2012 agreement failed the BOOT, it was Loukas Kakogiannis, RAFFWU activist and member, who applied to terminate the 2012 agreement with backdated effect. To avoid the multi-billion dollar wage claim of retrospective termination (with evidence showing the employer deliberately altered its evidence before the Fair Work Commission to prevent it becoming aware of the orchestrated wage theft) the company rushed a new agreement to the shopfloor which would return over $200 Million per annum in penalty rates, casual loading, overtime rates and other conditions long denied under successive SDAEA deals.

[4] See Schneiders, B, *Hard Labour: Wage Theft in the Age of Inequality*, Scribe, 2022.

38. At McDonald's it was Xzavier Kelly, RAFFWU activist and member, who applied to terminate the 2013 agreement in 2019 which stripped over 100 000 workers of all weekend penalty rates and smashed other conditions. Just like at Woolworths, SDAEA and the company steadfastly fought that application. By seeing through the application, represented by his union, Xzavier returned over $130 Million per annum in penalty rates, casual loading, overtime rates and other conditions. The termination took effect in February 2020.

39. At Domino's Pizza it was Casey Salt, RAFFWU activist and member, who applied to terminate the 2005 agreement in 2017 which was used to purportedly strip 20 000 workers of all casual loading, all penalty rates and many other conditions. SDAEA had maintained the agreement for 12 years while the company recruited for them. Even at hearing when the company had agreed the notorious wage stripping agreement should be terminated, SDAEA was still desperately demanding the hearing be adjourned and the harm continue to be inflicted on workers. By seeing through her application, represented by her union, Casey returned many millions per annum and numerous superior conditions.

40. Faced with having to pay casual loading for the first time to its delivery drivers, Domino's Pizza mass converted around 10 000 delivery drivers to part-time employment.

41. RAFFWU represented members and participated in many other negotiations since 2017 for new agreements. On every occasion RAFFWU has acted professionally and with the highest integrity. Unlike many employers and SDAEA, RAFFWU has never met in secret. For many employers including McDonald's, Coles, Woolworths, Bunnings, Officeworks, Big W, Dan Murphy's and others, the very first time a worker from the shop floor participated in bargaining meetings was when they attended with RAFFWU.

42. Of course, RAFFWU is eternally criticised by employers **because we have cost them** over $1 Billion per annum in higher wages by returning the minimum. One billion badges of honour for the members of RAFFWU who have built a fighting, militant union unashamedly on the side of the working class.

43. All this is the relevant context for the determination of big business to drive changes to the legislation RAFFWU has so effectively used to drive compliance and restore the conditions stripped and stolen by exploitative employers with their SDAEA. We attach the submission of RAFFWU to the Wage Theft Inquiry for further information about how the BOOT was circumvented in the past.

Amendment to Address Abolition of Obligation to Explain Agreement Terms

44. In the Bill it was proposed to eliminate the direct and express requirement on an employer to take all reasonable steps to explain the terms of a proposed agreement and the effect of the terms. We understand the effect of amendment (29) is to abandon that change. We welcome that recognition of the RAFFWU concern.

The Better Off Overall Test

45. The Better Off Overall Test, or 'BOOT' as it is widely known, is the test applied by the Commission when approving enterprise agreements, where proposed agreements must leave each employee, and prospective employee, 'better off overall' when compared to the relevant industry award order to apply to employees.

46. Under the current legislation, if a proposed enterprise agreement does not leave each employee and prospective employee better off overall, the Commission cannot approve that agreement.[5] In those circumstances, the employer can offer to make undertakings to bring the agreement up to the requisite standard,[6] or otherwise the employees remain on the agreement that is currently in place, or the relevant award.[7]

Not Broken – Big Business and SDA Have Sold a Lie

47. Since 2016, Big Business and their SDA has maintained a fallacy that the BOOT is somehow broken. These oft repeated lies have found their way into folklore. Ill-informed journalists, politicians, business leaders and others have repeated the mantra as if it is a truism. It is not.

48. There is not a single example of the purportedly broken system. We are told that there are fewer agreements now and agreements apply to fewer workers – but that is because retail and fast food employers can no longer negotiate conditions inferior to the minimum Modern Award as we have outlined.

49. That is the truth. That is why this legislation is demanded by Big Business.

[5] See section 186(2)(d).
[6] See section 190.
[7] The exception is the rarely used exemption provision in s 189(2) of the Act where an agreement that does not meet the BOOT may be approved if that approval is not contrary to the public interest because of exceptional circumstances.

50. Perhaps learning from the overreach of the Omnibus IR Bill explanatory memorandum, this Bill's explanatory memorandum only refers to a single example of difficulties with BOOT. That single example is said to be the basis for the wholesale annihilation of the protection which has returned over a billion dollars per year to our lowest paid workers and effectively protected them in almost all scenarios for 6 years.

51. That example is Officeworks. Despite the reference, what happened is not explained. RAFFWU knows what happened because we were there, in the room.

52. Officeworks made an application for approval of an agreement which would return many millions of dollars worth of penalty rates and other conditions thanks to RAFFWU. Officeworks chose not to stipulate in its agreement that it would not require anyone to work in a cold room, work in Broken Hill or hold a liquor licence. That was a choice of Officeworks.

53. The Officeworks application was made on 15 July 2019. The Fair Work Commission asked for a response to the concern (about the three things) on 16 August 2019. Officeworks made its undertaking dealing with those issues on 23 August 2019. It was over. It was of such little consequence to the parties because Officeworks made a simple commitment it wouldn't require those things. It took 7 days.

54. It is worth noting that the employer could very well operate industry nights, external sales events or similar activities in which it could conceivably have required service of alcohol. It could open a store in Broken Hill – like Coles, Woolworths, McDonald's, KFC and other major chains. The cherry picking of an inconsequential issue, dealt with in short form, is base pedantry not worthy of legislative change.

55. However, we expect Big Business or SDAEA has spruiked purported other reasons for changes. None of them are exposed or named. That is because they all fall away under scrutiny.

56. The only reason to attack BOOT is to pay workers less. ALP politicians couldn't have put it clearer in their demands for promises from LNP politicians before the May 2022 election. Every major party made that promise before the election – the BOOT would not be changed. Every employee better off. Any other test is not the BOOT we need.

Bunnings

57. There were many good reasons why RAFFWU did not support the approval of the *Bunnings Warehouse & Smaller Format Stores Agreement 2019*. It was only the

developed, professional approach of RAFFWU, and the determination of the Fair Work Commission, that a wage thieving proposed agreement was exposed as ripping off workers.

58. In truth, the employer observed the opportunity COVID presented to abandon the agreement it made with its employees. It retained its extant wage stealing agreement struck with its SDAEA in 2013 - prior to the launch of RAFFWU.

59. On 24 February 2020, the employer wrote:

> *Once the Commission has sought the bargaining representatives' views, we would appreciate if the Deputy President could confirm whether she is satisfied with the undertakings or whether there are any further issues that need to be addressed in order for the 2019 Agreement to be approved.*

60. On 2 March 2020 following ongoing attempts by the employer to extend and delay the process, the Fair Work Commission wrote:

> *I refer to your email below and confirm that the Deputy President grants the Applicant permission to provide a short note to the Commission, reflecting what Bunnings submits is the proper analysis of the hypothetical scenarios put forward by RAFFWU and the SDA.*
>
> *The Deputy President requires that this be provided by close of business Wednesday, 4 March 2020.*
>
> *Any submissions in reply to this note are to be provided by no later than close of business Friday, 6 March 2020.*
>
> ***The Deputy President confirms that, following the filing of the above, no further submissions will be accepted unless requested by the Commission or permission has been granted for such further filing.***

61. Final reply submissions were filed on 6 March 2020 and the decision of the Fair Work Commission was no doubt imminent. The employer had indicated it was prepared to make any minor undertakings the Fair Work Commission deemed appropriate. RAFFWU was in the room.

62. On 18 March 2020 the employer withdrew its application. It did not cite any difficulty with the robust review in which it was participating. It's representative announced:

> *We write to inform you that, due primarily to the uncertainty created by COVID-19, Bunnings is discontinuing its application for approval of the Bunnings Warehouse & Smaller Format Stores Agreement 2019. We accordingly attach a Form F50 - Notice of discontinuance.*

63. The nonsense espoused by Wesfarmers and its spokespeople about difficulties with bargaining or BOOT is self-serving garbage. The agreement withdrawal was to avoid the

impost of the new agreement in circumstances where it wanted to keep its options open – and its inferior conditions in place - as the pandemic took hold.

One Cent Per Hour

64. Retail and fast food agreement cases are complex because they are run on the absolute edge of workers being worse off than under the Award. The employers pay a pittance under their proposed agreements – in the case of Kmart, McDonald's and others, just 1 cent per hour more than the absolute Award minimum – and argue deleterious other conditions should not be considered detrimental.

65. The cases are not about workers being paid 10%, 20%, 50% or 100% more than the Award then quibbling over a small allowance. Workers are usually paid 1% or less more than the Award if the SDAEA is involved.

McDonald's

66. We also expect the lobbyists of McDonald's have been in the halls of Parliament. McDonald's had many flaws in its 2018/2019 agreement and the process which led to its purported making. RAFFWU filed seven witness statements of workers in support of allegations including:

a) The agreement was not explained to workers;
b) Workers were misled about the effect of the terms of the agreement;
c) The NERR was not provided to employees within 14 days;
d) The vote itself was not an optional secret ballot of employees;
e) Employees were directed to vote;
f) Some employees were unable to cast a vote;
g) The website of the vote was unavailable for significant periods;
h) The website of the vote would only accept 'yes' votes for significant periods;
i) The website of the vote was not secure and suffered from ongoing unauthorised access;
j) The agreement failed the BOOT on numerous fronts (nine named by RAFFWU); and
k) More than 20 000 workers, over 40% of the workforce, voted against the agreement.

67. RAFFWU understands the no vote – led by RAFFWU and supported by thousands of young workers – is the largest vote against an enterprise agreement in Australian history. This was despite all the barriers put before workers. Of course, the evidence impugned

the employers and rather than test that evidence at hearing the employer withdrew its rotten agreement made with its SDAEA.

Kmart

68. Since Wesfarmers is oft quoted on these issues, we expect Kmart is also an example pressed for change but devoid of truth. The Kmart agreement did not pass the BOOT and was properly tested by the Fair Work Commission – including at the insistence of RAFFWU. Kmart had benefited from an extant agreement which paid workers far less than the minimum Award for years.

69. Workers were entitled to an agreement that passed BOOT. The 2019 agreement did not. Even on appeal the agreement still required substantive undertakings to be made to pass BOOT.

70. Criticism directed at the Fair Work Commission or RAFFWU is so misplaced in the Kmart case that it beggars belief. The employer made 8 (eight) statutory declarations in support of its application including by changing the evidence across the course of the proceeding. That complex case analysed an agreement which paid a pitiful and miniscule 1 c per hour more than the minimum Award, and which failed the BOOT. The current system works.

Summary of proposed changes to the BOOT

71. The Bill proposes to, relevantly, make the following changes to the BOOT:

a) Remove the requirement for the Commission to consider prospective employees who may be engaged under the proposed enterprise agreement;[8]

b) Deem that the requirement for the Commission to consider whether each employee will be 'better off overall' compared to the relevant award will be by a flexible 'global assessment', whereby the more beneficial terms, and less beneficial terms are considered holistically to form the requisite view;[9]

c) Gives primary consideration to the 'common view' (if any) of the employer bargaining representatives and registered organisations who are bargaining representatives as to whether the agreement passes the BOOT;[10]

d) Mandates that the Commission may only consider the patterns or kinds of work, and types of employment, of employees that are reasonably foreseeable at the time of the application when determining if the agreement

[8] Clause 526.
[9] Clause 528.
[10] Clause 528, section 193A(4).

passes the BOOT; and,[11]

e) Provide a mechanism where an employee, registered organisation, or employer may apply to the Commission to have the agreement subject to undertakings or amended if it no longer meets the BOOT after approval, because the work arrangements or kinds of work in the agreement have since changed.[12]

72. The proposed changes will:

a) Allow agreements to be approved that leave workers worse off than the award if the employer's operations or work arrangements change during the life of the agreement.[13] For example, where an employer changes its hours of operation, schedules workers in different ways or opens new locations in ways that are not known by the Commission at the time of approval.

b) Allow agreements to be approved where prospective employees are worse off in comparison to the award. For example, an agreement could include clauses intended to overcome a substantial detriment that are limited to employees at the time of approval, that provide that those employees will always be paid above award, or special extra payments, but new employees would be excluded. A current employee could be paid a 50% loading grandparented to that employee to cover all penalty rates foregone and a new employee could receive no penalty rate or casual loading. The Commission could not consider those prospective employees under the proposed changes and be required to approve the agreement despite these glaring faults.

c) Allow agreements to be approved that leave workers worse off compared to the award, particularly with regard to terms that go to employees' working conditions and quality of life, such as rostering practices and ordinary working hours, as part of the proposed 'global assessment'. The current better off overall test requires every employee and prospective employee be considered to be better off which is well understood to not allow non-financial benefits to offset actual minimum wages, so the new 'global assessment' appears to deliberately weaken the current standard.

d) Limit the Commission's scope to determine whether the agreement passes to the consideration of patterns or kinds of work that are 'reasonably

[11] Clause 528, section 193A(6).
[12] Clause 534.

foreseeable' at the time of approval, which will encourage employers to change their businesses after approval to the disadvantage of workers or simply mislead the Commission as to the nature of whether something is foreseeable. In the past, major retailers and fast food companies have purported certain rosters were representative for the purposes of the BOOT, which they knew were not representative at all.

e) Platform the view of the SDAEA in determining whether the agreement passes the new test. In practice, very few employers have a bargaining representative and so "primary consideration" would be left only to views of the SDAEA.

f) Provide an avenue for an approved agreement that no longer meets the test to be reconsidered through a complex case but only in circumstances where the work arrangements or kinds of work contemplated in the initial approval application have since changed, or a new employee has been employed who is inflicted with different conditions to earlier employees.

73. These changes will see very many low paid workers earn even less. We have seen it before. We have lived experience of how a weaker test than the BOOT delivers woeful, exploitative, wage stealing outcomes for our lowest paid.

74. RAFFWU calls for all BOOT changes to be abandoned. They are based on a fallacy. They will cost millions of workers, billions of dollars.

Better Off Overall Test – Every.Employee.Better.Off. No More

75. As explained above, the Better Off Overall Test is simply not broken. The proposed changes will enable the approval of an enterprise agreement that would have previously failed the Better Off Overall Test. That is its purpose.

76. The destruction of BOOT is secured by two main means.

Patterns & Types of Employment

77. The first is the explicit limitation on the Fair Work Commission considering relevant matters. The second is the exclusion of prospective employees altogether from the test (discussed further below.) These changes go further than the Omnibus IR legislation rejected during the last Parliament.

78. Patterns of work, kinds of work and types of employment are all dealt with in Modern

Awards. The proposed legislation would place an onus on an objector to identify how such a pattern or kind of work, or type of employment, is reasonably foreseeable. An employer **only** proposes an agreement which undermines the Award because it may seek to exploit that change in the future. That is, an employer has no purpose in cutting a Sunday penalty rate if it doesn't use Sunday work. It wouldn't seek to cut the rate. It would just include the Sunday rate.

79. The change will turn this simple logic on its head.

80. For example, take a major fast food company that didn't employ workers on a casual basis. Until recently, a major fast food company in Australia did not employ any or many employees on a casual basis. It could make an enterprise agreement and pay no casual loading. It could say it doesn't intend to ever employ workers on a casual basis. We know of at least one Fair Work Commission member who would describe that it is ***not*** reasonably foreseeable that casual (type of) employment will be used. Therefore, that Commissioner would not be permitted to have regard to the issue.

81. It is clearly preposterous. Appeals and judicial reviews will be waged on what "reasonably foreseeable" means.

82. We anticipate employers will lead evidence, hand on heart, saying they didn't reasonably foresee some pattern or kind of work, or type of employment, at the time the application for approval was made. Millions of workers will lose billions of dollars. It has happened in the past and Big Business is desperate for it to happen again.

Prospective Employees

83. Originally the Bill proposed to exclude prospective employees altogether from any consideration in relation to BOOT. The Government amendment tries to overcome the justified criticism of this attack on our lowest paid workers by shunting their situation into its 'reconsideration mechanism'.

84. It is reiterated "prospective employees" in Australia's lowest paid workplaces – where BOOT is most important – are often:

a) young, including many children;
b) in their first employment;
c) insecurely employed, particularly in casual employment; and/or
d) migrant workers.

85. For example, of the McDonald's networks over 100,000 workers in Australia:

a) Over 85% are employed on a casual basis;

b) Over 50% are 13 to 17 years of age;

c) Over 80% are under 21 years of age;

d) The average length of service is 1.6 years; and

e) Annual churn/turnover is almost 50%.

86. The amended Bill would have these workers be responsible for mounting complex legal cases to remedy an agreement which, on the current law, would have simply failed BOOT. These workers could be being paid as little as half the Award wages – which themselves might be 40% of a full 'adult' wage – while they run that complex legal case.

Reconsideration Mechanism

87. The two areas described above are covered by a "reconsideration mechanism" which, at its core, provides for a worker to apply to the Fair Work Commission for a new review and test of the agreement taking into account either the changed types of employment, patterns or kinds of work, or be a new employee with inferior conditions imposed on them compared to the original employees when the agreement was first tested.

88. That reconsideration mechanism would involve overcoming foundational hurdles and be contested by employers and potentially others (such as SDAEA.) Obviously, the application of the mechanism will only occur where there is an argument a worker is having conditions *less than the intended very minimum Award conditions* applied to them. That is, they are necessarily low paid with poor conditions and few (if any) resources.

89. This structure would place the responsibility on very many young, insecurely employed and vulnerable workers to do the task currently managed successfully and without incident by the Fair Work Commission.

90. It is scandalous. It is demonstrably unfair and reeks of an ersatz intent. The true intent is to facilitate the deliberate ripping off of our lowest paid and least secure workers. The authors of the Bill must know workers will not run the cases.

Examples of Worker Led Cases

91. The reconsideration process is not dissimilar to a termination case or the *Hart v Coles* appeal. Of course, they are different cases. However, in each a worker was responsible for mounting a case about the terms of an agreement being less than the minimum. In

Hart it was a BOOT assessment but in the context of an appeal. In a termination case it is not a BOOT assessment but the detriment experienced by employees was a relevant consideration.

92. In *Hart*, the Applicant, Duncan Hart, was represented by Counsel (Siobhan Kelly) and an experienced Industrial Advocate (Josh Cullinan). The application for appeal was lodged on 31 July 2015. There followed a series of attacks by the respondent (Coles) and the SDAEA.

93. Many hearings were held, interim decisions issued. Coles was represented by a notorious employer legal outfit, Junior Counsel and Senior Counsel. SDAEA was represented by a law firm, Junior Counsel and Senior Counsel. Character attacks were levelled against Duncan Hart and Josh Cullinan. Photos of Josh Cullinan's children were put into evidence by the employer.

94. Duncan was a low paid employee - paid far less than the minimum Award wage they would have received had the Award applied. Just like around 80% of all Coles employees at the time.

95. Thousands of pages of materials, dozens of emails with parties, many days of hearings, witness examination, cross-examination, lengthy submissions, careful analysis, expert witnesses and more were involved.

96. This was where the Agreement catastrophically left over 60,000 workers worse off. It was stark, obvious and plain. At every stage Coles and SDAEA refused to admit the most blatant of truths. Final hearings were held on 28 April 2016 and the case was determined on 31 May 2016 – 10 months after filing – when the decision in favour of Duncan and tens of thousands of workers was published. Over one thousand hours of skilled Counsel and industrial advocate time was expended on the case by his team.

97. This is what stands in front of every applicant in a case like a reconsideration case.

98. In termination cases, a good example is McDonald's. After an immense amount of careful consideration and information gathering, Xzavier Kelly's application was lodged on 9 May 2019. The first listing was received within a week and the first hearing was on 23 May 2019. There were further hearings on 26 August 2019 and 11 November 2019. It was not until the last hearing that McDonald's admitted the Agreement ought be terminated.

99. Every hour delayed is more wages stolen from workers.

100. Having determined on 11 November 2019 that the Agreement ought be terminated – more than 6 months after the application was made – the Fair Work Commission then gave McDonald's a further 3 months before it would be required to pay the far higher minimum conditions. They did not flow to workers until February 2020 – nine months after the application was made.

101. However, the real issue lies in the cases that are not taken. This is the real clincher with the purported reconsideration process. Lawyers would have us think that these systems are simple and clear. This is a rotten nonsense.

102. The vast majority of workers, including in retail and fast food, do not understand such processes. Hundreds of thousands are employed as casual workers – where their entire livelihood is dependent on not aggrieving their employer. Hundreds of thousands are young workers, in their first employment.

103. Today, every casual employee at Myer is being paid less than they would earn under the minimum conditions Modern Award. This has been the case for a decade or more. It is beyond doubt that an employee with the capacity and wherewithal to terminate the Agreement applying to Myer would directly benefit from that termination.

104. Similarly, the enforceable minimum conditions at Coles Liquorland are well below the minimum conditions of the Modern Award. There are thousands of workplaces across Australia where rotten old zombie agreements *could* be terminated uplifting the conditions of workers substantially. There is a trickle of applications where there ought be a flood.

105. The reason workers at McDonald's, Domino's Pizza, Bakers Delight, IGA, Woolworths, Coles and many others are earning over a billion dollars per year more now in restored conditions is because RAFFWU took those cases for our members. Every one of them was unaware of the exploitation inflicted upon them until exposed by RAFFWU.

106. This isn't "small scale" exploitation either. At Domino's Pizza, delivery drivers were casual, paid minimum wages, without the 25% casual loading, without any penalty rates, without 3 hour minimum shifts and without proper car allowances. Workers were literally underpaid 35% to 75% of the minimum Award wage. Despite this, the conditions were inflicted on workers for years before RAFFWU helped Casey Salt terminate the agreement.

107. The “Zombie Agreement” changes proposed in this very Bill are only required because we know it is not reasonable or fair to expect workers to mount complex legal cases to overturn bad agreements which pay less than the minimum.

Global Assessment

108. The current test is well known and well understood by industrial participants. It provides for an analysis of whether each employee, and prospective employee, is better off overall.

109. The new “Global Assessment” appears to speak to enabling offsetting of conditions on the basis of the discretionary view of each Commissioner. This kind of ‘rewriting’ can only diminish the rights of workers. No proper explanation is given in the explanatory memorandum as to why this change is necessary or how it will work in the real world.

110. The system is not broken. It does not need such a change. It will delay agreement making because parties will contest the concept over the coming years – including in the Courts. It will waste the time of industrial participants, the Fair Work Commission and the Courts. There is no justification for the change and, as with all BOOT changes, it should be abandoned.

Platforming a Voice

111. The Bill platforms the voice of consensus between registered organisations which are bargaining representatives above all others by forcing the Fair Work Commission to give those voices “primary consideration”.

112. While the Fair Work Commission will need to consider all the materials before it, this escape hatch will no doubt be deployed to platform the voice of SDAEA in the retail and fast food sectors. That is the purpose of the Bill. That purpose is derived from the experience of SDAEA and Big Business whose business model of collaborating to pass agreements which fail BOOT have been smashed by RAFFWU.

113. In a system which provides for employees to choose their representative, in accord with the freedom of choice structure endorsed by the High Court, all workers and all their bargaining representatives ought be properly considered by the Fair Work Commission when making its assessments. This Bill seeks to change that most simple of concepts.

Variations Should Enable Rights for Employees to Bargaining Representatives

114. Changes are proposed which would enable variations to be made to include new employers in multi-employer agreements. These, in addition to all variations to any agreement, should enliven the same bargaining representative rights for workers when negotiating an Enterprise Agreement.

115. These are often complex arrangements which should include simple and clear rights for workers to be informed and to have a bargaining representative of their choice support and represent them through the variation process.

Amendment to Address Repeat Protected Action Ballots

116. In the Bill it was proposed to impose a new requirement that bargaining representatives apply for and hold new Protected Action Ballots more than every three months for a given employer in order to authorise protected action. We understand the effect of amendment (59) is to abandon that change. We welcome that recognition of the RAFFWU concern.

Compulsory Conferences Already in Employer Arsenal – No Basis for New Onus

117. The Fair Work Act already provides for compulsory conciliation processes where bargaining parties have a dispute in relation to bargaining. Those disputes are rarely used by employers because experienced industrial parties – the only parties who have used protected industrial action – engage professionally and responsibly in negotiations.

118. The new requirement of compulsory conciliation conferences over bargaining when workers wish to authorise their own access to protected industrial action is a nonsensical and unjustified further impost on workers, unions and the Fair Work Commission. It is an unfair imposition on time and resources of workers and their unions to access protected industrial action. The requirement should not be included in the Bill.

Protected Action Ballots - Outrageous and Nonsensical Schema

119. The restrictions on workers being able to access protected industrial action in Australia are numerous and unjustified. The entire Protected Action Ballot structure is not just a burden on workers and their unions, but fundamentally nonsensical.

120. The process involves workers *authorising their own action* through a complex ballot

process with mandated steps, opportunity for employer intervention and minimum thresholds. Once authorised, each worker *chooses whether to participate in any action* in any event. The law mandates participation in industrial action is entirely optional. It is ludicrous that workers who do not intend to participate in industrial action can determine whether other workers can even get access to industrial action. Further, it is nonsensical that workers need to authorise their own actions at all.

121. These schema are the core reason why worker wages have gone backwards. The entire Protected Action Ballot system should be abandoned. Workers and their unions ought be able to authorise their own action by simple decision. Workers get to choose whether to engage in any action in any event.

122. Protected Action Ballots are a preposterous relic of big business' desire to limit worker action in pursuit of fair conditions. They have led to the smashing of real wages. Their imposition means Australian workers do not have a right to strike.

Sexual harassment changes

123. Overall the premise of introducing a new prohibition of sexual harassment in the *Fair Work Act 2009* Cth is a good one. The breadth of coverage in section 527D to workers, those seeking to become workers, and persons conducting a business or undertaking for example, is helpfully broad.

124. In order to make the obtaining of stop sexual harassment orders and a finding of liability more achievable for complainants, the Bill should include a reverse presumption that sexual harassment has occurred unless proved otherwise, akin to section 361 of the *Fair Work Act 2009* (Cth). Under a reverse onus, a respondent would be required to show, on the balance of probabilities, that the alleged sexual harassment did not occur or fell outside the definition of sexual harassment.

125. Under the proposed section 527J, the Commission is only empowered to make stop sexual harassment orders if it is satisfied that there is a risk that the applicant may continue to be sexually harassed by respondents. It is difficult for an applicant to prove they may continually be sexually harassed. It will also encourage employers to simply transfer perpetrators to other work locations to stymie orders.

126. The Bill should remove the requirement under s 527J that the Commission be satisfied that the applicant will continue to be at risk of sexual harassment before it can make a stop sexual harassment order.

127. Further, where an individual respondent is removed from a sexual harassment dispute under section 527S(2), the applicant only has 14 days from being notified of that removal to file an application in court. Court applications can take several weeks to put together properly, and if an application is launched in the Federal Court of Australia, are held to very strictly. Fourteen days is insufficient time for applicants to sufficiently prepare a court application, and risks wasting the Court's time with avoidable amendments or strike out applications at a later date.

128. The Bill should eliminate the period for a person to file sexual harassment dispute under section 527T(2) or increase it to 60 days in all circumstances, similar to the period of time available to complainants under section 46PO of the *Australia Human Rights Commission Act* 1986 (Cth).

129. Finally, applications under section 527F to the Commission, and consequently on to any Court will attract the costs shield under section 611 and section 570 of the Act respectively. That is, the applicant will bear their own costs even if they are successful, although they are shielded from paying those of the respondent if they are not. Individual applicants often do not have sufficient funds to support litigation and often enter into arrangements with firms where the firms costs are recovered on settlement or a favourable judgment. This may limit individual access to justice by removing the financial justification for law firms to assist workers who do not have the capacity to pay.

130. The Bill should exempt respondents to stop sexual harassment applications to the Commission under section 527F from the operation of section 611 of the Act. The Bill should also exempt respondents to any court applications under section 527D, 527K and 527S from the operation of section 570 of the Act. The effect of such exemption would mean that the costs of litigation would be shifted to respondents, except in proceedings which are vexatious or without reasonable cause, or owing to unreasonable conduct. In instances where a worker has engaged a lawyer on a 'no win no fee' or like model, or a union that is expending resources to make the application, this proposal would decrease those cost concerns, in circumstances where there would otherwise be a risk of never recovering the costs of a successful application. It follows that this proposal would encourage applicants to make meritorious applications in the hope of recovering costs expended, without much adverse risk.

CONCLUSION

131. The BOOT is not broken. There is no elucidated basis for change because it does not

exist. The changes should not be made to BOOT.

132. This submission is limited because of the very limited time available for submissions.

Retail and Fast Food Workers Union

Retail and Fast Food Workers Union

Submission

Submission to the Senate Economic References Committee inquiry into the unlawful underpayment of employees' remuneration

Contact: Josh Cullinan, Secretary,
[redacted]

1. The Retail and Fast Food Workers Union Incorporated (**RAFFWU**) is a trade union representing workers in the retail and fast food industry. The union launched in November 2016 following the exposure of widespread wage theft and rights stripping in the retail and fast food sectors. The union has approximately 2000 members across the country and staff in most states.

2. The union has been responsible for returning almost a billion dollars per annum in penalty rates, casual loading, higher junior rates, overtime rates and other rights in its short life.

3. More information about RAFFWU is available on its website www.raffwu.org.au

4. We welcome the opportunity to make a submission to the Inquiry and thank the Senate Economic References Committee for its invitation to make this submission.

> *On 13 November 2019, the Senate referred an inquiry into the unlawful underpayment of employees' remuneration to the Senate Economics References Committee for inquiry and report by the last sitting day in June 2020.*
>
> *The terms of reference for the inquiry are as follows:*
>
> *The causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue, with particular reference to:*
>
> *a. the forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business';*
> *b. the cost of wage and superannuation theft to the national economy;*
> *c. the best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment;*
> *d. the taxation treatment of people whose stolen wages are later repaid to them;*
> *e. whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;*
> *f. the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence;*
> *g. whether Federal Government procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft; and*
> *h. any related matters.*

5. We note that we have made earlier submissions to the inquiries of senate committees into *Corporate Avoidance of the Fair Work Act*, the *Pay Protection Bill* and *Penalty Rates*. Those submissions dealt with some of the forms and reasons for wage theft and the latter is appended to this submission. At those earlier enquiries members of RAFFWU attended and spoke to their experience of wage theft.

6. In this submission we build on the investigative work of RAFFWU in exposing wage theft, including by identifying specific instances of organised and coordinated wage theft valued at billions of dollars.

(a) *the forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business'; and*
(b) *the cost of wage and superannuation theft to the national economy*

7. There are very many forms of wage theft perpetrated against workers in Australia.

8. This section is broken into a series of parts. The first deals with the largest and most notorious wage theft in modern Australian history.

The Unlawful Legalising of Wage Theft

9. For decades employers in the retail and fast food industries have sought mechanisms when making industrial instruments that would enable them to pay less than the minimum wages and conditions otherwise applicable to staff.

10. Most notoriously, a series of "agreements" were negotiated between major employers and the *Shop, Distributive and Allied Employees Association* ("SDAEA" aka SDA and Shoppies) which either directly undercut minimum terms and conditions (when approved under the Fair Work Act since 2010, sometimes when approved/lodged/certified before 2010, or were allowed to remain in place or extended by SDAEA since 2010.)

11. In May 2015 Josh Cullinan made a submission to the Fair Work Commission identifying the ways in which the *Coles Supermarkets Store Team Agreement 2014-2017* ("Coles 2014 Agreement") paid the vast majority of employees less than what they would earn under the General Retail Industry Award 2010 ("the Retail Award"). Concordant with that submission, *Fairfax Media* published articles relating to that submission. In May 2015 and June 2015, the issue was raised in *The Age*, the *Sydney Morning Herald* and *The Australian*.[1]

12. In June 2015 the Fair Work Commission accepted undertakings from Coles relating to the rates of pay of casual workers, 17 year old workers and 18 year old workers, and approved the Coles 2014 Agreement. The Fair Work Commission then approved the Coles 2014 Agreement on 10 July 2015.

13. On 31 July 2015, Duncan Hart (and subsequently the Australasian Meat Industry Employees Union ("AMIEU")) appealed the decision to approve the Coles 2014 Agreement.

14. That appeal was not determined until 31 May 2016 when the appeal was upheld[2]. Here the

[1] See http://www.smh.com.au/national/legal-challenge-to-tear-up-cosy-deal-between-coles-and-shop-union- 20150529-ghce7n html, http://www.smh.com.au/national/watchdog-steps-in-over-coles-low-pay-deal-with- union-20150613-ghn4rs.html, http://www.smh.com.au/national/fair-work-commission-orders-coles-to-lift- wages-for-75000-workers-20150710-gi9usl.html and http://www.theaustralian.com.au/national- affairs/industrial-relations/coles-forced-to-pay-casual-workers-10pc-more/news- story/d4ab07056441e2995c6efdd9b6677e4a

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

case is referred to as *Hart v Coles*.

15. Between July 2015 and May 2016, numerous news articles were published, describing similar issues to those exposed at Coles. They were published by most reputable news outlets in Australia, including most mainstream media outlets.

16. Each such analysis was based on rosters, payslips, timesheets and other records of employment. Comprehensive robust analysis was undertaken of material from Coles, Woolworths, McDonald's and Hungry Jacks. This was complemented by the actual lived experience of workers in stores and outlets.

17. Whether it be through the *Hart v Coles* case (described below), submissions to Senate inquiries[3] or publication by the media[4] the scale of this wage theft is extraordinary. Any worker, working a modest proportion of hours on weeknights and/or weekends, at most of Australia's largest retailers and fast food companies was earning less than they would earn if there was no SDAEA agreement in place.

18. While understating the cost of returning the penalty rates, casual loading, overtime rates, higher junior rates and other conditions, even market analysts have quantified the stolen wages in the hundreds of millions of dollars per year.

19. RAFFWU estimates the **annual** stolen wages to have been at least approximately:

a) $220 Million at Woolworths Supermarkets

b) $50 Million at other Woolworths Group entities such as Big W, BWS, Dan Murphy's and Woolworths Petrol

c) $130 Million at McDonald's

d) $150 Million at Coles Supermarkets

e) $30 Million at other Coles Group entities such as Liquorland, First Choice Liquor and Coles Express

f) $30 Million at Kmart

g) $30 Million at Target

h) $15 Million at Officeworks

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[3] Evidence of David Suter and Ben Dobson, Transcript of Melbourne Public Hearing to the Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, 18 May 2017, evidence of numerous RAFFWU witnesses to Penalty Rates and Pay Protection Bill enquiries.

[4] See examples in http://www.smh.com.au/business/workplace-relations/sold-out-quarter-of-a-million-workers-underpaid-in-union -deals-20160830-gr4f68 html, http://www.smh.com.au/national/maccas-pay-work-with-the-lot-hold-the-penalties-20160519-goyoi4 html, http://www.abc.net.au/news/2016-05-20/mcdonalds-giving-workers-a-rotten-deal,-says-nteu-officer/7431168, http://www.smh.com.au/business/workplace-relations/hamburgled-mcdonalds-coles-woolworths-workers-lose-in-union-pay-deals-20160518-goycw5.html, http://www.theage.com.au/business/workplace-relations/dominos-pizza-workers-losing-millions-in-union-deal-without-penalty-rates-20160705-gpyzpf html and http://www.smh.com.au/business/workplace-relations/first-big-pay-boost-for-underpaid-coles-workers-20160813-gqrpbr html

i) $30 Million at Bunnings

j) $30 Million at KFC

k) $20 Million at Hungry Jack's

l) $15 Million at Red Rooster

m) $80 Million at Domino's Pizza

n) Many millions at others including Best & Less, Noni B, Specialty Fashion Group, IGA, David Jones, Myer and more.

20. As we have gained access to more comprehensive information from members, our analysis of rosters, timesheets, payslips and other documentary materials have seen our previous very conservative estimates substantially increased.

21. Until 2018 we had very few examples of the experience of workers securing Award entitlements after displacement from an SDAEA agreement. Since 2018 the simple lived reality for hundreds of thousands of workers has been massively increased wages thanks to the work of RAFFWU.

22. However, we did have some examples. The Federal Magistrates Court in 2011 in *Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233 held that Hungry Jacks and the SDAEA had negotiated an agreement to cover Hungry Jacks employees in Tasmania. Neither Hungry Jacks nor the SDAEA applied for certification of the agreement. It therefore operated as an unregistered agreement. Both the SDAEA and Hungry Jacks treated the agreement as if it had been certified and Hungry Jacks paid its workers as if it had been certified.

23. 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.

24. 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.

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

26. Remarkably, like at Coles in May 2015, on some occasions the Fair Work Commission itself

had information which clearly and unambiguously identified that workers would be substantially worse off under SDAEA agreements than the relevant Award.

27. An example is KFC in Queensland. The application to approve the *KFC Team Members' Enterprise Agreement – Queensland & Tweed Heads (NSW) 2014 – 2017* was made on 19 June 2014[5], eleven days before the expiry of the 80% transitional provisions of penalty rates in the Fast Food Industry Award ("Fast Food Award").

28. Even with these lower transitional penalty rates, the employer's own analysis[6] showed many employees were substantially worse off than the Fast Food Award. The employer argued:

> *We understand that the SDA has previously submitted information on the 9% Penalty Buyout to the FWC. We also understand that the 9% Penalty Buyout was used in the McDonald's Australia Enterprise Agreement 2013 as referred to in our Form 16 at Clause 1.3. We confirm that the SDA (Qld Branch) has taken a similar approach (a level playing field) with the formulation of the Enterprise Agreement before you for consideration.*

29. This was an extraordinary admission. The employer knew some employees were worse off but the "level playing field" offered by SDAEA on cutting of penalty rates should be a consideration for the Fair Work Commission in determining whether an enterprise agreement should be approved. The enterprise agreement included union encouragement clauses requiring the employer to encourage employees to join SDAEA.

30. The detriment was reiterated in a report by the Fair Work Commission's member support team which advised[7] the presiding member:

> *Rates for employees who work more than approximately 20% of their ordinary time in a particular week on Saturday or Sunday, after 9pm on weekdays, or on public holidays, may not be high enough to prevent employees being disadvantaged.*

31. Despite this, **no remedial action** was required by the Fair Work Commission other than a purported guarantee *future* employees would be rostered across the hours of the week "…*so that they will not be disadvantaged when compared to penalty rates for Weekend Work as provided in the Fast Food Award 2010.*" Whether or how such an undertaking is enforceable is unclear. In any event, it did nothing for the numerous employees who the employer had identified would be paid substantially less than the Fast Food Award.

32. The express admission that many workers would be worse off should have caused alarm for

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[5] See F16 application by Collins Foods Limited dated 19 June 2014 in AG2014/6545 for approval of the *KFC Team Members' Enterprise Agreement – Queensland & Tweed Heads (NSW) 2014 – 2017*
[6] Correspondence of Collins Foods Limited on file of AG2014/6545 dated 24 July 2014 (Tables 1 & 2) at Attachment A
[7] See report of Member Support Team on file of AG2014/6545 dated 26 August 2014.

the presiding member. He had been the person to approve the McDonald's agreement referred to in the 24 July 2014 correspondence.

33. Instead, the agreement was approved and applied to 4229 employees, 85% of whom were under 21 years of age and 95% of all employees were casual or part-time[8]. Like with so many other large Fast Food employers, workers are overwhelmingly young, casual, and paid less than the minimum wage. These young insecure workers are the fodder for a rapacious SDAEA and its massive multinational Fast Food company mates.

34. The application by KFC was supported with a statutory declaration filed by KFC made by Judy A Fenton, Human Resources Manager, which included a declaration that they thought the agreement passed the better off overall test. This was supported by a declaration from SDAEA made by Joe de Bruyn. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement.

35. Initially the gross embarrassment of losing *Hart v Coles* led to SDAEA arguing the decision stablished a:

> *'new expansive interpretation of the BOOT where the FWC is now looking at each and every employee rather than broader groups[/classes] or workforces as whole*.'[9]

36. The SDAEA also provided evidence to the Education, Employment and References Committee Inquiry into Corporate Avoidance of the Fair Work Act 2009 on 18 May 2017 that the *Hart v Coles*

> *'decision last-year said the test is going to be an individual test moving forward…[with] the global test set aside…it is now a strict individual test.'*[10]

37. In the past we have sought to explain and identify how these SDAEA claims are not only untrue but also broadly offensive to legal practitioners and the Fair Work Commission itself. That approach has been far too kind. Particularly in light of past ALP Senators (including past Senator Ketter a long term SDAEA official) in different committees dismissing concerns of RAFFWU as some form of internecine union tiff, we take this opportunity to explain the true nature of the wage theft perpetrated in retail and fast food.

38. No respectable person now contests the massive scale of underpayment perpetrated by way of SDAEA industrial instruments.

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[8] See F18 Statutory Declaration by Collins Foods Limited dated 19 June 2014 in AG2014/6545 for approval of the KFC Team Members' Enterprise Agreement – Queensland & Tweed Heads (NSW) 2014 – 2017

[9] Letter from Joe De Bruyn, SDA National Present, and Gerard Dwyer, National Secretary to the Australian Council of Trade Unions, 8 June 2016, 2; See also Evidence to Education and Employment Reference Committee, Senate, Melbourne, 18 May 2018, 35-6 (Mr Gerard Dwyer, National Secretary-Treasurer, Shop, Distributive and Allied Employees' Association).

[10] Transcript of Melbourne Public Hearing to the Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009,* 18 May 2017, 39.

39. However, some argue they are respectable while also defending SDAEA (and employers) as simply incompetent. While this fails any pub test, in this submission we explain what was known by SDAEA.

40. This is an essential foundation to not only understanding the scale of wage theft and who is responsible, but also how that wage theft infects every aspect of the business model of some of Australia's largest employers of low wage workers. It is no surprise that the litany of recent wage theft scandals occurred at many of the employers who have previously relied on SDAEA support to have approved industrial instruments which paid workers billions of dollars less than minimum Award conditions.

41. We start with a short history of SDAEA submissions about their state of knowledge.

42. In 2007, the SDAEA provided a submission to the Senate Standing Committee on Employment, Workplace and Education Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007. This inquiry examined the then Liberal Government's 'fairness test'. The SDAEA noted that the 'fairness test' would allow:

> *'…employers to deliberately and significantly reduce the terms and conditions of employment of individual employees by the expedient of giving small marginal improvements to a majority.*
>
> ***The clearest example of how this abuse can occur is that in the retail industry**, an employer by who has the majority of its employees working Monday to Friday, and a small number of employees who only work on a Saturday and Sunday, **negotiates a collective agreement which removes all weekend penalties on the basis of increasing the base hourly rate of pay**. For the majority of employees who work the predominant of hours Monday to Friday and may occasionally work Saturday and Sunday, such an arrangement gives them an advantage and improves their terms and conditions of employment. However, for the small number of employees who are only employed to work on Saturday or Sunday, their rates of pay are reduced dramatically. **They suffer real disadvantage and real loss of pay.***
>
> *If the overall effect test in 346(M)(1)(b) permitted such an agreement to operate**, it would create serious injustice.** The better test is that as articulated by the Commission in many decisions and that is a collective agreement **when testing the global test or the overall effect of a fairness test is that it must be applied to each individual employee.** An example just given, **it would not be possible to simply remove the penalty rates on weekends by a slight increase in the weekly base rate where some employees only worked weekends.** An agreement of such a sort would then fail the fairness test in relation to those employees.'*[11]

[11] Shop, Distributive & Allied Employees Association, Submission No 14 to the the Senate Standing Committee on Employment, Workplace and Education, *Inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, 2007, 10.

43. We know the majority of employees in major supermarkets and major fast food companies work enough hours on weeknights and weekends to render them substantially worse off.

44. On 14 August 2007, the SDAEA provided a submission to the Senate Standing Committee on Employment, Workplace and Education Inquiry into Workplace Agreements. The SDAEA noted that:

> *'Employers will only use an averaged rate of pay [higher rate than ordinary hours] …when it is cost neutral or where it provides clear savings to an employer by being lower than the amount that would otherwise be paid under an Award. This is not rocket science! It is simple stuff!…retention of penalties and loadings provides a fairer outcome for workers who are predominately employed only to work these penalty or loaded hours.*[12]

45. In February 2008, the SDAEA provided a submission to the Senate Standing Committee on Employment, Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008. The SDAEA criticised AWAs that offered higher rights of ordinary hour pay and reduced penalty rates.

> *'AWAs in the retail industry were confusing and misleading for employees. They sometimes, for example had a higher base rate of pay than the award for the retail industry…However, the costs of obtaining this pay was often the total loss of penalties for night time work and weekend work, significantly reduced penalty rates for public holiday work…advocates of AWAs often boasted that they had higher hourly rates of pay than the award…but invariably, the AWA provided worse terms and conditions of employment in relation to…penalty rates…'*[13]

46. In February 2009, the SDAEA provided a submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008. In its submission, the SDAEA recognised and identified employees who worked some or all of their hours at penalty rate times ("Class 2") as a relevant and vulnerable 'class' for the *BOOT*:

> *An employee who works a pattern of work, which may have periods of work on high penalties, and periods of work on low or no penalties, and who has the BOOT test applied at a time when no penalty rates occurred, may have an agreement which clearly passes the BOOT at that time, but which would have failed if the BOOT test has been applied when the employee worked penalty or loaded hours.*[14]

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[12] Shop, Distributive & Allied Employees Association, Submission No 14 to Senate Standing Committee on Employment, Workplace and Education, *Inquiry into Workplace Agreements*, 24 August 2007, 109-10, 113

[13] Shop, Distributive & Allied Employees Association, Submission No 9 to Senate Standing Committee on Employment, Workplace Relations Committee, Inquiry into the Workplace Relations Amendment (Transition to Forward With Fairness) Bill 2008, February 2008, 21-3.

[14] Shop, Distributive & Allied Employees' Association. Submission No 12 to Senate Education, Employment, and Workplace Relations Committee, *Inquiry into The Fair Work Bill*, January 2009, 144.

47. In 2010, the fact the BOOT applied to each individual employee was made clear in the *Armacell Australia Pty and Others* decision; the operation of the legislative test was described thus:

> *"The BOOT, as the name implies, requires an overall assessment to be made. This requires identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under an agreement."*[15]

48. For efficiency reasons, the FWC operates on an evidentiary presumption that if a 'class' of employees is to be taken to be better off, it is not necessary to enquire into each employee's individual circumstances.[16] Section 193(7) of the Fair Work Act provides that if a 'class' of employees is taken to be better off then 'an evidentiary presumption [is established], that in the absence of any evidence to the contrary, the better off overall test does not require the…[*FWC]*…to enquire into each employee's individual circumstances'. An employee association acting in the best interest of its members can displace this evidentiary presumption by providing evidence of individual employee circumstances that would result in that employee being worse off. The SDAEA ought to have known this.

49. SDAEA knew the BOOT applied to each individual employee. In January 2009, the SDAEA made a submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008. The SDAEA submission made clear the SDAEA's understanding that the BOOT would apply to each individual employee.[17]

50. On 17 February 2012, the SDAEA made a submission to the *Fair Work Act Review* attesting to SDAEA's understanding of the BOOT:

> *'The way in which the BOOT is to be applied has been described as a global test applied individually…it is the package of terms and conditions provided for by the enterprise agreement as applied to each individual employee as against the package of terms and conditions provided by the award as applied to each individual employee.'*[18]

51. In March 2015, the SDAEA made a submission to the Productivity Commission's Inquiry into the Workplace Relations Framework. The Productivity Commission sought comment on whether the BOOT should continue to apply to each individual employee[19] or 'should the test

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[15] [2010] FWAFB 9985, 41 affirmed *AKN Pty Ltd t/as Aitkin Crane Services* [2015] FWCFB 1833 (15 April 2015) [43]; See Also *Fair Work Act* (Cth) 2009 s 193(1).
[16] *Fair Work Act 2009* (Cth) s 193(7).
[17] Shop, Distributive & Allied Employees' Association. Submission No 12 to Senate Education, Employment, and Workplace Relations Committee, *Inquiry into The Fair Work Bill*, January 2009, 143-5.
[18] Shop, Distributive & Allied Employees' Association, Submission to the Department of Employment, *Fair Work Act Review 2012*, 17 February 2013, 13.15.
[19] Productivity Commission, *Workplace Relations Framework: Issue Paper 3* (January 2015) Productivity Commission < http://www.pc.gov.au/inquiries/completed/workplace-relations/issues/workplace-relations-issues3.pdf> 4

focus on collective welfare improvement for employees?'[20]

52. In its response to the Productivity Commission, the SDAEA noted the BOOT, 'ensure[s] that no employee at the time of applying the BOOT is worse off than others covered by the relevant award',[21] that the BOOT should continue to be 'met for each individual employee covered by an agreement',[22] and 'there should be no provision which would allow for employees to be paid at lower rates than their award-reliant counterparts.'[23]

53. These SDAEA admissions were made shortly before opposing Mr Hart's application for leave to appeal the FWC's approval of the Coles 2014 Agreement on 31 July 2015 on the grounds that the SDAEA believed Coles 2014 Agreement passed the BOOT,[24] despite knowing that *Class 2* individual employees could be worse off.[25]

54. Of course, businesses engage in these behaviours for the direct financial gain and the manifest commercial advantage as against competitors who do not have the benefit of paying workers less than minimum wages. In March 2015, the SDAEA made a submission to the Productivity Commission's Inquiry into the Workplace Relations Framework. The SDAEA cautioned:

> *'Allowing an organisation covered by an agreement to provide staff with lower terms and conditions overall than employees covered by an award,* ***provides an unfair commercial advantage to such employers and is undesirable for this reason alone****.*
>
> *There should be no provision which would allow for employees to be paid at lower rates than their award-reliant counterparts,* ***as this would effectively provide agreement-covered enterprises with an advantage over award-reliant businesses. This effectively creates a two-tier system of employees and employers and is patently unfair for all involved****.' [26]*

55. This followed a case in 2014 when the SDAEA targeted an employer to terminate the agreement which was in place at the time. The Decision[27] of the Fair Work Commission notes:

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[20] Ibid 5.
[21] Shop Distributive & Allied Employees' Association, Submission to the Productivity Commission, *Productivity Commission Review into the Workplace Relations Framework*, 19 March 2015, 50.
[22] Ibid 49.
[23] Ibid.
[24] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2015] FWCFB 7090 (27 October 2015).
[25] Transcript of Proceedings, *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* (Fair Work Commission, C2015/4999, Commissioner Roe, 2 February 2016) PN2325.
[26] Shop Distributive & Allied Employees' Association, Submission to the Productivity Commission, *Productivity Commission Review into the Workplace Relations Framework*, March 2015, 49.
[27] Shop, Distributive and Allied Employees Association [2014] FWCA 5344

> ***[8]*** *The SDA submits it is now more than 18 months since the Agreement passed its nominal expiry date and there is currently no prospect of negotiations commencing for the establishment of a new Agreement. It submits the employees covered by the Agreement are disadvantaged when the terms and conditions in the Agreement are compared with those in the underlying General Retail Industry Award 2010.* ***It also submits the employer has been "sheltered" by this situation, while its competitors are covered by different arrangements and are transitioning to the minimum terms and conditions contained in the Modern Award.***
>
> *[9] The SDA provided a detailed comparison of the terms and conditions in the Agreement and those in the Modern Award****. In its submission the particular areas of disadvantage for employees who continue to be covered by the existing Agreement derive from the penalty rates provided for work on Sundays for employees in New South Wales, and the loading provided to casual employees****."*

56. Here the employer was DSG Holdings Australia Pty Ltd and the enterprise agreement was the *RETAIL ADVENTURES PTY LTD STORE SALES STAFF AGREEMENT 2009*. DSG operated Sam's Warehouse and Go-Lo amongst other brands. Their main competitor was Kmart and similar stores. DSG had taken over a business which had been in administration and had closed more than 150 stores. The company went into liquidation in February 2014[28]. This was before, or around the time of, the application by SDAEA.

57. It is of note that SDAEA targeted the business for termination action when its competitors, such as Kmart, had negotiated agreements which cut the penalty rates payable to staff. Despite this, SDAEA used as an argument that DSG should not be sheltered from its competitors.

58. It raises questions as to what special arrangements must be satisfied by employers to reach and maintain the favour of SDAEA.

59. On 10 December 2015, SDAEA submitted[29] to the Fair Work Commission that an agreement made by 7/11 franchisees included less beneficial terms specifically identifying a common wage rate of $21.83 compared to the Award $18.99 (14.95% loading.) That submission was made during the appeal of the Coles 2014 Agreement where SDAEA was ruthlessly defending a common wage rate of $20.97 compared to the Award $18.52 (13.2% loading).

60. Clearly the 7/11 franchisees did not have the favour of SDAEA.

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[28] See https://www2.deloitte.com/au/en/pages/finance/articles/retail-adventures.html

[29] See F18 statutory declaration by SDAEA dated 10 December 2015 in AG2015/6175 for approval of the *7 Eleven Fuel and Non Fuel Enterprise Agreement 2015*

61. None of the fast food businesses who refused to recruit for SDAEA and process their fee deductions were offered the “level playing field” demanded by KFC in Queensland in 2014.

Circumventing the BOOT (Better Off Overall Test)

62. Above we have outlined the scale of wage theft, examples of how it was known in the past, the direct knowledge of SDAEA of the laws and the commercial advantage afforded those in SDAEA’s favour.

63. Next we outline the process that was used since 2010 to facilitate the wage theft. This was done by circumventing the Better Off Overall Test.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

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

70. The process is open to manipulation. Below we deal with this in more detail but for present purposes the agreement that was the subject of *Hart v Coles* – the Coles 2014 Agreement is a good example. A statutory declaration made by Angelo Yoannidis was filed by Coles 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 his opinion, the agreement passed the better off overall test. The Coles' statutory declaration was supported by a statutory declaration signed by an officer of the SDAEA – Gerard Dwyer. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement.

71. When the application for approval was determined, having been the subject of numerous public media articles, 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.

72. Coles having given those undertakings, the agreement was approved[30]. Despite being approved, the agreement did not pass the BOOT. Indeed, it fell well short of passing the BOOT.

73. 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

[30] see *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2015] FWCA 4136 (10 July 2015)

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.

74. This mechanism had several 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.

75. 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 in penalty payments, overtime, casual rates, shift rates or junior rates. In the case of the Coles 2014 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.

76. 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.

77. 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. In the Fast Food sector it was directly expressed as a 9% loaded rate in the KFC case but often fell far short of even that loading.

78. Third, the proposed agreement included a number of 'corporate' employment benefits, provision of which was said (at the hearing of the *Hart v Coles* 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.)

79. Analysis of the *Coles 2014 Agreement* identified the vast majority of workers were worse off. At other major retailers and fast food companies, it was even worse.

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

81. 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.

82. In the case of the Coles 2014 Agreement, both Coles and the SDAEA 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 SDAEA each signed a statutory declaration to the effect that they believed the agreement passed the BOOT in circumstances where it manifestly did not.**

83. 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 2014 Agreement is not such a case. It manifestly did not pass the BOOT.

84. The Coles case is not unusual. RAFFWU is not aware of any case in which the Commission has enquired in to why a fast food or retail employer and/or a registered employee organisation have filed a statutory declaration to the effect that they reasonably believe an agreement passes the BOOT when it manifestly does not.

85. When the *Hart v Coles* 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-billion dollar employer, armed with significant corporate and legal resources, along with SDAEA, either were unable to identify the detriment, or knew of the detriment and did not draw it to the attention of the Commission.

86. As was described earlier in this submission. SDAEA says *this is not rocket science*. *It is simple stuff*.

87. Second, as noted above, the MST routinely assessed "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.

88. The "sample typical rosters" are anything but sample or typical. The 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 2 employees. To take the *Coles 2014 Agreement* 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.

89. 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.

90. 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. The choice of such stores was something Coles was well familiar with as will be explained later.

91. 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.)

92. 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.)

93. 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.

94. The Tribunal 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.

95. 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 Commission.

Coles Supermarkets in 2011

96. For example, in 2011, Coles applied for approval of the agreement that became the *Coles Supermarkets Australia Pty Ltd And Bi-Lo Pty Limited Retail Agreement 2011* ("Coles 2011 Agreement"). 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 earned wages for the first five persons rostered whose

name started with “B” and the same for those whose name started with “C”.[31] This was later known as the 17 August 2011 request.

97. Rather than choosing the cohorts nationally, Coles identified two specific stores and took B persons from Albury and C persons from Essendon Fields. 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 substantially worse off.

98. This was brought into stark relief in 2017, following the *Hart v Coles* landmark decision when Coles worker Penelope Vickers applied to terminate the Coles 2011 Agreement. As part of those proceedings, in [2017] FWCFB 5279, an Order was issued by the Fair Work Commission:

> *[43] We make the following orders:*
>
> *(1) Coles shall, on or before 7 November 2017, file and serve an affidavit made by a person with the requisite direct knowledge which deposes as to the steps taken by Coles to respond to the 17 August 2011 request.*
>
> *(2) Coles shall, on or before 7 November 2017, produce to the Commission at its Sydney registry all documents recording or concerning the steps taken by Coles to respond to the 17 August 2011 request.*

99. That is, the Fair Work Commission ordered that by 7 November 2017 Coles must file affidavit evidence and all documents which dealt with how Coles responded to the 17 August 2011 request – how it chose the two stores which miraculously showed workers were better off.

100. On 6 November 2017, Ms Vickers discontinued her application. Coles announced it had settled the matter by way of a media release.

101. To be clear, ***the day before it was required to produce the affidavit and documents***, Coles settled the case. The order lapsed and the documents never saw the light of day.

102. The 2011 statutory declaration by Coles Supermarkets was made by Angelo Yoannidis, Employee Relations Manager at the time. The 2011 statutory declaration for SDAEA was made by Joe de Bruyn. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement.

Woolworths Supermarkets in 2012

103. In Woolworths Group, the process by which wage theft was purportedly legalised is somewhat different. For many years each major Woolworths Group entity made a specific submission analysing “roster scenarios” that had been agreed with SDAEA. For example, in 2012 the

[31] See Annexure C.

statutory declaration of Woolworths Group in seeking approval of its *Woolworths National Supermarket Agreement 2012* had an Attachment 3 – Wage Comparison[32] which stated:

> ## Introduction
>
> Woolworths Ltd and Woolworths (South Australia) Pty Ltd ('Woolworths') have made an enterprise agreement titled the Woolworths National Supermarket Agreement 2012 ('the Agreement').
>
> **The Agreement was made in consultation with the Shop Distributive Allied Employees Union ('SDA') as the bargaining representative for a very substantial number of employees.** All other bargaining representatives were also given the opportunity to meet and discuss the Agreement.
>
> **The Company and the SDA submit that the Agreement passes the Better Off Overall Test and have collated a number of different rostering examples to demonstrate this** for Team Members (Shop Assistants) at a Grade 2 level, Team Members performing replenishment duties at Grade 2 level, Bakers, Butchers, Meat Slicers/Skilled Meat Assistants and Meat Packers.
>
> **In all situations we have used an indicative roster, which reflects the likely and regular work patterns for employees in the relevant classifications across the States and Territories.**
>
> Emphasis Added

104. This kind of language and approach was used repeatedly by Woolworths Group at Big W, Dan Murphy's, BWS and Woolworths Petrol.

105. While it is simple to say the rosters chosen were simply not typical or indicative, we now know that much more was going on at Woolworths Group. In the case to terminate the *Woolworths National Supermarket Agreement 2012* an affidavit of evidence was read in public court. It is attached to this submission. That evidence laid out the process used in 2012 by Woolworths Group to choose the "indicative rosters".

106. In truth, "indicative rosters" had been chosen in 2009 as part of the application process for the previous supermarkets agreement. Critically, 4 of those rosters were changed in the 2012 statutory declaration.

107. As evidenced[33], 3 of those changed rosters were of replenishment workers which, had they actually been used in 2012, would have shown that the vast majority of state based examples of that work were much worse off under the 2012 Agreement than the Award.

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[32] See page 80 of the Affidavit of Joshua James Cullinan read into evidence on 30 November 2018 and attached at Annexure B

[33] See [14] – [19] and page 209 of the Affidavit of Joshua James Cullinan read into evidence on 30 November 2018 and attached at Annexure B

Grade 2		Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total	Paid Ord Hours	Wage Rates 1/7/12	Weekly Wage	Difference
QLD	Full-Time	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-3:30am (6 hours)			9pm-5:30am (8 hours)	38				
	EBA	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 3 x 130%			3 x 175%, 5 x 130%	38	47.15	19.6142	$ 924.81	
	MA	8 x 130%	8 x 130%	8 x 130%	6 x 130%			3 x 200%, 5 x 130%	38	51.5	17.53	$ 902.80	$22.01
	Part-Time	9pm-4am (6 hours)					9pm-12am (3 hours)	9pm-1am (4 hours)	13				
	EBA	3 x ord, 3 x 130%					1 x ord, 2 x 125%	3 x 175%, 1 x 130%	13	16.95	19.6142	$ 332.46	
	MA	6 x 130%					3 x 150%	3 x 200%, 1 x 130%	13	19.6	17.53	$ 343.59	-$11.13
	Casual		8pm-12am (4 hours)					8pm - 12am (4 hours)					
	EBA		4 x 120%					1 x 170%, 3 x 195%	8	12.35	19.6142	$ 242.24	
	MA		4 x 155%					4 x 225%	8	15.2	17.53	$ 266.46	-$24.22
NSW	Full-Time	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-3:30am (6 hours)			9pm-5:30am (8 hours)	38				
	EBA	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 3 x 130%			3 x 175%, 5 x 130%	38	47.15	19.6739	$ 927.62	
	MA	8 x 130%	8 x 130%	8 x 130%	6 x 130%			3 x 200%, 5 x 130%	38	51.5	17.53	$ 902.80	$24.83
	Part-Time	9pm-4am (6 hours)					9pm-12am (3 hours)	9pm-1am (4 hours)	13				
	EBA	3 x ord, 3 x 130%					1 x ord, 2 x 125%	3 x 175%, 1 x 130%	13	16.95	19.6739	$ 333.47	
	MA	6 x 130%					3 x 150%	3 x 200%, 1 x 130%	13	19.6	17.53	$ 343.59	-$10.12
	Casual		8pm-12am (4 hours)					8pm - 12am (4 hours)					
	EBA		4 x 120%					1 x 170%, 3 x 195%	8	12.35	19.6739	$ 242.97	
	MA		4 x 155%					4 x 225%	8	15.2	17.53	$ 266.46	-$23.48
ACT	Full-Time	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-3:30am (6 hours)			9pm-5:30am (8 hours)	38				
	EBA	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 3 x 130%			3 x 175%, 5 x 130%	38	47.15	19.6739	$ 927.62	
	MA	8 x 130%	8 x 130%	8 x 130%	6 x 130%			3 x 200%, 5 x 130%	38	51.5	17.53	$ 902.80	$24.83
	Part-Time	9pm-4am (6 hours)					9pm-12am (3 hours)	9pm-1am (4 hours)	13				
	EBA	3 x ord, 3 x 130%					1 x ord, 2 x 125%	3 x 175%, 1 x 130%	13	16.95	19.6739	$ 333.47	
	MA	6 x 130%					3 x 150%	3 x 200%, 1 x 130%	13	19.6	17.53	$ 343.59	-$10.12
	Casual		8pm-12am (4 hours)					8pm - 12am (4 hours)					
	EBA		4 x 120%					1 x 170%, 3 x 195%	8	12.35	19.6739	$ 242.97	
	MA		4 x 155%					4 x 225%	8	15.2	17.53	$ 266.46	-$23.48
VIC	Full-Time	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-3:30am (6 hours)			9pm-5:30am (8 hours)	38				
	EBA	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 3 x 130%			3 x 200%, 5 x 130%	38	47.9	19.7197	$ 944.57	
	MA	8 x 130%	8 x 130%	8 x 130%	6 x 130%			3 x 200%, 5 x 130%	38	51.5	17.53	$ 902.80	$41.78
	Part-Time	9pm-4am (6 hours)					9pm-12am (3 hours)	9pm-1am (4 hours)	13				
	EBA	3 x ord, 3 x 130%					1 x ord, 2 x 125%	3 x 200%, 1 x 130%	13	17.7	19.7197	$ 349.04	
	MA	6 x 130%					3 x 162%	3 x 200%, 1 x 130%	13	19.96	17.53	$ 349.90	-$0.86
	Casual		8pm-12am (4 hours)					8pm - 12am (4 hours)					
	EBA		4 x 120%					1 x 170%, 3 x 220%	8	13.1	19.7197	$ 258.33	
	MA		4 x 155%					4 x 225%	8	15.2	17.53	$ 266.46	-$8.13
TAS	Full-Time	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-5:30am (8 hours)	9pm-3:30am (6 hours)			9pm-5:30am (8 hours)	38				
	EBA	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 5 x 130%	3 x ord, 3 x 130%			3 x 200%, 5 x 130%	38	47.9	19.5718	$ 937.49	
	MA	8 x 130%	8 x 130%	8 x 130%	6 x 130%			3 x 200%, 5 x 130%	38	51.5	17.53	$ 902.80	$34.69
	Part-Time	9pm-4am (6 hours)					9pm-12am (3 hours)	9pm-1am (4 hours)	13				
	EBA	3 x ord, 3 x 130%					1 x ord, 2 x 125%	3 x 200%, 1 x 130%	13	17.7	19.5718	$ 348.42	
	MA	6 x 130%					3 x 150%	3 x 200%, 1 x 130%	13	19.6	17.53	$ 343.59	$2.83
	Casual		8pm-12am (4 hours)					8pm - 12am (4 hours)					
	EBA		4 x 120%					1 x 170%, 3 x 220%	8	13.1	19.5718	$ 256.39	
	MA		4 x 155%					4 x 225%	8	15.2	17.53	$ 266.46	-$10.07

108. Woolworths Group could not let that be shown so it *changed its indicative rosters* to ensure the analysis would continue to show all workers were better off under the Agreement than the Award.

109. It's **own analysis** of the remaining rosters identified a further roster, that of a Butcher working in Tasmania[34], who would be worse off under the Agreement than the Award. Neither this nor the other rosters were brought to the attention of the Fair Work Commission.

TAS

Qualified Butchers - Schedule A

40% of transitional amount

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total	Paid Ord hrs	Wage Rates 1/7/12	Wkly Wage	Diff
Full Time		7.00-16.00	7.00-16.00	7.00-16.00	7.00-16.00	7.00-14.00						
WW Supermarkets		8 ord	8 ord	8 ord	8 ord	6 ord		38	38	21.6474	$ 823.40	
Modern Award		8 ord	8 ord	8 ord	8 ord	4 x 115% 2 x 115%		38	39.7	18.58	$ 737.63	$ 84.98
Full Time	6.00-15.00	7.00-16.00	7.00-16.00	7.00-14.00			6.00-15.00					
WW Supermarkets	8 ord	8 ord	8 ord	6 ord			8 x 150%	38	42	21.6474	$ 909.19	
Modern Award	8 ord	8 ord	8 ord	6 ord			8 x 200%	38	46	18.58	$ 854.68	$ 54.51
Full Time	6.00-17.00				6.00-17.00	6.00-17.00	6.00-15.00					
WW Supermarkets	10 ord				10 ord	10 crd	8 x 150%	38	42	21.6474	$ 909.19	
Modern Award	10 ord				10 ord	6 x 115% 5 x 135%	8 x 200%	38	49	18.58	$ 910.42	$ -1.23
Part Time		6.30-13.30	6.30-13.30	16.00-20.00		6.30-10.30						
WW Supermarkets		6 crd	6 crd	4 crd		4 crd		20	20	21.6474	$ 432.95	
Modern Award		6 crd	6 crd	4 x 115%		4 x 125%		20	21.3	18.58	$ 395.75	$ 37.19
Casual				6.30-10.30		7.00-10.00	10.00-13.00					
WW Supermarkets				4 x 120%		3 x 120%	3 x 170%	10	13.5	21.6474	$ 292.24	
Modern Award				4 x 123%		3 x 131%	3 x 200%	10	14.83	18.58	$ 275.91	$ 16.33

[34] See [14] – [15] and page 195 of the Affidavit of Joshua James Cullinan read into evidence on 30 November 2018 and attached at Annexure B

110. Instead, Woolworths Group secretly changed its "indicative rosters, which reflects the likely regular work patterns for employees" so that every example was better off overall. The "red box" in the assessment was changed for a fundamentally different roster (shown in orange.)

111. To avoid doubt, the rosters were simply not indicative of the vast majority of Woolworths workers in any event. They were chosen to disguise the truth. There was no part-time worker only working weekends or nights for example. However, we now know it is not just deliberate blindness but actual deliberate modification to avoid the truth being seen. The Fair Work Commission was never informed the rosters had been changed and that the changes were implemented to avoid the Fair Work Commission being aware the Agreement ***would*** leave workers worse off than the Award.

112. Worse, statutory declarations were made. In the case of the *Woolworths National Supermarket Agreement 2012,* the Woolworths Group statutory declaration (including the analysis) was declared by Fiona Catherine Santolin.[35] The SDAEA statutory declaration in support (which agreed with the content of the Santolin statutory declaration) was made by Ian Blandthorn.[36] They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement.

113. Woolworths and SDAEA played dumb and the 2012 Agreement was approved[37] and put in place with the Fair Work Commission noting:

> *[7] On the basis of the submissions and material provided, I am satisfied that each of the requirements of ss.186, 187 and 188 that are relevant to this application for approval have been met.*

114. Woolworths Group has benefited from special industrial instruments being negotiated with SDAEA since the mid 1990s.

115. 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 from the mid 1990s 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).

[35] See JJC-4 at page 36 and on of the Affidavit of Joshua James Cullinan read into evidence on 30 November 2018 and attached at Annexure B
[36] See Annexure E
[37] See [2012] FWAA 9179

116. Having learned of the mechanism to cut wages of very low paid workers, Woolworths Group embraced it.

117. In 2010 the Fair Work Act introduced the Better Off Overall Test which meant the relationship with SDAEA became more important than ever if it was to get its deals approved. Non-indicative rosters were labelled indicative and back slaps were had all round.

118. However, in 2012 it took an even more sinister turn. Indicative rosters were knowingly and deliberately changed, and the truth was withheld from the Fair Work Commission when statutory declarations were sworn. This would appear to indicate the unlawful legalising of wage theft.

119. That action led to a further 7 years of Woolworths Group "legally" stealing over $1 Billion in wages of its very low paid employees.

120. It also infected the organisational culture with a dark truth of wage theft.

121. It is entirely unsurprising that in 2019 it was forced, kicking and screaming, to admit over $400 million in other wage theft. This time perpetrated against workers not subject to SDAEA deals. In effect, salaried managers who had not been covered by SDAEA agreements had been treated as if they were when it came to overnight and weekend loading assessments. It was the same infected culture which had grown accustomed to stealing the wages of low paid retail workers which oversaw this 'new' wage theft.

122. Similar indicative rosters agreed with SDAEA and submitted as part of the statutory declarations filed by Woolworths Group were made in each of their other businesses.

123. In Big W, the 2012 statutory declaration for Woolworths Group was made by Meaghan Davis, Divisional HR Manager at the time. The Big W 2012 statutory declaration for SDAEA was made by Ian Blandthorn. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement. This would include why the "Indicative Rosters and BOOT Wage Comparisons – Attachment to F17 Form" was labelled as "Version 2".

INDICATIVE ROSTERS AND BOOT WAGE COMPARISONS - ATTACHMENT TO F17 FORM (VERSION 2 - COMPLETED)

124. In BWS, the 2013 statutory declaration for Woolworths Group was made by Rebecca Todd, Human Resources Manager, BWS at the time. The BWS 2013 statutory declaration for SDAEA was made by Ian Blandthorn. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement. That would include why the only example of a "part-time worker" indicative roster was for 30 hours per week and only 7 worked at penalty rate times.

125. In Dan Murphy's, the 2012 statutory declaration for Woolworths Group was made by George Diakos, Human Resources Manager, Dan Murphy's at the time. The Dan Murphy's 2012 statutory declaration for SDAEA was made by Ian Blandthorn. They are presumably best placed

to give evidence of the true knowledge of the parties to this wage stealing agreement.

126. These are not the practices of cash strapped unsuccessful businesses. These practices were perpetrated by some of the world's most "successful" businesses. They were not "a cost of doing business." They were a way of doing business which maximised profit **by** perpetrating gross wage theft against the lowest paid workers in Australia – many of them children.

McDonald's 2013

127. The largest employer of children in Australia is McDonald's Australia and its licensees. More than half of its workforce of over 100 000 workers are under the age of 18. More than 80% are under the age of 21. The business uses sophisticated metrics to maintain a churn of its workforce ensuring that 80% or more continue to be paid poverty junior rates.

128. In 2013 it made an application for approval of the *McDonald's Australia Enterprise Agreement 2013*. That agreement provided no weekend penalty rates and cut the quantum and period of late night penalty rates. Comprehensive analysis in 2016 showed that more than 60% of workers earned on average more than $1000 per year less compared to the Award. This includes many workers working very few hours on very low junior rates.

129. The statutory declaration filed by McDonald's Australia included "indicative rosters".[38] Despite more than half of its workforce being under 18, only 2 child workers – each classified as "casual school student" – were included. The first had a worker doing 3 weekday evening shifts of 5, 5 and 4 hours duration and a shorter 3 hour Sunday shift. The company analysis showed in QLD they would earn $1.16 more than the Award – some 0.5%. In WA they would earn $1.05 more than the Award. This roster had 14 of 17 hours worked at non-penalty rate times. If the roster had included a single additional Sunday hour, or a single less weekday hour, they would have been worse off.

130. No roster had all, most or more than 25% of hours worked on weekends. This is despite huge numbers of workers working only on weekends. The roster manipulation went so far as to have a 19 year old "casual crew" finish a 7.5 hour shift on one day at 8pm only to return at midnight for a 5 hour shift. As with other employers, the rosters are a fabrication designed to secure approval of an agreement which steals wages.

131. The 2013 statutory declaration for McDonald's Australia was made by Joanne Taylor, Senior Vice President of McDonald's Australia at the time. They declared that the employer and SDA considered that the agreement passed the BOOT.

> 3.8 If the employer considers that the Agreement does not pass the better off overall test as set out at s.193 of the *Fair Work Act 2009* (and, possibly, item 18 of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*), identify any exceptional circumstances that FWA should consider when deciding whether approving the Agreement would not be contrary to the public interest (s.189):
>
> The Employer and the Union consider that the Agreement passes the better off overall test.

[38] See annexure D.

132. The statutory declaration for SDAEA was made by Joe de Bruyn who agreed with Ms Taylor's statutory declaration. They are presumably best placed to give evidence of the true knowledge of the parties to this wage stealing agreement.

133. There has not been any investigation into this practice. In the past we alleged it was a ludicrous 'coincidence'. Now with the Woolworths internal analysis, the Coles settlement and other materials we know there is no coincidence. This is wage theft pure and simple and:

a) The Fair Work Commission has failed to investigate the theft;

b) The majority of Past Senate Committees have failed to investigate the practice and shielded SDA and their business partners; and

c) Those responsible have not been held to account.

134. We even have the fantastical scenario that the wage theft was approved by the Fair Work Commission in KFC to ensure they had a *level playing field*. A field SDAEA offered its friendly business partners. A field wage thieves could play on when they recruited for the SDAEA.

SDAEA Applying for Wage Stealing Orders

135. Ordinarily Enterprise Agreements or their equivalent transitional instruments from past legislation will apply only to those employees who are employed by the employer named in the agreement, or their successor if they transfer with the business. New employees of new employers are generally not covered.

136. In retail and fast food, the value of an SDAEA agreement is immense. It can literally help a business steal billions in minimum wages. For franchise heavy businesses this poses a problem because they often have parts of their business closing, opening and transferring between different legal entity employers.

137. SDAEA offered its business partners a solution.

138. In 2013 and 2014, SDAEA applied for (and secured) wage stealing orders from the Fair Work Commission which ensured their deals with franchisors would continue to apply to new franchisee employers when they hired new employees.

139. These were secured for KFC[39], Red Rooster[40] and Pizza Hut[41]. The effect of the orders was to exclude new staff from Award coverage. The wage stealing agreements would apply to them.

140. On each occasion the SDAEA and employers argued a phasing 9% loading rendered the vast

[39] [2013] FWC 3859
[40] Various but for example, see AG2014/1433
[41] AG2013/8007

majority of employees better off overall than the Award. In some, express promises (never delivered) were made that new agreements would be negotiated and put in place (presumably once they passed the BOOT.)

141. None of the relevant applications had actual evidence of how workers would be better off. Any rudimentary assessment would have exposed the truth. By virtue of these applications the Fair Work Commission was repeatedly led into error and made the Orders.

142. However, it begs the question why SDAEA would have made the applications itself – thus exposing itself to honest undeniable criticism for **inflicting the wage theft directly**. This was exposed in negotiations with KFC in 2019. The employer explained that they were *not able* to seek such orders which applied globally for any new franchisee. New employers could apply but they were at risk each time of the order being denied. That is, each individual franchisee would have had to apply each time it was created and took over an outlet.

143. As the purported industrial representative of the class of workers being fast food workers, SDAEA was in a privileged position. It's status as a registered organisation of employees meant it could apply for the orders thus inflicting wage stealing on all future workers of new franchisees.

144. In return, the employers recruited for SDAEA. Not only did many of the wage stealing agreements state employers would promote SDAEA, but the price of SDAEA obtaining the Orders was that each employer entered into a Memorandum of Understanding (MoU)[42] with SDAEA.

Union Recognition and Membership

8. Red Rooster recognises the SDA as being a Union that has representation of all employees covered by this agreement.

It is the policy of Red Rooster that it shall encourage all employees covered by this agreement to consider joining the SDA. This includes positively promoting union membership at the point of recruitment.

All new employees covered by this agreement shall, upon induction, be given an application form to join the SDA and any appropriate literature provided by the SDA. All new employees shall be shown a copy of the SDA video, "Your Job, Your Union" during induction and shall be introduced to a union delegate as soon as is practical.

Red Rooster undertakes, upon authorisation, to deduct union membership dues, as levied by the SDA in accordance with its rules, from the pay of employees who are members of the SDA. Such monies collected will be forwarded to the SDA at the beginning of each month together with all necessary information to enable the reconciliation and crediting of subscriptions to members' accounts.

145. The Fair Work Commission relied on the express statements by SDAEA and employers. The employers knew exactly the savings they secured with the Orders. The SDAEA knew the value of what they offered. The only one's none the wiser with the very low paid fast food workers who had the wage stealing deals inflicted upon them.

[42] See, for example, Annexure F

146. A Royal Commission into Wage Theft would investigate, interrogate and identify those responsible and be the first step in holding them to account.

FAILING TO APPLY THE BOOT AT ALL

147. In 2016 the *McDonald's Australia Enterprise Agreement 2013* ("McDonald's 2013 Agreement") was varied to include new franchise companies and delivery drivers. In effect, the scope and employers bound were varied.

148. A critical shortcoming of the variation was that the Fair Work Act was not properly applied to the application for variation.

149. The Fair Work Act is clear, when a variation is proposed a new *Better Off Overall Test* must be applied to the agreement. The date of the test is the date of the application for the variation, and the test is of the entire agreement – not just those sections varied. There is nothing on the file of the variation to the McDonald's 2013 Agreement to indicate any form of BOOT was undertaken at all. Such action was not specified in the decision. This is remarkable. It would appear, despite the express terms of the Fair Work Act, that none of the Fair Work Commission, McDonald's Australia, the SDAEA, nor any of the lawyers involved, identified the issue or raised it as a concern.

150. It is beyond doubt that the McDonald's 2013 Agreement would have failed the BOOT in early 2016. That test is what the Act required.

151. In this case, thousands of employees had the McDonald's 2013 Agreement applied to them without ever having a BOOT conducted.

152. We reiterate the agreement failed the BOOT in 2013 when approval was granted by virtue of the material filed and relied on by the company and SDAEA. The catastrophic failure of the loading to compensate workers was learned by the Fair Work Commission in 2014 when KFC relied on the McDonald's approval to get its *level playing field*. Then in 2016, the Fair Work Commission didn't bother conducting a BOOT at all. McDonald's and SDAEA were laughing all the way to the bank.

SUMMARY

153. SDAEA knew how the BOOT was applied to every employee individually. SDAEA knew loading rates could be used to pay workers less than they would earn under many rosters.

154. SDAEA negotiated agreements which circumvented the BOOT. Each employer negotiated willingly knowing the financial savings which could be achieved as compared to the Award.

155. The Fair Work Commission relied on the evidence in the form of statutory declarations, often with additional material or indicative rosters.

156. SDAEA and employers developed schemes to maximise the likelihood of agreement approval despite the agreements manifestly not passing BOOT.

157. No investigation has been conducted by statutory authorities into the implementation of that scheme, the filing of relevant evidence, the role of the Fair Work Commission or the damage caused to overwhelmingly low paid workers by the conduct.

OTHER FORMS OF POPULAR WAGE THEFT

158. Recent media exposure of the **salaried worker wage theft** has highlighted how retail and fast food remain reliant on salary structures which have stolen the wages of thousands of workers.

159. In its simplest form, this involves paying a salary which is not commensurate with the wage that would have been earned had the worker simply been paid hourly wages under the relevant Award. This almost always involves non-payment of overtime required and worked, and very often involves simply unpaid penalty rates, allowances, loading and other rights.

160. While Woolworths Group has been exposed as being the largest wage thief, RAFFWU sees this conduct in almost every retailer and fast food entity in which we have members. The scale is immense.

161. Failure to pay salaries concordant with minimum award wages for the role is endemic in the retail and fast food sectors.

162. **Classification wage theft** involves the failure to pay workers according to the classification of their work. For example, in November 2019 the McDonald's group employed approximately 10000 employees classified as "crew trainer". These workers were required to supervise employees and/or train new employees as a major responsibility in their day to day role. However, McDonald's did not pay them the minimum base rate as required by law.

163. When this issue was identified to McDonald's, all of these workers had their positions abolished and a new classification of "Crew Coach" was introduced which purported to not require workers to supervise employees and/or train new employees as a major responsibility in their day to day role.

164. Another example is at Bakers Delight. Many outlets required very young workers under 18 years of age to oversee the shop for hours each week – including to supervise other young employees. These workers were invariably not paid a supervisory or higher classification.

165. Failure to properly classify and pay according to the correct classification is endemic in the retail and fast food sectors.

166. Attendance at training events, staff meetings, staff 'social' gatherings and the like are often unpaid or classed as 'voluntary' and not paid. This **training and meeting wage theft** is

prevalent, systemic and endemic across the retail sector. Unpaid online training is now a common expectation in all parts of the retail and fast food sectors.

167. Time recording systems are regularly not the basis for payment in retail. A variety of systems are used to avoid payment by way of the actual time worked. Some are simply ignored (Coles Supermarkets), others employ “Pay to Roster” structures (Woolworths) where workers ‘sign’ an ‘adjustment’ document which purportedly entitles the employer to not pay for time worked.

168. Less prevalent, but still regular occurrences, are systems of “clocking off” and returning to work.

169. Many retailers with small stores employ simple systems of ‘not paying’ for time spent opening up stores or closing up stores. An example is Spend-less Shoes whose responsible officer patronisingly declared to RAFFWU that they are a ‘good retailer’ on the basis that they at least paid for closing. They openly admitted Spend-less Shoes did not pay for time spent opening up stores.

170. This issue occurs often in shopping centres where stores are contracted to open and close stores at set times with the store to remain open for the entire period between. These often match to a full-time role and staff are rostered only for the period the centre is open – when the store is trading. Obviously there is a 15-30 minute period for a worker to open/close shutters, turn equipment on/off, set alarms, put tables and sale items in/out, set up the cash till and more. In very many retail and fast food outlets this work is not paid and amounts to **opening/closing wage theft**.

171. Across retail and fast food, workers are not paid for breaks. This manifests as non-payment for time worked on meal breaks which are not paid – or **breaks wage theft**. The understaffing of stores, the single staffing of many retailers and the requirement to remain open means workers are unable to stop work. They are often not paid for the unpaid meal break they do not actually take. They also often cannot access toilets – especially when they are not located within the shop.

172. RAFFWU has had many reports of medical complications from workers not being able to access toilets, of workers wetting themselves at work, of workers wearing incontinence pads without a medical necessity and of workers using buckets and wash basins as toilets. These are not just at boutique small outlets but include employers such as Noni B, BWS and very many others. Many (such as Noni B and BWS) had the added benefit of wage stealing SDAEA deals.

173. These are the cruel realities of the retail and fast food sectors, populated with wage thieves who place no value on the dignity and worth of their victims.

174. There are very many other forms of wage theft – too numerous to quantify in a report like this. We are also cognisant that this submission not be used as a how to guide for wage thieves. The thieving of wages has been a business practice for centuries. It is not new. What is new is that the electorate has grown angry about the inaction of politicians. This is a unique opportunity

for politicians to take real, serious steps to address wage theft.

175. The starting point for that is a Royal Commission into Wage Theft.

c. the best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment;

176. A Royal Commission into Wage Theft is the best means of identifying and uncovering wage and superannuation theft. Participants would have the protection such a Royal Commission would bring.

177. Current systems do not provide the mechanism for low paid workers to raise and resolve wage theft. Within the first 6 months of employment (12 months for small business employers) there are no protections against unfair dismissal. Proving a complaint about wages led to a dismissal is fraught with difficulty and must be lodged within 21 days of dismissal. It is prosecuted (after the initial stage) in the federal courts.

178. The 21 day period should be abolished. It is remarkable that a worker who has unlawful adverse action taken against them *not resulting in dismissal* has 6 years to commence a prosecution relating to the adverse action. Requiring a worker to take such action within 21 days when they are without work having been subjected to wage theft is ludicrous and blatantly anti-worker.

179. Workers and their unions should have unfettered simple access to their employment records, including leave balances. The laws currently allow a wage thief to require an employee to request leave balances, information about industrial instruments which apply, contract copies and the like. All this should be accessible to every worker without request. Failure to provide simple, free, unmonitored access should be a serious offence.

180. In our experience, casual workers are at the greatest risk of being unable to act against wage theft. Current workplace laws provide little protection for an underpaid victim exposed to a cunning wage thief. All workers in casual employment should be permitted to have their employment deemed as ongoing after 6 months employment. The deeming would be administered by a statutory authority so no request needs to be made for consideration by the employer. Young, casual workers are the most susceptible to wage theft. A process for them to have greater job security will enable greater exposure and abolition of wage theft.

181. All victims of wage theft working under a visa should be granted automatic immunity from any repercussions related to their employment and possible visa violations.

182. All victims of wage theft should be exempt from any purported “voluntary unemployed” designation by Centrelink or other agencies. No victim of wage theft should be forced to

maintain an employment relationship with a wage thief out of fear of being destitute. Social security payments should be increased to the equivalent of a living wage. Current social security payments are so low that they force victims of wage theft to continue working for wage thieves and to continue having their wages stolen. We recognise this is their intention but it should be stopped.

183. Currently many workers cannot determine what industrial instrument applies to their employment. Employers should be required to provide clear information to employees about the relevant industrial instruments which apply – including copies of the instruments.

184. There should be a national register of all industrial instruments which apply and to which employers they apply. Currently there is no such register. The database maintained by the Fair Work Commission does not identify current employers for each instrument, or even whether they are still in force.

185. Currently many wage stealing SDAEA and other agreements remain in force in the retail and fast food sectors. Since the *Hart v Coles* case these zombie agreements have been discussed for 5 years in the media and at previous senate inquiries but no action has been taken to stop their *Workchoices* wage theft.

186. Extant industrial instruments in the retail and fast food sectors should all be audited by a statutory authority for compliance with BOOT. The Fair Work Act should be modified to provide any agreement which does not pass BOOT as at the date of the test be considered for termination and employees given the opportunity to provide their view prior to termination.

187. The s.206 proposal below would reduce, but not avoid, the impact of this zombie agreement wage theft however it has been shunned by those not on the side of workers in past senate inquiries.

d. the taxation treatment of people whose stolen wages are later repaid to them;

188. Those responsible for wage theft should pay the taxes of those affected, and meet all other liabilities including those created by virtue of robodebt style recovery mechanisms.

189. Further, the responsible thief should also meet all legal, accounting, migration and associated costs borne by the victim. These would include all migration law costs.

e. whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;

190. Wage thieves should be properly recognised as the managers, owners, directors, supply chain masters, labour hire purchasers and majority shareholders in entities. They should all face the same consequences.

191. Clearly liability should be extended to all those who have an incentive to steal wages through the use of supply chains, labour hire, franchising and similar arrangements.

f. the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence;

192. Penalties must be substantially increased and paid to the worker or their industrial association unless exceptional circumstances apply. The cost of litigating wage theft can be substantial – both in legal costs, union costs and personal costs such as time and stress.

193. Industrial associations should be empowered to prosecute wage theft and industrial instrument breaches in the courts irrespective of their registration as an organisation of employees. While RAFFWU currently litigates a number of matters, specific breaches of an Award or Enterprise Agreement are prosecuted by workers in the retail and fast food sectors with the support of RAFFWU.

194. Victims of wage theft crime should not have to negotiate *up to* the stolen wages in mediation or conciliation. Substantially increased penalties would provide a stronger incentive for employers to resolve claims at the stolen wages.

195. Current laws provide no obvious mechanism to return the wages stolen by unlawfully legalised agreements. Amending s.206 to implement the objective of the *Pay Protection Bill* would remove the incentive to strike such agreements. It would eliminate the incentive to maintain such agreements.

196. It would also be desirable to mandate that agreements cannot include terms which specify penalty rates lower than the respective modern award. It would prospectively guarantee workers at least the modern award rates, irrespective of their employer or the involvement of SDAEA.

197. A presumption of guilt should be introduced where records are not kept.

198. A national online public register of wage thieves should be maintained so that workers can identify quickly whether they are working for a wage thief and simple steps they can implement to minimise the risk the thief poses to their livelihoods.

199. Wage thieves should be banned from employing vulnerable labour – such as children, workers on junior rates, disabled workers, casual workers, trainees, migrant workers and others. This will have the benefit of forcing employers who wish to continue using exploitative (junior, etc) poverty rates to at least pay those rates or face substantial additional cost (in the form of ordinary minimum wages.)

200. Wage thieves should be monitored (at their own cost) by a national statutory authority, including detailed payroll monitoring for 5 years once exposed as wage thieves.

201. Repeat wage thieves should be jailed and banned from employing workers – including being in a responsible position for workers – for ten years.

202. Victims and their unions should be able to recover their stolen wages through a low hurdle, free service managed by competent and compassionate staff. RAFFWU is concerned the involvement of various Commissioners of the Fair Work Commission, and the failure of the Fair Work Commission to undertake any investigation of its involvement in the wage theft, raises questions about the competence of the Fair Work Commission to handle such enforcement processes.

203. RAFFWU recommends a separate body be established which would facilitate resolution of wage theft cases. Workers should be able to be represented by their industrial association of choice. The body would not be a gate keeper to the courts. It would provide a low cost alternative. Presiding officers should be appointed by an independent body assessing mediation skills and legal competence. They should not be appointed by the Industrial Relations Minister of the day.

204. Deduction from wages for uniforms, equipment, overpaid wages and other items should be banned altogether. The current legislation provides for agreement to some deductions by employers but it is too easily circumvented by a wage thief arguing agreement was reached. If the deduction is to be paid to the employer, it should be prohibited and alternative arrangements can be made.

g. whether Federal Government procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft; and

205. Procurement policies must ban wage thieves. This ban must be for all entities controlled or directed by those responsible for wage theft.

206. Considering the current discussion regarding *Indue* exclusive purchase agreements, wage thieves should be banned from providing services to vulnerable persons such as those reliant on social security payments.

CONCLUSION

207. The scale of wage theft due to SDAEA agreements is in the billions of dollars. Over a million very low paid workers have been affected by the wage theft. Other forms of wage theft must also be stopped. A Royal Commission into Wage Theft is the most obvious and simple solution to properly investigate and expose those responsible. The Royal Commission into Wage Theft would also identify the best mechanism to compensate victims of SDAEA wage theft.