Australian bar and restaurant chain exploits Fair Work Act to avoid penalty rates

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Last week, Brisbane-based bar and restaurant chain Mantle Group Hospitality (MGH) sacked its entire casual workforce and rehired them under a separate entity.

Under the new arrangement, the company is not required to pay evening and weekend penalty rates and can ask workers to swap the dates on which public holidays are observed. Despite these conditions, workers are paid only the legal minimum base rates set down in the relevant industrial awards.

MGH employs around 700 workers at 17 venues in Brisbane and Sydney, including James Squire brew houses and the Pig 'N' Whistle pub chain.

The move came just ten days after the Fair Work Commission (FWC) quashed an even more unfavourable 2021 enterprise agreement that had covered the workers since last year. The United Workers Union (UWU), which brought the case, had hailed the ruling, declaring it had "notched up another win."

These are only the latest attacks on workers' basic rights by a company that has avoided paying basic employee entitlements for more than two decades. Until May last year, MGH employed hundreds of workers under an enterprise agreement that was approved in 1999, expired in 2002, renewed in 2010, and expired again in 2012.

Under the Staff Services Pty Ltd agreement, casual workers received no penalty rates for working nights, weekends or public holidays. Once the agreement expired, base pay was increased in line with the awards, but workers continued to be denied penalty rates. As a result, in 2022, workers were paid at least $5 an hour less than the legal minimum on Saturdays, $10 an hour less on Sundays, and $26 an hour less on public holidays.

In April 2022, MGH worker Henry Thom lodged an application with the Fair Work Commission (FWC) to terminate the long-expired agreement. Termination would mean that workers' pay and conditions would be set by the Hospitality Industry (General) Award or the Restaurant Industry Award, depending on their specific role in the company.

Commissioner Jennifer Hunt ruled in favour of Thom's application, declaring it "unconscionable" that the company had kept the expired agreement in place for so long.

Ahead of the ruling, MGH began transferring workers to another subsidiary, Hot Wok Food Makers Pty Ltd, where they would be covered by an enterprise agreement approved by the FWC in 2021. This agreement contained clauses allowing workers to "voluntarily" waive evening, weekend and public holiday penalty rates, and "agree" that overtime would be paid at ordinary base rates.

When workers were asked to move to Hot Wok, they were given a form to sign that included the following:

"I understand that should my Employer consent/agree to this application, then

• any time worked by me in excess of my ordinary hours of work; and

• any hours worked by me between 7:00pm and 7:00am Monday to Friday and at any time on Saturdays and Sundays; and

• any hours worked by me on public holidays;

shall be paid at my ordinary hourly rate in accordance with clause 3.2.1 of the Agreement."

The pro forma manner in which this was presented to workers makes clear that there was little that was "voluntary" about it. As Hunt noted in her ruling terminating the Staff Services agreement, "It is inconceivable to imagine an employee voluntarily agreeing to work for the payment of $28.77 per hour on a public holiday when they would otherwise be entitled to $56.15 per hour."

The commissioner also noted, "the presence in the Hot Wok Agreement of the voluntary hours provisions is such that the Agreement could never satisfy the BOOT." The Better Off Overall Test (BOOT), part of the Fair Work Act, is supposed to prevent the approval of enterprise agreements under which workers could be paid less than under the award, taking into account penalty rates, ordinary hours of work and rostering.

So how and why was the Hot Wok agreement approved by the FWC in the first place?

In signing off on the agreement in July 2021, then FWC deputy president Amanda Mansini noted "the Commission raised concerns" over whether it passed the BOOT, but that these had been satisfied by further information provided by the company. Much of this information, along with the initial application for approval of the agreement, was "false or misleading" as a result of "deliberate conduct" by MGH's

chief of human relations, according to subsequent FWC findings.

Mansini asserted the FWC "took steps to ensure that the relevant employees … were informed of: the application; the Commission's concerns; the Applicant's responses to those concerns; and were invited to express their views.…"

But whatever "steps" were taken by the FWC failed to uncover that none of the "relevant employees" who voted in favour of the agreement would ever have been covered by it.

Hot Wok had just five employees at the time the agreement was made, only four of whom voted. Three of those are venue managers, whose responsibilities include hiring and firing workers, as well as setting rosters, while the fourth works in payroll. All four earn far more than the full-time salary of workers in the highest pay classification set down in the agreement. It was only after the agreement was approved, by four workers who had no right to vote on it, that MGH began transferring hundreds of workers, who would be subject to the exploitative conditions, from Staff Services to Hot Wok.

The Full Bench of the FWC found on January 12 that this was a "deliberate manipulation by which the four employees had their employment transferred from SSE to Hot Wok for the purpose of 'making' an enterprise agreement which was intended to apply to the large number of SSE employees who were transferred to employment with Hot Wok only after the agreement was approved."

Despite the FWC's criticisms of MGH, and the UWU's celebration of the ruling, the company's latest move appears to be a similar operation. The KGS Staff Pty Ltd enterprise agreement to which workers have now been moved was voted on in June 2019 by just eight workers, according to the *Australian Financial Review*.

Why would a business with only eight employees introduce a complex enterprise agreement, containing seven different pay classifications as well as provisions for trainees and apprentices? The only apparent purpose is to lock in pay and conditions for subsequently hired workers who have no say in the agreement. But the FWC approved this agreement as a matter of routine, just as it did the Hot Wok deal.

The Full Bench of the FWC said in its January 12 ruling that the process of approving enterprise agreements "would break down entirely" if the industrial court was required to "investigate for itself the truth" behind the assertions of employers. In other words, the FWC accepts company claims at face value, and it is up to workers employed under unfair terms to use their own resources to mount a legal challenge.

In her May 2022 ruling, Commissioner Hunt noted that this presents a particular difficulty for casual workers. Legally, their employment is terminated at the end of each shift, and "often employers make jurisdictional objections on the basis that the casual employee who has made the application was not working at the precise time the application was made."

The FWC's hands-off approach to approving enterprise agreements that eviscerate workers' pay and conditions is in stark contrast to its response to workers' industrial action, which is subject to a protracted approval process and can be shut down at any time.

In recent months, the FWC suspended the right of workers to strike at Svitzer and Qenos on the basis that economic harm might possibly be caused by lockouts, which were initiated by the companies, not workers.

Far from being an "independent umpire," as the unions claim, the FWC is the pro-business arbiter of an industrial relations system that is completely stacked against the working class. This system was set-up by successive union-backed Labor governments. The FWC and Fair Work Act were established by the Rudd-Gillard government in 2008, but the framework is rooted in the Hawke-Keating Accords of 1983?1996. The Albanese government is continuing the process, with the introduction late last year of new measures to step up the FWC's powers to shut down strikes and impose wage- and condition-slashing enterprise agreements.

UWU industrial officer Martin de Rooy's call for MGH to "negotiate a union agreement" also represents a dead-end for workers. In the September quarter last year, new union-negotiated enterprise agreements delivered average nominal annual wage rises of just 2.6 percent, far below the 7.8 percent official inflation rate.

The role of the union apparatus, along with the FWC, is to continually drive down wages and conditions, while suppressing any opposition of workers to this deepening assault. In hospitality, the UWU primarily does this by diverting the anger of workers over wage theft, dire conditions, and rampant exploitation of migrant workers and youth, into legal challenges and toothless appeals to government.

To fight for decent wages and conditions, workers in hospitality and throughout the working class will need to form new organisations of struggle in every workplace, democratic rank-and-file committees independent of the unions. Through a network of these committees, workers can prepare to fight back, not just against their employers, but the whole industrial relations system and its defenders in the unions and all the parliamentary political parties.