

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

*Fast Food Industry Award 2010*  
(AM2017/49)

**9 February 2018**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS –

### *FAST FOOD INDUSTRY AWARD 2010*

(AM2017/49)

#### **Ai GROUP SUBSTANTIVE CLAIMS**

1. The Australian Industry Group (**Ai Group**) refers to the directions made by Commissioner Lee on 8 February 2018 to file supplementary submissions concerning the SDA objection to the inclusion of a facilitative provision in clause 25.5(a)(i) of the Fast Food Industry Award 2010 (**Award**).
2. This submission constitutes the supplementary submission.
3. Ai Group continues to rely on its submission filed 21 December 2017.

#### ***Decision in Remington Products Australia Pty Limited v Energizer Australia Pty Limited***

4. Ai Group submits that the decision in *Remington Products Australia Pty Limited v Energizer Australia Pty Limited* [2008] FCAFC 47; (2008) 246 ALR 113 (“**Remington**”) supports its submission that the proposed facilitative provision (if the subject of a determination made by this Full Bench) is supplementary to the determination of the Full Bench in the Penalty Rates Proceedings.
5. The decision in *Remington* emphasises that a supplementary order (or determination) does not vary or alter the initial order (or determination) (see *Remington* at [8]). The proposed facilitative clause (if the subject of a determination made by this Full Bench) does not alter or vary the initial determination of the Full Bench in the Penalty Rates Proceedings on the end time of the late night penalty.
6. The decision in *Remington* illustrates that an order that stands “side by side” with the initial order is a supplementary order (see *Remington* at [13]). The proposed facilitative clause (if the subject of a determination made by this Full Bench)

stands “side by side” with the initial determination of the Full Bench in the Penalty Rates Proceedings on the end time of the late night penalty.

7. The decision in Remington highlights that a supplementary order (or determination) does not “touch upon” the initial order (see Remington at [9]). The proposed facilitative clause (if the subject of a determination made by this Full Bench) does not “touch upon” the initial determination of the Full Bench in the Penalty Rates Proceedings on the end time of the late time penalty.
8. The decision in Remington notes that a supplementary order (or determination) is not limited to an order (or determination) in aid of the enforcement or working out of the initial order (see Remington at [10]).
9. The decision in Remington demonstrates that the failure of a court or tribunal to make the supplementary order at the time of the initial order (even if expressly pressed at that time) does not preclude the court or tribunal making the supplementary order (see Remington at [14]). The failure of the Full Bench in the Penalty Rates Proceedings to make a determination including the facilitative provision does not preclude this Full Bench from making such a determination.
10. The decision in Remington demonstrates that the touchstone for the exercise of the making of a supplementary order (or determination) is not essentiality but appropriateness and reasonableness (see Remington at [16], [19]). (Ai Group submits that the time for determining such appropriateness or reasonableness is the final hearing and not now in advance of the final hearing.)
11. The factual position in Remington is an illustration of an order (the removal of items from public display or the placement of overstickers on packaging – see Remington at [4]) that supplements an earlier order (the permanent restraint on supply the items – see Remington at [3]). The proposed facilitative clause (if the subject of a determination made by this Full Bench) similarly supplements the earlier determination of the Full Bench in the Penalty Rates Proceedings on the end time of the late night penalty.

**Outcome**

12. This Full Bench should reject (and dismiss) the SDA objection (including the claimed striking out from the application of the proposed facilitative provision).