

The Shop, Distributive and Allied Employees' Association

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**NATIONAL PRESIDENT**

Joe de Bruyn

**NATIONAL SECRETARY**

Gerard Dwyer

13 December 2017

Commissioner Lee  
Fair Work Commission  
11 Exhibition Street  
MELBOURNE VIC 3000

Dear Commissioner,

**RE: AM2014/267 - 4 yearly review of modern awards –  
Fast Food Industry Award 2010 (FFIA)**

We write this letter in relation to the above matter which was before you in Conference on 1 December 2017. The SDA raised concerns at Conference regarding the re-agitation of a claim by the AiG which has already been dealt with by the Penalty Rates Full Bench.

The AiG confirmed at Conference on 1 December 2017 the intention to pursue a claim to vary the ceasing time of the evening penalty rate in the FFIA from 6am to 5am, or to introduce a facilitative provision in relation to this. The ceasing time of the evening penalty rate in the FFIA was determined in the recent decision of the Penalty Rates Full Bench [2017] FWCFB 1001.

The SDA submits that this matter was fully considered by the Full Bench and the appropriate ceasing time for the evening penalty rate was determined to be 6am. The decision provided that:

[1134] *In our view the span of hours attracting the 15 per cent additional payment **should be amended to 'between midnight and 6.00am'**. In the context of this award the provision of an additional payment for work performed between 6.00am and 7.00am does not achieve the modern awards objective.*

*(emphasis added)*

[1334] *It is convenient to deal here with another aspect of clause 25.5, in particular clause 25.5(a)(ii) which states: '*

*(ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% loading.*

[1335]

*Clause 25.5(a)(ii) provides for the payment of a 15 per cent loading for ordinary hours of work 'after midnight', but does not set the span of hours between which the loading is to be paid. The equivalent provision in the Restaurant Award (clause 34.2(a)(ii), above) provides that the 15 per cent loading is paid for ordinary hours worked between midnight and 7.00am. We note that RCI proposes to vary the span of hours to which this penalty applies, but the pertinent point for present purposes is that the Fast Food Award does not presently prescribe the span of hours during which the loading is to be paid. For the reasons set out above it would be logical to align the evening penalty rate provisions in the Fast Food and Restaurant Awards. We now turn to the RCI's claim.*

The SDA strongly objects to the FWC hearing this matter again as part of the 4 yearly review of modern awards. The matter was considered by the Full Bench and a decision issued.

The SDA respectfully requests that the FWC strike out this application by the AiG to re-agitate the claim for an earlier ceasing time of the late night penalty in the FFIA, as part of the 4 yearly review of modern awards.

Yours Sincerely,



**GERARD DWYER**  
NATIONAL SECRETARY AND TREASURER

cc. President Ross