Fair Work Commission

s.156 – 4 yearly review of modern awards

Fast Food Industry Award 2010

AM 2014/49

Submissions

Shop Distributive and Allied Employees' Association

16 March 2018

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to part B. Merit submissions of the Amended Directions issued by the President on 15 February 2018.

2. There are two substantive matters in relation to the *Fast Food Industry Award 2010* that these submissions will address.

    a. Firstly, the Australian Industry Group ("Ai Group") seeks to delete the current part time clause (clause 12) and replace with an alternative clause.
    b. Secondly Ai Group seeks to insert a facilitative provision into the evening penalty clause (clause 25.5) to allow a fast food employer and a majority of employees concerned to agree to alter the end time of the penalty rate period on Mondays to Fridays from 6am to 5am.

3. The SDA represents its members in the retail and fast food industries. As at December 2017 the SDA had just in excess of 213,000 members. Of these approximately 21,500 work in McDonald's, Hungry Jacks, KFC and Domino's.

Part Time Clause

4. The SDA does not oppose the deletion of the current part time clause (clause 12) and the insertion of the part time clause included in the draft determination emailed to the SDA on 22 February 2018 and attached to these submissions as Annexure A.

5. The SDA supports the principle of meaningful, secure and reliable work. These principles are most likely to be achieved when work is permanent (either full time or part time). The SDA submits that the consent draft determination will encourage the use of permanent part time employees in what is a highly casualised workforce. The consent draft

determination also provides a mechanism for part time employees to access additional hours when this is mutually acceptable to both the employer and employee.

6. The fast food industry has a significantly sized workforce. It is characterised by large numbers of junior employees. A high proportion of employees in this industry are high school or tertiary level students.

7. The Ai Group submissions make the following observations:

> 54. "Currently, crew rosters in the fast food industry are prepared by taking into account (among other things) the availabilities of employees (the hours that they inform their employers that they are available to work and which are ordinarily greater than the number of hours they actually work) and expected customer demand…".[1]
>
> 55. "Currently, employees in the fast food industry change their availabilities regularly, including on a permanent or ongoing basis and a temporary basis…".[2]
>
> 56. "Currently, customer demand in the fast food industry fluctuates significantly for a variety of reasons, including special events (such as sporting events)…". [3]
>
> 58. "Currently, many employers in the fast food industry invite employees to work additional hours to those included in rosters so as to cover for other employee absences and unpredicted customer demand…".[4]

8. The SDA notes the observations made in the Ai Groups submissions in relation to this application and submits that the draft determination part time clause is compatible with those features of the industry as described by Ai Group.

---

[1] Outline of Submission of Australian Industry Group, dated 23 February 2018, paragraph 54
[2] Ibid, paragraph 55
[3] Ibid, paragraph 56
[4] Ibid, paragraph 58

9. The SDA submits that the changes to the part time clause are consistent with the modern awards objective and in particular section 134(1)(d)

(d) the need to promote flexible modern work practices and the efficient and productive performance of work;

The SDA submits that the amended clause will:

- promote part time employment in an industry with high levels of casual workers.
- Provide greater security of hours with a guaranteed minimum of at least 8 hours per week.
- Permit employers and employees to mutually agree to the working of additional hours, which will encourage employers to offer available hours to part-time employees before hiring casuals.

10. After consultation with Ai Group and representatives from McDonald's, Craveable Brands and Hungry Jack's the SDA is satisfied that the proposed clause offers benefits to employees.

11. The SDA submits that the following are benefits to employees;

- Employees are guaranteed a minimum of at least 8 hours per week (currently a 3 hour per week minimum applies) (Draft determination clause 12.1(a))

- Employees can access additional hours where available (up to 38 hours per week) (Draft determination clause 12.7)

- Employees can only be rostered within the availability they provided at the point of engagement, or changed as per clause 12.6 (where employees are rostered outside their availability overtime payments apply) (Draft determination clause 12.2(b))

- Employees have the ability to change their availability with 14 days' notice when personal circumstances change (Draft determination clause 12.6)

- Employees may request an increase in the number of guaranteed minimum hours where an employee has regularly worked in excess of the guaranteed minimum hours over a 12-month period (Draft determination clause 12.9)

- Draft clause includes a savings provision ensuring any existing rostering arrangements continue unless a new agreement is reached regarding hours (Draft determination clause 12.8)

- All agreed additional hours (up to 38 hours per week) will be paid at ordinary rates and employees will accrue personal leave and annual leave

- Any extra hours worked which are not agreed between the employer and employee continue to be paid at overtime rates, as per the current award provision (Draft determination clause 12.7 (e) and (f))

12. On 1 February 2018 the SDA wrote to Commissioner Lee outlining its objection to the Ai Group's application to delete clause 12 of the *Fast Food Industry Award 2010* and to introduce a new flexible part time clause. The SDA stands by the submissions made in its letter of 1 February 2018 and our opposition to the form of the original application made by the Ai Group. However, the SDA has engaged in extensive discussions with the Ai Group, including a conference facilitated by Commissioner Lee, and as a result, the SDA is satisfied to support the deletion of clause 12, and the insertion of the draft determination (as agreed) as this clause provides benefits for employees and the appropriate protections for this industry so that it meets the modern awards objective.

13. Clause 12 of the current Award provides a mechanism by which a part-time employee can agree to work additional hours at the ordinary rate provided that the agreement to vary the roster is made in writing before the variation to the roster is worked (Clause 12.3 and 12.7).

14. The consent draft determination provides a more flexible mechanism for agreement for a part-time employee to be offered and agree to work additional hours. The SDA does not believe that the draft determination significantly departs from the principles of the current clause 12 of the Award, which will promote greater permanency and encourage employers to offer additional hours to part-time employees before casuals by recognising the mutually agreed availability of employees.

15. Access to additional hours combined with a guaranteed minimum number of hours provides significant improvements for part-time employees in the fast food industry.

16. The SDA further submits that the additional variation proposed in the draft determination to insert a rostering provision which requires the employer to prepare and make available to part-time employees a roster and that the roster can only be changed by mutual agreement or with seven days' notice, is a significant improvement and benefit for employees.

17. The SDA often represents members who have raised issues regarding a change to a roster outside of their availability and the impact this has on their family, caring or study commitments.

18. Clause 12.7(b) of the draft determination provides that:

> *The employee may not be rostered for work outside of the employee's availability*;

19. This clause will serve to eliminate the problems associated with part-time employees managing roster changes outside of their availability which clash with responsibilities and obligations outside of work.

20. The SDA does not oppose the proposed variation to the part time clause as per the draft determination attached.

Insertion of a facilitative provision into the evening penalty clause

21. The SDA opposes the inclusion of a facilitative provision into the evening penalty clause of the *Fast Food Industry Award 2010* at clause 25.5(a)(ii).

22. In submissions dated 20 February 2018 the SDA summarised its position in respect of the inclusion of a facilitative provision as follows.

> 4. The SDA submits that this matter was fully considered by the Penalty Rates 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.

5. At a conference before President Ross on 11 September 2017 and before Commissioner Lee on 1 December 2017 Ai Group outlined its intention to pursue a claim to insert a facilitative provision in the FFIA to allow an employer and a majority of employees to agree to amend the ceasing time of the evening penalty rate from 6am to 5am. This application was made in the context that Individual Flexibility Arrangements were too burdensome in the fast food industry.

6. The SDA raised objections during the Conference on 1 December 2017 to the application made by the Ai Group proceeding on the basis that the matter had already been dealt with in the 4-yearly review as part of the Penalty Rates Full Bench.

7. The SDA wrote to Commissioner Lee on 13 December 2017 outlining its objection to the FWC hearing this matter again as part of the 4-yearly review of modern awards and emphasised that this matter was fully considered by the Penalty Rates Full Bench (2017) FWCFB 1001.

8. The Full Bench fully considered the matter and determined that the appropriate ceasing time for the evening penalty rate was 6am.

9. In its submission dated 9 February 2018 the Ai Group submits that the objections of the SDA should be dismissed.[5]

23. In a Statement dated 1 March 2018 the Full Bench rejected the SDA's jurisdictional objection to this matter being heard.

[5] SDA Submissions (AM2014/49) dated 20 February 2018.

24. Despite the jurisdictional objection being rejected by the Full Bench, the SDA submits that for the purpose of the application before the FWC, the appropriate end time for the evening penalty rate has been determined by the Penalty Rates Full Bench in its decision issued on 23rd February 2017 as 6am.

25. The SDA further submits that this is the appropriate end time and the Award already provides a sufficient mechanism for altering the end time of the evening penalty rate, that is, clause 7 Award Flexibility.

26. The Ai Group make various observations about early morning operations. These include that some employers in the fast food industry commence trade at 5am[6]; that some employers in the fast food industry prepare their restaurants for opening between 5am and 6am[7]; and that there are significant numbers of employees who make themselves available to work between 5am and 6am[8].

27. The SDA notes these observations.

28. Paragraph 31 of Ai Group's submissions states:

"Currently, it is not practical to make and document individual flexibility arrangements for as many as 10,962 employees (with the process of making and documenting taking approximately 10 minutes per arrangement)."

The Anderson affidavit, at paragraph 43, states that "3,102 represents a fair approximation of the number of employees who would be required to work across the hours of 5am to 6am…". Therefore the company would need to make and document individual flexibility arrangements with about 3100 employees, not 10,962 employees.

[6] Outline of Submission of Australian Industry Group, dated 23 February 2018, paragraph 28
[7] Ibid, paragraph 29
[8] Ibid, paragraph 30

29. The Fast Food Industry Award 2010 contains at clause 7 an award flexibility provision. This provision appears at Annexure B of this submission. In particular the award flexibility provision provides:

> 7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
>
> **(a) arrangements for when work is performed;**
>
> (b) overtime rates;
>
> **(c) penalty rates;**
>
> (d) allowances; and
>
> (e) leave loading.
>
> (emphasis added)

30. The SDA does not accept that in the situation described by Ai Group at paragraph 28 above it is impractical to make and document individual flexibility arrangements for either large employers or small employers.

31. The Anderson affidavit at paragraph 58 estimates that it would take approximately 10 minutes to "negotiate, prepare and execute each agreement…".

32. The SDA makes the following observations about the use of flexibility arrangements and the Anderson affidavit.

- As at 2 February 2018 there were 972 McDonald's restaurants in Australia. (Anderson affidavit, paragraph 6)
- The Anderson affadavit estimates 3102 employees work between 5am and 6am. (Anderson affidavit, paragraph 43)
- The 3102 employees (those employees working from 5am to 6am) divided by 972 (number of McDonald's restaurants) equals 3.2 employees.

33. The SDA submits that for a store with sophisticated rostering and management systems and the use of a "learning and engagement computer software program known as "metime"" (see Anderson affidavit paragraphs 17-19) it would not be overly onerous to make individual flexibility arrangements with approximately 3-4 employees per restaurant. Any individual flexibility arrangement need only be made once with each individual employee as an ongoing arrangement and is not required on each occasion.

34. While information going to the number of employees engaged on a store by store basis is not included in Ai Group's submissions, the SDA submits that McDonald's stores are likely (in most cases) to have larger numbers of employees working from 5am to 6am than other employers operating at these times who are likely to be covered by the *Fast Food Industry Award 2010*. Therefore, the administrative burden of using an individual flexibility arrangement would be less for most other fast food employers.

35. The Ai Group submissions at paragraph 33 submit that some employees in the fast food industry prefer to work early morning shifts for personal reasons. The situation where an employee would prefer to work early in the morning (and is prepared to forgo a penalty loading) is adequately dealt with by entering into an individual flexibility agreement if the employee chooses.

36. The SDA also submits that acceptance to work unsociable hours does not negate the purpose of the penalty, which is to compensate employees for working those unsociable hours.

37. Employees accept hours (unsociable or otherwise) for a range of reasons including financial necessity and also balancing work and other responsibilities. Compensation for unsociable hours still applies whether someone accepts to work during unsociable hours. Acceptance or

willingness to work does not mean an employee would agree to forgo the penalty or be paid at lower, ordinary rates.

38. The SDA strongly submits that the integrity of compensation for unsociable hours is compromised by a facilitative provision which allows a majority of employees to agree to remove it. This is particularly relevant for award employees who do not have the capacity to do this in the context of an enterprise agreement which may seek to buy out this provision by way of improved base rates of pay and other benefits.

39. Paragraph 32 of the Ai Group submissions compare the non payment of penalty rates for the Monday to Friday - 5am to 6am period in the McDonalds Australia Enterprise Agreement 2013 with the penalty rates in the Fast Food Award. The paragraph further states that McDonalds Restaurants do not have trouble filling the early morning shifts and then make the assertion that an incentive such as a loading is not required. Paragraph 32 states:

> Currently, under the McDonald's Agreement, the evening penalty is only paid between 1.00am and 5.00am (see clause 28.3 of the McDonald's Agreement) for crew and not for managers (see clause 28.4 of the McDonald's Agreement). The McDonald's restaurants do not experience difficulties in filling the shifts that cover 5.00am to 6.00am (see Anderson Affidavit, pars 36, 42, 44; see also Agostino Affidavit, par 21). Currently, the McDonald's restaurants have more employees making themselves available between 5.00am and 6.00am than positions to be filled (see Anderson Affidavit, pars 36, 42; Agostino Affidavit, par 21). Accordingly, the McDonald's restaurants do not need to offer an incentive (such as a loading) to fill the period 5.00am to 6.00am.[9]

40. The SDA makes a number of observations about the assertions in paragraph 32 above.

[9] Outline of Submission of Australian Industry Group, dated 23 February 2018, paragraph 32

- Currently a 3 hour shift starting at 5am and finishing at 8am (Monday to Friday) under the McDonald's enterprise agreement would pay **$65.34**[10]**.**
  (Level 2/2A, adult, $21.78ph X 3)
- Currently a 3 hour shift starting at 5am and finishing at 8am (Monday to Friday) under the Fast Food Award would pay **$63.25.**
  (Level 1, adult, 20.08 X 2 + 23.09)

41. The SDA notes that currently a part time Level 2/2A employee (equivalent to Level 1 in the Fast Food Award) in a McDonald's store in NSW who works a 3 hour shift from 5am to 8am between Monday and Friday will be $2.09 better off than an employee under the Fast Food Award.
    (NB McDonald's pay rates differ from state to state. The highest rate for a Level2/2A, adult employee is $21.95 in the ACT. The lowest rate is $21.55 in Tasmania)

42. Furthermore, the assertion made in the Ai Group submissions above

    "*Accordingly, the McDonald's restaurants do not need to offer an incentive (such as a loading) to fill the period 5.00am to 6.00am.*"

    is unhelpful and irrelevant. Describing a situation where employees are prepared to work unsociable hours without an employer offering an incentive does not provide adequate justification for the removal of a penalty loading; a loading which the Penalty Rates Full Bench determined was appropriate and necessary to meet the modern awards objective.

43. This point is particularly irrelevant given the context of the rates paid at McDonalds. As demonstrated at paragraph 40 above employees at McDonalds have been compensated for the removal of the penalty rate

[10] McDonald's and SDA National Agreement Summary (NSW), Schedule A Wages Summary, at ANNEXURE C

between 5am-6am with a higher base rate of pay which means that when they work a minimum shift from 5am to 8am they receive more under the Agreement than the Award.

44. Currently the Fast Food Award provides for an ordinary hourly rate for a part time employee Level 1 at $20.08. With the addition of a 15% loading the rate is $23.09. The SDA submits that an additional $3.01 per employee per day is a minor cost impost to an employer that has chosen to commence trade at 5am.

45. The Anderson affidavit at paragraph 40 refers to a roster report that shows the number of McDonald's employees rostered to work at times which includes the period 5am to 6am. The report covers two separate periods (18th to 24th September 2017 and 5th to 11th February 2018). From Monday to Friday in each of the 4 randomly selected stores either 3 or 4 employees were rostered to work between 5am and 6am.

46. If we assume an equivalent operation as the 4 McDonald's stores described above with similar trading hours and covered by the Fast Food Award. In this example the additional cost to the employer would be $9.03 per day in a store with 3 employees and $12.04 per day in a store with 4 employees.

47. The SDA submits that this is not a prohibitive cost burden that would preclude a fast food operator from trading or commencing work to prepare for trade. The SDA submits that the negative impact of this change to an employee would outweigh any benefit attained by an employer.

48. As stated earlier in these submissions, the Award already contains a sufficient mechanism for an employee and employer to alter the end time of the evening penalty rate, clause 7 Award Flexibility.

49. The SDA submits that the Award Flexibility provision contained in Awards was carefully and specifically designed so that an employer and

an employee could agree to an individual flexibility arrangement while ensuring that this was done so that certain criteria was met:

- that an employee and employer have genuinely made the agreement without coercion or duress
- that it must result in the employee being better off overall at the time the agreement is made
- can only be made after the individual employee has commenced employment with the employer.

50. The SDA submits that it is not the administrative burden that employers want to negate by introducing a facilitative provision but the need to fulfil the criteria of reaching an agreement, particularly, that it is a genuine agreement and that it results in the individual employee being better off overall.

51. The Statement[11] of the Full Bench on 20 July 2017 in relation to plain language drafting of standard clauses went to the context of these requirements:

> **[21]** During the award modernisation proceedings in 2008 it was common ground between parties that agreement should be a genuine one and should be in writing. 13 The following term was proposed in the model clause at attachment C of the decision14 in June 2008 and became award flexibility clause X.2 in all modern awards:
>
> > 'X.2. The employer and the individual employee must have genuinely made the agreement without coercion or duress.'
>
> **[22]** In 2013, a second sentence was added to clause X.2 after the sentence above as follows:
>
> > '**X.2** The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.' 15 (emphasis added)
>
> **[23]** In respect of addition the additional sentence to clause X.2 above the Full Bench noted:

[11] [2017] FWCFB 3745

> '**[2]** In addition to these variations one further variation was adopted in order to improve the level of compliance with the requirements of the model flexibility term. The evidence suggested that a significant proportion of IFAs were entered into before the individual employee has commenced employment, contrary to the intent of the model flexibility term and the Act. To address that issue we decided to insert the following words in the model flexibility term:
>
> > "An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer".' 16

52. The SDA submits that the Award Flexibility clause in Awards have been carefully considered and structured in such a way to ensure that agreements made under the clause were done to satisfy the intent of the model term and the Act.

53. The SDA further submits that agreements between employers and individual employees to alternative arrangements in regard to penalty rates, among other things, is included in the Award Flexibility clause in the Fast Food Award and not as a facilitative provision because the Award Flexibility clause provides the appropriate protection to employees to ensure they genuinely need to make alternative arrangements, have not been coerced and will be better off from making the agreement.

54. The application to insert a facilitative provision to enable a majority of employees to agree to alter the end time of the evening penalty rate from 6am to 5am should be rejected on this basis.

Section 134 The Modern Awards Objective

55. The SDA submits that a reduction in the rate of pay for the period of 5am to 6am even by way of facilitative provision will have an adverse effect on the relative living standards and the needs of the low paid (see section 134(1)(a). The SDA further submits that an individual flexibility arrangement is the appropriate way to ensure that an employee and

employer have genuinely made the agreement without coercion or duress and that the employee must be better off.

56. The SDA submits that the need to encourage collective bargaining section 134(1)(b) and the need to promote social inclusion through increased workforce participation (see section 134(1)(c)) is a neutral consideration.

57. The SDA submits that this application does not promote flexible modern work practices and the efficient and productive performance of work (see section 134(1)(d)). This application disturbs a current provision without any evidence to demonstrate that a variation is required or necessary.

58. The SDA submits that this application is inconsistent with the modern awards objective of the need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours (see section 134(1)(da)(ii)). While the inclusion of a facilitative provision itself will not affect the remuneration of employees it introduces a mechanism to do so.

59. A facilitative provision in the terms sought will disadvantage significant numbers of employees. The practical operation of the provision is also unclear. The proposed wording in the draft determination attached to the Ai Group submissions at paragraph 3 reads:

> *The evening penalty end time (6.00 am) may be altered by up to one hour at the end of the spread (up to 5.00am), by agreement between an employer and the majority of employees concerned.*

The SDA submits that "**the majority of employees concerned**" is unclear. It is not apparent if the "employees concerned" refers to those employees who work between the hours of 5am and 6am or those who have indicated availability to work between 5am and 6am or whether "employees concerned" may be defined in some other way. Furthermore it is uncertain if "the majority of employees concerned"

applies over one store or a number of stores owned by one franchisee (for example) or over all stores of a particular brand. Ai Group's own evidence identifies possible confusion in the practical application of this clause.

> 28.Currently, some employers in the fast food industry (such as some employers operating McDonald's restaurants) open their restaurants between 5.00am and 6.00am as part of normal trading hours (see Anderson Affidavit, par 10).
>
> 29. Currently, other employers in the fast food industry (including some employers operating McDonald's restaurants) prepare their restaurants for opening between 5.00am and 6.00am (see Anderson Affidavit, par 14).
>
> 30. Currently, for one employer in the fast food industry (McDonald's), there are as many as 10,962 employees each week day who make themselves available to work between 5.00am and 6.00am (see Anderson Affidavit, par 36). Currently, the same employer only requires an estimated 3,102 employees each week day to work between 5.00am and 6.00am (see Anderson Affidavit, par 42)[12].

Ai Group identifies a number of operational situations; stores that do not operate between 5am and 6am; stores that trade from 5am – 6am; stores that prepare for trade from 5am;

60. The SDA submits that the principle of equal remuneration for work of equal or comparable value (see section 134(1)(e) is a neutral consideration.

61. In reference to section 134(1)(f) the SDA submits that the insertion of a facilitative provision will have no effect on productivity on the basis that reducing the cost of labour for a particular period does not increase efficiency or output for that period. Where such a facilitative provision is agreed to by a majority it is self evident that employment costs will decrease, although the SDA submits that such cost savings for employers are marginal (see paragraph 44 above). Furthermore Ai Group has not demonstrated that the 15% penalty loading is a burden to employers. The SDA submits that there will be an additional administrative process

[12] Outline of Submission of Australian Industry Group, dated 23 February 2018, paragraphs 28-30

in using either a facilitative provision or an individual flexibility arrangement.

62. The SDA submits that the objective of a simple and easy to understand modern award system that avoids unnecessary overlap is a neutral consideration (see section 134(1)(g).

63. The Penalty Rates Full Bench (2017) FWCFB 1001 considered the appropriateness or otherwise of a penalty rate between the times of 5am and 6am in the context of addressing the previous anomaly of the Fast Food award not providing a span of hours during which the penalty loading was to be paid. Paragraph 1335 of this decision states

> "… it would be logical to align the evening penalty rate provisions in the Fast Food and Restaurant Awards".

64. Ai Group has not demonstrated that such a change is necessary. In its submissions addressing consideration of section 134 factors[13] the majority of modern award objectives are considered as "neutral considerations" (see references to section 134(1)(a), 134(1)(b), 134(1)(c), 134(1)(d), 134(1)(da)(ii) and (iv), 134(1)(e), 134(1)(g), 134(1)(h).

65. Ai Group concedes at paragraph 41 that there will be an adverse impact on relative living standards and the needs of the low paid. At paragraph 47 (Ai Group submissions) Ai Group submits that a facilitative provision could have a positive benefit to business through a reduction in employment costs. The SDA submits that the merit of this benefit is of such a low magnitude (see paragraph 46 above) that it is almost inconsequential.

[13] Outline of Submission of Australian Industry Group, dated 23 February 2018, paragraphs 40-52

66. Clause 25.5 of the Fast Food Award is consistent with contemporary circumstances of the fast food industry. A facilitative provision is unnecessary and undesirable.

ANNEXURE A

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Fast Food Award 2010 (MA000003)

(AM2017/49)

JUSTICE ROSS, PRESIDENT SYDNEY, XX XXXX 2018

4 yearly review of modern awards – Fast Food Award 2010 (MA000003).

A. Further to the decision issued on [insert date][1] it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Fast Food Industry Award 2010*[2] be varied by:

1. Deleting existing clause 12.

2. Inserting new clause 12:

12. Part-Time Employment

12.1 A part time employee is an employee who:

(a) Works at least 8 but less than 38 hours per week;
(b) Has reasonably predictable hours of work; and

(c) Receives on a pro-rata basis, equivalent pay and conditions to those of full- time employees.

12.2 At the time of engagement, the employer and the part-time employee will agree in writing upon:

(a) the number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and

(b) the days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

12.3 The employee may not be rostered to work less than 3 consecutive hours in any shift.

12.4 The guaranteed minimum hours shall not be less than 8 hours per week.

12.5 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

12.6 Where there has been a genuine and ongoing change in the employee's personal circumstances, the employee may alter the days and hours of the employee's agreed availability on 14 days' written notice to the employer. If the alteration to the employee's agreed availability cannot reasonably be accommodated by the employer within the guaranteed minimum hours then, despite clause 12.2, those guaranteed minimum hours will no longer apply and the employer and the employee will need to reach a new agreement in writing concerning guaranteed minimum hours in accordance with clause 12.2.

12.7 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

(a) The additional hours are offered in accordance with clause 25 – Hours of Work and clause 26 - Rostering;

(b) The employee may not be rostered for work outside of the employee's availability;

(c) Agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times) and accrue entitlements such as annual leave and personal/carer's leave;

(d) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(e) Additional hours worked in accordance with this clause are not overtime; and

(f) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

12.8 A part-time employee who immediately prior to (**operative date of variation**) has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause 12.2.

12.9 Where a part-time employee has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed minimum hours, the employee may request in writing that the employer agree to increase the guaranteed minimum hours. If the employer agrees to the request, the new agreement concerning guaranteed minimum hours will be recorded in writing. The employer may refuse the request only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal.

12.10 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13 – Casual Employment.

12.11 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly rate prescribed for the class of work performed.

3. Inserting a new clause after clause 25:

26. Rosters

26.1 A roster for part-time employees must be prepared by the employer and made available to the employee which sets out the name of each employee, the days of the week to be worked, and their start and finishing times.

26.2 The roster will be alterable by mutual consent at any time or by amendment of the roster on seven days' notice.

4. Renumbering existing clauses 26 to 31 (inclusive), as clauses 27 to 32.

5. Deleting existing clause 26.2 (renumbered 27.2 in accordance with 4, above) and inserting the following new clauses:

27.2 A full-time employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's rostered commencing time on any one day; or

(c) After an employee's rostered ceasing time on any one day; or

(d) Outside the ordinary hours of work.

27.3 A part-time employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Hours worked by a part-time employee outside the employee's availability; or

(c) Outside the ordinary hours of work.

27.4 A part time employee shall be paid overtime if directed to work:

(a) Before the employee's rostered commencing time on any one day; or

(b) After the employee's rostered ceasing time on any one day.

27.5 Provided that no overtime penalty is payable for hours worked within the employee's availability by the part-time employee in excess of the guaranteed minimum hours that are:

(a) rostered; or

(b) not rostered in advance but agreed to be worked consistent with clause 12.7.

6. Renumbering existing clauses 26.3 to 26.6 (inclusive) as clauses 27.6 to 27.9.

B. This determination comes into effect on [insert date].

PRESIDENT

7. Award flexibility

[Varied by PR994446, PR542123]

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

[7.2 varied by PR542123 ppc 04Dec13]

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and

[7.3(b) substituted by PR994446 from 01Jan10; varied by PR542123 ppc 04Dec13]

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

[7.4 substituted by PR994446 from 01Jan10]

7.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

[7.5 deleted by PR994446 from 01Jan10]

[7.6 renumbered as 7.5 by PR994446 from 01Jan10]

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

[New 7.6 inserted by PR994446 from 01Jan10]

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

[7.8(a) varied by PR542123 ppc 04Dec13]

(a) by the employer or the individual employee giving 13 weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

[Note inserted by PR542123 ppc 04Dec13]

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

[New 7.9 inserted by PR542123 ppc 04Dec13]

7.9 The notice provisions in clause 7.8(a) only apply to an agreement entered into from the first full pay period commencing on or after 4 December 2013. An agreement entered into before that date may be terminated in accordance with clause 7.8(a), subject to four weeks' notice of termination.

[7.9 renumbered as 7.10 by PR542123 ppc 04Dec13]

7.10 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

ANNEXURE C

Level 3 McCafé Co-Ordinator Hourly Pay			
Age in Years	% of Weekly Wage	Full-Time and Part-Time (Casual Unloaded Base)	Casual Incl. Casual Loading
21+	100%	$22.83	$28.53
20	90%	$20.55	$25.68
19	80%	$18.26	$22.83
18	70%	$15.98	$19.98
17	60%	$13.70	$17.12
16	50%	$11.41	$14.27
15	40%	$9.13	$11.41
14	40%	$9.13	$11.41

Level 3 Shift Supervisors Hourly Pay			
Age in Years	% of Weekly Wage	Full-Time and Part-Time (Casual Unloaded Base)	Casual Incl. Casual Loading
21+	100%	$23.08	$28.84
20	90%	$20.90	$26.12
19	80%	$18.72	$23.40
18	70%	$16.54	$20.68

This Agreement Summary is intended to provide a summary only of the wages requirements of the McDonald's Australia Enterprise Agreement 2013 ("Enterprise Agreement"). It is not intended to in any way replace the terms of the Enterprise Agreement.

It is the responsibility of each employee and McDonald's employer to review and apply the Enterprise Agreement in full, and the Employee Relations Hotline [02 9875 7200] is available to answer any questions you may have. The Enterprise Agreement is available on mstime at People and Training >> Enterprise Agreements.