

See the amended version of this submission received 12 July 2018 - paragraphs amended are 13 to 17 to refer to the Research Note on page 3, and Schedule 2 amended removing witness K Hossain.

FAIR WORK COMMISSION
AM 49 of 2017

2014 FOUR YEARLY REVIEW
STAGE 4
FAST FOOD INDUSTRY AWARD

OUTLINE OF SUBMISSION OF AUSTRALIAN INDUSTRY GROUP

1. The Australian Industry Group ("**Ai Group**") is representing employers in the fast food industry in relation to the review being conducted by the Fair Work Commission ("**Commission**") of the *Fast Food Industry Award 2010* ("**Fast Food Award**") pursuant to section 156 of the *Fair Work Act 2009* (Cth) (the "**FW Act**").
2. As part of the review, Ai Group seeks two variations to the Fast Food Award:
 - (a) First, the insertion of a facilitative provision into the evening penalty clause (see clause 25.5 of the Fast Food Award) to permit a fast food employer and a majority of employees concerned to agree to change the end time of the penalty from 6.00am to 5.00am (see claim S16 in the FWC Summary of Proposed Substantive Variations dated 14 December 2017 ("**FWC Summary of Proposed Variations**")); and
 - (b) Secondly, the deletion of the current part-time clause (see clause 12 of the Award) and the insertion of a new flexible part-time clause largely modelled on the clause arising from the determinations in the *Part-time and Casual Employment Decision* [2017] FWCFB 3541 and the *Part-time and Casual Employment Further Matters Decision* [2017] FWCFB 6181 (a new claim not recorded in the FWC Summary of Proposed Variations).
3. The SDA opposes the first proposed variation but supports the second proposed variation.
4. Ai Group has set out its proposed variations in a draft determination that appears as Schedule 1 to this outline.
5. Ai Group relies upon ten affidavits in support of its proposed variations. The deponents of the affidavits are listed in Schedule 2 to this outline.

Nature of the Review

6. The Commission is required to undertake a “review” of the Fast Food Award (see section 156 of the FW Act).
7. A “review” for the purposes of section 156 of the FW Act involves an “inspection”, a “re-examination” or a “looking back upon” the Fast Food Award (see *SDA v Australian Industry Group* [2017] FCAFC 161 at [25], [38] per North, Tracey, Flick, Jagot and Bromberg JJ; *Re Horticulture Award* [2017] FWCFB 6037 at [33] per Catanzariti VP, Sams DP, Saunders C; *Re Education Group Awards* [2018] FWCFB 1087 at [21] per Catanzariti VP, Kovacic DP, Saunders C).
8. In conducting the “review”, the Commission is required to consider whether the Fast Food Award (when operating with the National Employment Standards) achieves the modern awards objective by providing a “fair” and “relevant” minimum safety net (see section 134 of the FW Act; see also section 138 of the FW Act; see further, for example, *CFMEU v Anglo American Metallurgical Coal Pty Limited* [2017] FCAFC 123 at [28] per Allsop CJ, North and O’Callaghan JJ; *SDA v Australian Industry Group* [2017] FCAFC 161 at [45] per North, Tracey, Flick, Jagot and Bromberg JJ; *Penalty Rates Decision* [2017] FWCFB 1001 at [36], [37], [102], [141] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC; *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [11], [12] per Hatcher VP, Hamberger SDP, Kovacic and Bull DP, Roe C; *Re Blood Donors Leave* [2017] FWCFB 4621 at [62] per Hatcher VP, Clancy DP, Spencer C; *Annualised Wage Arrangements* [2018] FWCFB 154 at [6] per Hatcher VP, Dean DP, Saunders C; *Re Education Group Awards* [2018] FWCFB 1087 at [11], [20], [21], [22] per Catanzariti VP, Kovacic DP, Saunders C).
9. The Commission is required to consider the factors identified in subparagraphs (a) to (h) of section 134(1) of the FW Act but may also consider other relevant factors identified from the subject matter, scope and purpose of FW Act (see *SDA v Australian Industry Group* [2017] FCAFC 161 at [48], [50] per North, Tracey, Flick, Jagot and Bromberg JJ; *Re Horticulture Award* [2017] FWCFB 6037 at [35] per Catanzariti VP, Sams DP, Saunders C; *Annualised Wage Arrangements* [2018] FWCFB 154 at [6] per Hatcher VP, Dean DP, Saunders C). The other relevant factors may include the perspectives of employers and employees and contemporary circumstances (see, for example, *Re Horticulture Award* [2017] FWCFB 6037 at [36] per Catanzariti VP, Sams DP, Saunders C).
10. The Commission may treat some of the factors identified in subparagraphs (a) to (h) of section 134(1) as neutral considerations or irrelevant in a particular review (see, for example, *Penalty Rates Decision* [2017] FWCFB 1001 at [863], [1373], [1380], [1383], [1683], [1854], [1944], [1945] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC; *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [369] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C; *Re Blood Donors Leave* [2017] FWCFB 4621 at [65] per Hatcher VP, Clancy DP, Spencer C; *Re Horticulture Award* [2017] FWCFB 6037 at [24], [34], [121], [125], [132] per Catanzariti VP, Sams DP, Saunders C; *Re Education Group Awards* [2018] FWCFB 1087 at [14] per Catanzariti VP, Kovacic DP, Saunders C).
11. The Commission is not to attach primacy to one of the factors in the subparagraphs (a) to (h) of section 134 (1) over the other factors (see, for example, *Penalty Rates Decision* [2017]

FWCFB 1001 at [196] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC; *Re Horticulture Award* [2017] FWCFB 6037 at [24] per Catanzariti VP, Sams DP, Saunders C; *Re Education Group Awards* [2018] FWCFB 1087 at [14] per Catanzariti VP, Kovacic DP, Saunders C; see also *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [545] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C).

12. The Commission is not required to identify a material change in circumstance as a pre-condition to making a determination as part of the review (see *SDA v Australian Industry Group* [2017] FCAFC 161 at [23]-[37] per North, Tracey, Flick, Jagot and Bromberg JJ; *Penalty Rates Decision* [2017] FWCFB 1001 at [42]-[43], [230]-[264] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC; *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [11] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C; *Re Horticulture Award* [2017] FWCFB 6037 at [34] per Catanzariti VP, Sams DP, Saunders C; *Re Education Group Awards* [2018] FWCFB 1087 at [18] per Catanzariti VP, Kovacic DP, Saunders C).

Fast Food Industry

13. In 2016, the fast food industry comprised an estimated 189,449 employees (see Hossain Affidavit, annexure KH-1, row 1).
14. In 2016, an estimated 35,944 employees in the fast food industry worked on a full-time basis and an estimated 144,367 employees in the fast food industry worked on a part-time (that is, less than 35 hours per week) basis (see Hossain Affidavit, annexure KH-1, row 2). (The employees working on a part-time basis include casual employees.)
15. In 2016, an estimated 102,487 employees in the fast food industry were full-time students and an estimated 7,676 employees in the fast food industry were part-time students (see Hossain Affidavit, annexure KH-1, row 4; see also Agostino Affidavit, par 27 (64 per cent of employees being students); Sullivan Affidavit, par 20 (50-60 per cent of employees being school students); Martinoli Affidavit, pars 11, 12, 38 (high number of employees being students); Swan Affidavit, par 10 (all but one employee being students); Guilk Affidavit, par 10 (44 of 61 employees (72 per cent) being students); see further Chapman Affidavit, par 17).
16. In 2016, an estimated 104,772 employees in the fast food industry were aged 15-19 years (see Hossain Affidavit, annexure KH-1, row 5).
17. In 2016, an estimated 95,192 employees in the fast food industry worked one to fifteen hours per week and an estimated 30,271 employees in the fast food industry worked sixteen to twenty four hours per week (see Hossain Affidavit, annexure KH-1, row 6).
18. In early 2018, an estimated 103,136 employees worked in stores for McDonald's (see Anderson Affidavit, pars 21), including an estimated 4,097 employees on a part-time basis in McDonald's corporate restaurants (see Anderson Affidavit, par 23) and a further estimated 18,759 employees on a part-time basis in McDonald's franchised restaurants (see Anderson Affidavit, par 24; see also Agostino Affidavit, par 13 (121 part-time employees)).

19. In early 2018, an estimated 16,134 employees worked in corporate (non-franchised) stores for Hungry Jack's (see Montebello-Hunter Affidavit, pars 11, 15), including an estimated 14,067 (or 87 per cent) on a part-time basis (see Montebello-Hunter Affidavit, par 12; see also Swan Affidavit, par 10 (55 part-time employees); Guilk Affidavit, par 10 (61 part-time employees)).
20. In early 2018, an estimated 11,977 employees worked in stores for Craveable Brands and trading under the names Red Rooster, Chicken Treat and Oporto (see Flemington Affidavit, pars 9, 23), including an estimated 3,714 employees engaged on a part-time basis (see Flemington Affidavit, pars 28, 29).
21. Currently, an enterprise agreement known as the *McDonald's Australia Enterprise Agreement 2013* ("**McDonald's Agreement**"), as varied in 2016 (see [2016] FWCA 1209), applies to employees working in McDonald's restaurants (see Anderson Affidavit, par 15; see also Agostino Affidavit, par 9).
22. Currently, six enterprise agreements – known as the *Hungry Jack's New South Wales and ACT Agreement 2004* ("**Hungry Jack's NSW/ACT Agreement**"), the *SDA Hungry Jack's Victoria Agreement 1999* ("**Hungry Jack's Victoria Agreement**"), the *Hungry Jack's Queensland Employee Collective Agreement 2009* ("**Hungry Jack's Queensland Agreement**"), the *SDA Hungry Jack's (South Australia and Northern Territory) Certified Agreement 2009* ("**Hungry Jack's SA/NT Agreement**"), the *Hungry Jack's Western Australia Employee Collective Agreement 2009* ("**Hungry Jack's WA Agreement**") and the *Hungry Jack's Tasmanian Employee Collective Agreement 2009* ("**Hungry Jack's Tasmania Agreement**") – apply to most employees working in Hungry Jack's stores (see Montebello-Hunter Affidavit, par 9; see also Swan Affidavit, par 9; Guilk Affidavit, par 18). However, some franchisees of Hungry Jack's stores are not covered by the Hungry Jack's enterprise agreements and are bound by the Fast Food Award only (see Sullivan Affidavit, par 15; Chapman Affidavit, par 9).
23. Currently, one enterprise agreement known as the *Red Rooster Agreement 2009* ("**Red Rooster Agreement**") applies to employees working at most (but not all) Red Rooster restaurants (see Flemington Affidavit, par 15).
24. Currently, one enterprise agreement known as the *Chicken Treat Employees SDA Agreement 2009* ("**Chicken Treat Agreement**") applies to employees working at most (but not all) Chicken Treat restaurants in Western Australia (see Flemington Affidavit, par 17) but the Award applies to employees working in the two Chicken Treat restaurants in Queensland (see Flemington Affidavit, par 18).
25. Currently, a variety of enterprise agreements apply to employees working in Oporto franchised restaurants (see Flemington Affidavit, par 13) but the Award applies to employees working in the sole Oporto corporate restaurant and 84 franchised restaurants (see Flemington Affidavit, pars 11, 14).
26. Currently, there are large numbers of casual employees working in the fast food industry (see Anderson Affidavit, pars 23, 24 (73,201 of 103,136 employees); Flemington Affidavit, pars 28, 29 (7,304 casual employees of 11,977 employees); Sullivan Affidavit, par 19 (165 of 178 employees); Chapman Affidavit, par 11 (97 of 123 employees); Martinoli Affidavit, par

10 (47 of 59 crew members); see further Agostino Affidavit, par 13 (75 of 362 employees)).

Ai Group Claim 1 – Facilitative Provision to Change End Time of Night Shift

27. Ai Group submits that the Commission should insert a facilitative provision in the Fast Food Award to allow employers and a majority of employees concerned to agree to vary the end time of the evening penalty rate from 6.00am to 5.00am ("**Ai Group Claim 1**") (see, for example, FWC Summary of Proposed Variations, item S16; see also the draft determination that appears as Schedule 1 to this outline).

Background

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).
31. 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) (see Anderson Affidavit, par 58).
32. 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.
33. Currently, some employees in the fast food industry prefer to work early morning shifts for personal reasons, including the ability to work before university commitments arise, the ability to conclude work earlier (and therefore have more leisure time during the remainder of the day) and the ability to work additional hours during the later parts of the day (see Anderson Affidavit, par 54).

34. Currently, in the restaurants that are preparing their restaurants for opening between 5.00am and 6.00am, they do not generate income from sales during these preparation times (see Anderson Affidavit, par 47).

Submission

35. Ai Group submits that the Fast Food Award should facilitate the making of flexible working arrangements for employees (see section 139(1)(b) of the FW Act) by efficient means, including for employees working between 5.00am and 6.00am.
36. Ai Group submits that the existing evening penalty clause in the Fast Food Award does not facilitate the making of flexible working arrangements for large groups of employees by efficient means (given the number of employees making themselves available to work 5.00am to 6.00am) as there is no effective mechanism (such as the proposed facilitative provision) to efficiently adjust by agreement the penalty rate between 5.00am and 6.00am and is thereby failing to achieve the modern awards objective.
37. Ai Group submits that the existing evening penalty clause in the Fast Food Award is ineffective as it fails to contain the proposed facilitative provision and is thereby failing to achieve the modern awards objective.
38. Ai Group submits that it is likely that the proposed facilitative provision would be utilised by participants in the fast food industry, given the terms of current enterprise agreements (such as the McDonald's Agreement) that have adjusted by agreement the penalty rate such that it is not payable between 5.00am and 6.00am.
39. Ai Group recognises that some of the major employers have addressed the issue by making and having approved an enterprise agreement containing for the non-payment of the penalty rate between 5.00am and 6.00am but there is no certainty that such enterprise agreements will continue in operation in the future or will be replaced by enterprise agreements with the same or similar terms in the future.

Consideration of Section 134 Factors

40. Ai Group submits that, in terms of the insertion of the proposed facilitative provision itself into the Fast Food Award, it will not have an adverse impact on the relative living standards (see section 134(1)(a)) and the needs of the low paid (see section 134(1)(a)) and is thus a neutral consideration.
41. Ai Group accepts that, where an agreement is made between an employer and a majority of employees concerned pursuant to the proposed facilitative provision, a reduction in the penalty rate between 5.00am and 6.00am will have an adverse impact on the relative living standards (see section 134(1)(a)) and the needs of the low paid (see section 134(1)(a)), especially those employees in the fast food industry who work between 5.00am and 6.00am (see also *Penalty Rates Decision* [2017] FWCFB 1001 at [823], [1357] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC), but submits that such a reduction will only occur through the agreement of the majority of employees concerned (such that it is a consensual

reduction) and will only be for a small amount (a reduction of the 15 per cent loading for one hour only).

42. Ai Group submits that the need to encourage collective bargaining (see section 134(1)(b)) is a neutral consideration (compare *Penalty Rates Decision* [2017] FWCFB 1001 at [827], [1360], [1664], [1833], [1931] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC).
43. Ai Group submits that the need to promote social inclusion through increased workforce participation (see section 134(1)(c)) is concerned with additional employment (see *Penalty Rates Decision* [2017] FWCFB 1001 at [828], [1361], [1665], [1834], [1932] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC) and is (in light of the absence of material addressing the issue) a neutral consideration.
44. Ai Group submits that the need to promote flexible work practices and the efficient and productive performance of work (see section 134(1)(d)) is a neutral consideration (see also *Penalty Rates Decision* [2017] FWCFB 1001 at [1373] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC).
45. Ai Group submits that the need to provide additional remuneration for employees working unsocial hours or working shifts (see section 134(1)(da)(ii) and (iv)) is a neutral consideration as:
 - (a) the insertion of the proposed facilitative provision into the Fast Food Award itself will not affect the provision of additional remuneration for employees working unsocial hours or working shifts; and
 - (b) the reduction in the penalty rate between 5.00am and 6.00am, where an agreement is made between an employer and a majority of employees concerned pursuant to the proposed facilitative provision, is a reflection of the fact that the employer and the majority of employees concerned do not regard the period of 5.00am to 6.00am to be unsocial hours or shift work hours that need to attract an evening penalty and is outweighed by other considerations affecting the employees concerned (such as the earlier finishing of ordinary hours of work (see paragraph [33] of this outline)).
46. Ai Group submits that the principle of equal remuneration for work of equal or comparable value (see section 134(1)(e)) is a neutral consideration.
47. Ai Group submits that, in terms of the insertion of the proposed facilitative provision into the Fast Food Award itself, it will not have a direct impact on business (see section 134(1)(f)), although it provides the potential for the making of an agreement pursuant to the proposed facilitative provision that could have a positive impact on business (through a reduction in employment costs between 5.00am and 6.00am).
48. Ai Group submits that, where an agreement is made between an employer and a majority of employees concerned pursuant to the proposed facilitative provision, a reduction in the penalty rate between 5.00am and 6.00am will have a positive impact on business (see section 134(1)(f)) as employment costs will axiomatically or self-evidently fall (see also *Penalty Rates Decision* [2017] FWCFB 1001 at [852], [1382], [1669], [1840], [1935] per Ross J,

Catanzariti VP, Asbury DP, Hampton and Lee CC) and is thus to be regarded as a favourable consideration.

49. Ai Group submits that the need for simple, easy to understand, modern award system that avoids unnecessary overlap of modern awards (see section 134(1)(g)) is a neutral consideration.
50. Ai Group submits that the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (see section 134(1)(h)) is (in light of the absence of material addressing the issue) a neutral consideration (see also *Penalty Rates Decision* [2017] FWCFB 1001 at [865], [1386], [1687], [1946] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC).
51. Ai Group submits that the need to consider the proposed variation from the perspective of both employers and employees (see paragraph [9] of this outline) is a neutral consideration.
52. Ai Group submits that the need to consider contemporary circumstances (see paragraph [9] of this outline) is a favourable consideration, particularly the prevalence of employees making themselves available voluntarily to work 5.00am to 6.00am without payment of a penalty for that period.

Ai Group Claim 2 – Flexible Part-time Clause

53. Ai Group submits that the Commission should delete the existing part-time clause in the Fast Food Award (see clause 12 of the Fast Food Award) and replace it with a clause that permits flexible part-time work ("**Ai Group Claim 2**") (see Ai Group Submission dated 21 December 2017, par 5(d); Ai Group Submissions dated 16 January 2018, par 3(c); see also the draft determination that appears as Schedule 1 to this outline).

Background

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 (see Anderson Affidavit, pars 68, 70; Montebello-Hunter Affidavit, par 26; Flemington Affidavit, pars 30, 31, 43; Agostino Affidavit, pars 26, 28, 29, 30; Sullivan Affidavit, pars 23, 24, 28; Chapman Affidavit, pars 16, 18; Martinoli Affidavit, pars 15, 16; Swan Affidavit, pars 27, 28, 29; Guilk Affidavit, par 35(b)).
55. Currently, employees in the fast food industry change their availabilities regularly, including on a permanent or ongoing basis and a temporary basis (see Anderson Affidavit, pars 25(d), 25(e), 75; Montebello-Hunter Affidavit, par 22; Flemington Affidavit, par 32; Swan Affidavit, par 50; Guilk Affidavit, pars 37, 38; see also Agostino Affidavit, par 27; Martinoli Affidavit, pars 21, 22). The reasons for permanent or ongoing changes include changes in school or university timetabling and commitments (see Flemington Affidavit, par 42; Sullivan Affidavit, par 26; Chapman Affidavit, par 17; Agostino Affidavit, par 27; Swan Affidavit, par 19; Guilk Affidavit, par 37), as well as sporting commitments (see Agostino Affidavit, par 32; Sullivan Affidavit, par 26). The reasons for temporary changes include studying for school or

university examinations (see Flemington Affidavit, par 41; Guilk Affidavit, par 38; see also Agostino Affidavit, par 27; Sullivan Affidavit, par 32), taking school and university holidays (see Agostino Affidavit, par 27; Flemington Affidavit, par 41) and attending family or social commitments (see Agostino Affidavit, par 32; Flemington Affidavit, par 41).

56. Currently, customer demand in the fast food industry fluctuates significantly for a variety of reasons, including special events (such as sporting events) (see Anderson Affidavit, pars 73, 78; Montebello-Hunter Affidavit, par 30; Flemington Affidavit, pars 40, 47; Agostino Affidavit, pars 29, 32, 33; Sullivan Affidavit, pars 24, 29; Chapman Affidavit, par 21; Martinoli Affidavit, pars 26, 31; Swan Affidavit, par 27; Guilk Affidavit, par 4) and the weather (see Flemington Affidavit, par 40; Chapman Affidavit, par 21; Guilk Affidavit, par 51). Some of the fluctuations (such as special events) are predictable (see Montebello-Hunter Affidavit, par 30; Flemington Affidavit, par 40; Sullivan Affidavit, pars 24, 29; Chapman Affidavit, par 21; Martinoli Affidavit, pars 29, 31; Swan Affidavit, par 27; Guilk Affidavit, par 40) and some are unpredictable (see Anderson Affidavit, par 78; Montebello-Hunter Affidavit, par 30; Flemington Affidavit, par 47; Agostino Affidavit, par 34; Sullivan Affidavit, par 31; Chapman Affidavit, par 27; Martinoli Affidavit, pars 34; Swan Affidavit, par 32; Guilk Affidavit, pars 44, 45).
57. Currently, there are commonly departures from rosters in the fast food industry, due to reasons such as “no shows” (employees not attending for a rostered shift) (see Anderson Affidavit, pars 78, 81; Agostino Affidavit, par 35; Sullivan Affidavit, par 34; Chapman Affidavit, par 24; Guilk Affidavit, pars 46, 53; see also Flemington Affidavit, par 47), illness and injury (see Anderson Affidavit, par 78; Flemington Affidavit, par 47; Agostino Affidavit, par 35; Sullivan Affidavit, par 34; Chapman Affidavit, par 25; Swan Affidavit, pars 32, 33; Guilk Affidavit, pars 46, 53) and unpredicted customer demand (see Anderson Affidavit, par 78; Montebello-Hunter Affidavit, par 35; Agostino Affidavit, par 34; Sullivan Affidavit, pars 31, 35; Chapman Affidavit, par 27; Guilk Affidavit, pars 45, 47).
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 (see Anderson Affidavit, par 81; Montebello-Hunter Affidavit, pars 37, 38, 39, 52; Flemington Affidavit, par 48; Agostino Affidavit, par 38; Chapman Affidavit, par 28; Swan Affidavit, pars 35, 36; Guilk Affidavit, pars 47; see also Sullivan Affidavit, pars 30, 36). The decisions on arranging alternative staffing need to be made and implemented quickly (see Agostino Affidavit, pars 37, 42, 45; Sullivan Affidavit, par 38; Guilk Affidavit, par 54; see also Montebello-Hunter Affidavit, par 52).
59. The existing part-time clause in the Fast Food Award is set out in Schedule 3 to this outline. It requires that the “*actual starting and finishing times of each day*” be agreed “*in writing*” (see clause 12.2 and clause 12.3 of the Fast Food Award). It also requires that variations to the agreed actual starting and finishing times be recorded in writing “*before the variation occurs*” (see clause 12.3 of the Fast Food Award). It further requires that additional hours not agreed in writing to be paid as overtime (see clause 12.7 of the Fast Food Award).
60. The requirement in the existing part-time clause in the Fast Food Award for the employer and the part-time employee to agree in writing the actual starting and finishing times of each day of work is impractical (see Anderson Affidavit, pars 90, 94; Montebello-Hunter

Affidavit, pars 52, 54; Agostino Affidavit, par 42; see also Sullivan Statement, par 39; Guilk Affidavit, par 53), given the regularity of employees changing their own availability (see paragraph [55] of this outline; see also the existence of shift swaps amongst employees (Anderson Affidavit, par 72; Montebello-Hunter Affidavit, par 29)) and due to the need for some employees to work additional hours to cover other employee absences or to meet unanticipated customer demand (see paragraph [57] of this outline).

61. The requirement in the existing part-time clause in the Fast Food Award for the employer and employee to agree in writing the actual starting and finishing times of each day of work imposes an administrative burden (see Montebello-Hunter Affidavit, pars 53, 54; Flemington Affidavit, par 60, 61; Sullivan Affidavit, par 39; Martinoli Affidavit, pars 21, 25; Swan Affidavit, pars 48, 50; Guilk Affidavit, par 54).
62. The requirement for the employer and the employee to agree in writing to variations in actual hours before they occur is both impracticable and imposes an administrative burden (see Anderson Affidavit, par 93; Montebello-Hunter Affidavit, par 52; Agostino Affidavit, par 46; Chapman Affidavit, pars 22, 28, 29; Martinoli Affidavit, pars 24, 25; Swan Affidavit, pars 48, 50; Guilk Affidavit, pars 53, 54).
63. Currently, many employers in the fast food industry do not employ (and do not roster and do not use) part-time employees to meet changes in availabilities or predictable increases in customer demand (see Sullivan Affidavit, pars 30, 36; Chapman Affidavit, par 22; see also Flemington Affidavit, par 44), due to the need to pay overtime to part-time employees working additional hours (that is, hours above their guaranteed minimum hours) (see Sullivan Affidavit, par 38; Chapman Affidavit, pars 22, 29; see also Flemington Affidavit, par 44) and the need to record changes to guaranteed minimum hours in writing (see Sullivan Affidavit, pars 38, 39; Chapman Affidavit, par 22, 28, 29).
64. Currently, many employees in the fast food industry employ (and roster and use) casual employees to meet changes in availabilities or predictable increases in customer demand (see Sullivan Affidavit, par 30; Chapman Affidavit, par 28; see also Flemington Affidavit, par 44).
65. Currently, many employers in the fast food industry would prefer to employ part-time employees (rather than casual employees) because of a greater knowledge and experience in restaurant operations (see Anderson Affidavit, par 86; Agostino Affidavit, par 39; Guilk Affidavit, par 27), better service provided to customers (see Anderson Affidavit, par 86; Agostino Affidavit, par 39; see also Sullivan Affidavit, par 41; Chapman Affidavit, par 23; Guilk Affidavit, par 27), a better attitude (see Montebello-Hunter Affidavit, par 43; Sullivan Affidavit, par 41; Guilk Affidavit, par 28) and a more team-inclusive approach (see Martinoli Affidavit, par 52). Some employers would provide part-time employees with additional hours to enable the training of other employees (see Guilk Affidavit, par 49). Some employers believe that they will have better employee retention levels and lower on-boarding costs if they used part-time employees (see Anderson Affidavit, par 87; Montebello-Hunter Affidavit, par 43; Flemington Affidavit, par 55; Sullivan Affidavit, par 41; Guilk Affidavit, par 29; see also Martinoli Affidavit, par 50).

66. Currently, some employers covered by the Award would employ (and roster and use) part-time employees in lieu of casual employees if the Award was to contain a part-time clause that did not contain the existing impracticalities and administrative burdens and did not require the payment of the higher overtime payments for additional hours (see Sullivan Affidavit, par 41; Chapman Affidavit, pars 23, 31).
67. Many employees would benefit from part-time employment including:
- (a) a guaranteed minimum number of hours of work and thus guaranteed income (see Montebello-Hunter Affidavit, pars 42, 44; Sullivan Affidavit, par 41; Chapman Affidavit, par 23; Swan Affidavit, pars 16, 41; Guilk Affidavit, pars 15, 25), including a higher minimum number of hours than casuals (see Montebello-Hunter Affidavit, par 44);
 - (b) flexibility over the number of working hours worked, especially the ability to increase or decrease hours to suit their circumstances (given school and university commitments and family responsibilities) (see Anderson Affidavit, par 84; Montebello-Hunter Affidavit, pars 42, 46, 47; Flemington Affidavit, par 51; Agostino Affidavit, pars 27, 48; Martinoli Affidavit, pars 6, 43, 44, 45, 49, 51; Swan Affidavit, pars 18, 19, 20, 21; Guilk Affidavit, pars 15, 39); and
 - (c) accessing leave entitlements (see Anderson Affidavit, par 85; Montebello-Hunter Affidavit, par 42; Flemington Affidavit, par 53; Agostino Affidavit, par 49; Sullivan Affidavit, par 41; Chapman Affidavit, par 24; Martinoli Affidavit, pars 46, 47; Swan Affidavit, pars 16, 42, 45, 46; Guilk Affidavit, pars 14, 26), including to travel (see Martinoli Affidavit, par 53; Swan Affidavit, par 16, 45) and to have time to study for exams (see Montebello-Hunter Affidavit, par 48; Martinoli Affidavit, pars 46, 48, 53; Swan Affidavit, par 45; see also Guilk Affidavit, par 50).

Flexible Part-time Clauses

68. A number of employers in the fast food industry have included flexible part-time clauses in their enterprise agreements.
69. The part-time clause in the McDonald's Agreement is set out in Schedule 4 to this outline. It requires that a roster include the "*days of the week*" on which the part-time employee will work (see clause 14.4 of the McDonald's Agreement) and "*actual starting and finishing time on each day*" (see clause 14.4 of the McDonald's Agreement) but allows the employer to "*offer more hours of work*" which the part-time may "*elect*" to accept (see clause 14.4 of the McDonald's Agreement) and which, if accepted, is not required to be paid as overtime (see clause 14.4 of the McDonald's Agreement; see also clause 14.6 of the McDonald's Agreement; see further Anderson Affidavit, pars 76, 82; Agostino Affidavit, par 40; Martinoli Affidavit, pars 33, 36). Under the McDonald's Agreement, the "*actual starting and finishing times of each day*", if varied by the part-time employee "*electing*" to accept the "*offer*" of the employer, need not be agreed "*in writing*" (see also Anderson Affidavit, pars 77, 83; Agostino Affidavit, par 40; Martinoli Affidavit, pars 33, 36).

70. Under the Hungry Jack's enterprise agreements, the part-time clause permits the "*number of ordinary hours*" rostered to be worked by a part-time employee to be increased "*by mutual agreement*" (see, for example, clause 10(m) of the Hungry Jack's NSW/ACT Agreement) and, subject to not exceeding limitations on daily or weekly hours, without payment of overtime rates (see also Swan Affidavit, pars 30, 37; Guilk Affidavit, pars 43, 48).
71. Under the Red Rooster Agreement, the part-time clause permits the "*number of ordinary hours*" rostered to be worked by a part-time employee to be increased "*by agreement*" (see clause 9.6 of the Red Rooster Agreement) and, subject to not exceeding limitations on daily, weekly or fortnightly hours, without payment of overtime rates (see clause 9.6 of the Red Rooster Agreement; see also clauses 9.7 and 9.9 of the Red Rooster Agreement; see further 44, 49).
72. Under the Chicken Treat Agreement, the part-time clause permits the "*number of ordinary hours*" to be worked by a part-time employee to be increased "*by agreement*" (see clause 11(2) of the Chicken Treat Agreement) and, subject to not exceeding ten ordinary per day, without payment of overtime rates (see clause 11(4) of the Chicken Treat Agreement; see also Flemington Affidavit, pars 44, 49). Under the Chicken Treat Agreement, the "*agreement*" need not be recorded in writing (see also Flemington Affidavit, pars 45, 50).
73. Currently, some employers in the fast food industry pay part-time employees working additional hours at ordinary time rates (as opposed to overtime rates) (see Anderson Affidavit, pars 76, 82; Montebello-Hunter Affidavit, pars 32, 40; Agostino Affidavit, par 40; Martinoli Affidavit, pars 33, 36; Swan Affidavit, pars 30, 37; Guilk Affidavit, pars 46, 54) and do not encounter difficulties in finding part-time employees to work such additional hours at such rates (see Swan Affidavit, par 36; Guilk Affidavit, par 54).

Submission

74. Ai Group submits that the Fast Food Award should facilitate the making of flexible working arrangements for employees (see section 139(1)(b) of the FW Act), including in circumstances of other employee absences and of unpredicted customer demand (which necessitate the implementation of staffing changes quickly and easily (see Sullivan Affidavit, par 38)).
75. Ai Group submits that the existing part-time clause in the Fast Food Award does not facilitate the making of flexible working arrangements for part-time employees as:
- (a) it acts as a discouragement to the engagement of part-time employees and to the use of part-time employees to work additional hours; and
 - (b) it imposes an impractical administrative burden on employers (in the form of the requirement to reduce to writing the agreement to work additional hours),
- and is thereby failing to meet the modern awards objective.
76. Ai Group submits that the existing part-time clause in the Fast Food Award does not bear upon or connect with the contemporary circumstances in the fast food industry, including

the unpredictable fluctuation in customer demand (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [524] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C) and is thereby failing to meet the modern awards objective.

77. Ai Group submits that the existing part-time clause in the Fast Food Award is ineffective as (in addition to the two matters raised in paragraph [75] of this outline) it fails to contain the a clause modelled on the flexible part-time work clause recently inserted into the *Hospitality Industry (General) Award 2010* (“**Hospitality Award**”), the *Restaurant Industry Award 2010* (“**Restaurant Award**”) and the *Registered and Licensed Clubs Award 2010* (“**Clubs Award**”) (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 and *Part-time and Casual Employment Further Matters Decision* [2017] FWCFB 6181) and is thereby failing to meet the modern awards objective.
78. Ai Group submits the proposed flexible part-time clause will meet the contemporary circumstances of the fast food industry, including the unpredictable fluctuations in customer demand and the need for speedy and easy decisions on and implementations of staffing changes (and thus will be “*relevant*” for the purposes of section 134 of the FW Act (see, for example, *Penalty Rates Decision* [2017] FWCFB 1001 at [37], [120] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC; *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [523] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C)).
79. Ai Group submits that the proposed flexible part-time clause will enhance job and income security as it is likely to lead to the engagement of more part-time employees (who have the benefit of guaranteed minimum hours and thus guaranteed minimum pay) and the provision of more additional hours to part-time employees.

Differences to Flexible Part-Time Clause in Hospitality Award, Restaurant Award and Clubs Award

80. There are six major differences between the proposed flexible part-time clause and the flexible part-time clause inserted into the Hospitality Award:
- (a) First, there is no express statement in the proposed clause that provides a part-time employee may be employed in any classification in the Fast Food Award (compare clause 12.1 of the Hospitality Award).
 - (b) Secondly, there is no statement in the proposed clause that the enables the hours of a part-time employee to be averaged over a roster cycle (compare clause 12.2(a) of the Hospitality Award).
 - (c) Thirdly, the proposed clause includes a provision specifying the minimum number of consecutive hours in a shift (where there is no such provision in the Hospitality Award).
 - (d) Fourthly, the proposed clause includes a provision specifying that the guaranteed minimum number of hours shall not be less than 8 hours per week (where there is no such express provision in the Hospitality Award but where the proposed clause (see clause 12.1(a)) and the Hospitality Award (see clause 12.2(a)) otherwise specify that the guaranteed minimum number of hours shall not be less than 8 hours).

- (e) Fifthly, the proposed clause includes a provision addressing the working of additional hours as ordinary hours (see clause 12.7 of the proposed clause) which has no equivalent in the Hospitality Award.
- (f) Sixthly, the proposed clause includes a different overtime provision (see clause 12.7(f) of the proposed clause), due to the different provision of the working of additional hours as ordinary hours, which has no equivalent in the Hospitality Award (compare clause 12.8 of the Hospitality Award).

There is also some different ordering of provisions in the proposed clause and in the clause in the Hospitality Award (see, for example, clause 12.5 of the proposed clause and clause 12.4 of the Hospitality Award; see also clause 12.6 of the proposed clause and clause 12.7 of the Hospitality Award; see further clause 12.10 of the proposed clause and clause 12.6 of the Hospitality Award).

- 81. The six major differences also exist between the proposed clause (on the one hand) and the Restaurant Award and the Clubs Award (on the other hand).
- 82. Ai Group submits that the first difference is not material as the absence of an express statement is consistent with the implied ability (from the absence of a specific prohibition) of an employer to employ part-time employees in any classification in the Fast Food Award.
- 83. Ai Group submits that the second difference is consistent with crew rosters in the fast food industry being one week long (see Anderson Affidavit, par 68; Montebello-Hunter Affidavit, par 25; Flemington Affidavit, par 35; Agostino Affidavit, par 25; Sullivan Affidavit, par 22; Chapman Affidavit, par 14; Martinoli Affidavit, par 18; Swan Affidavit, par 24; Guilk Affidavit, par 33) and not fortnightly or monthly (with the resulting absence of a need to refer to averaging over a roster cycle).
- 84. Ai Group submits that the third difference provides additional protections to part-time employees and reflects (and continues) the existing clause 12.5 of the Fast Food Award (which clause 12.5 is not the subject of criticism by Ai Group in these proceedings).
- 85. Ai Group submits that the fourth difference is not material and (on one view) involves repletion of other provisions (see clause 12.1(a) of the proposed clause and clause 12.2(a) of the Hospitality Award (and clause 12.2(a) of the Restaurant Award and the Clubs Award)).
- 86. Ai Group submits that the fifth and sixth differences overcome the lack of flexibility and the administrative burden of the existing part-time clause in the Fast Food Award and notes that it is intended that a part-time employee would be paid overtime in accordance with a new part-time overtime clause to be inserted into the Fast Food Award if he or she was to work more than 38 hours per week. (For the avoidance of doubt, it is not intended that a part-time employee covered by the Fast Food Award would be entitled to be paid overtime if he or she worked (by agreement) additional hours above rostered hours up to the maximum 38 hours per week, due to the operation of clause 12.7 of the proposed clause.)

Consideration of Section 134 Factors

87. Ai Group submits that the insertion of the proposed flexible part-time clause into the Fast Food Award will not have an adverse impact on the relative living standards (see section 134(1)(a)) and the needs of the low paid (see section 134(1)(a)) of the part-time employees but could lead to enhanced job and income security for employees currently engaged as casuals (see paragraph [79] of this outline) which is a measure that addresses (and improves) the relative living standards of employees currently engaged as casuals (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [369], [526] per Hatcher VP, Hamberger SDP, Kovacic and Bull DPP, Roe C). Ai Group submits that these matters support the insertion of the proposed flexible part-time clause into the Fast Food Award.
88. Ai Group submits that the need to encourage collective bargaining (see section 134(1)(b)) is a neutral consideration.
89. Ai Group submits that the need to promote social inclusion through increased workforce participation (see section 134(1)(c)) is concerned with additional employment (see *Penalty Rates Decision* [2017] FWCFB 1001 at [828], [1361], [1665], [1834], [1932] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC) and is (in light of the absence of material addressing the issue) a neutral consideration.
90. Ai Group submits that the need to promote flexible work practices and the efficient and productive performance of work (see section 134(1)(d)) is a favourable consideration in support of the inclusion of the insertion of the proposed flexible part-time clause into the Fast Food Award.
91. Ai Group submits that the need to provide additional remuneration for employees working overtime, unsocial hours, weekends, public holidays and shifts (see section 134(1)(da)) is a neutral consideration.
92. Ai Group submits that the principle of equal remuneration for work of equal or comparable value (see section 134(1)(e)) is a neutral consideration.
93. Ai Group submits that the proposed flexible part-time clause could have a favourable impact on business (see section 134(1)(f)) by reducing overall employment costs (especially where a part-time employee is used to work additional hours, in comparison to the costs of a casual loading paid to casual employees) and thus supports the insertion of the proposed flexible part-time clause into the Fast Food Award.
94. Ai Group submits that the need for simple, easy to understand, modern award system that avoids unnecessary overlap of modern awards (see section 134(1)(g)) is a neutral consideration.
95. Ai Group submits that the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (see section 134(1)(h)) is (in light of the absence of material addressing the issue) a neutral consideration (see *Penalty Rates Decision* [2017] FWCFB 1001 at [865], [1386], [1687], [1946] per Ross J, Catanzariti VP, Asbury DP, Hampton and Lee CC).

96. Ai Group submits that the need to consider the proposed variation from the perspective of both employers and employees (see paragraph **[9]** of this outline) is a favourable consideration, particularly (for employers) the advantages associated with using part-time employees (such as better service, better attitudes and greater teamwork) (see paragraph **[66]** of this outline) and (for employees) the enhanced job and income security, together with leave entitlements, flowing from part-time employment (see paragraph **[67]** of this outline).
97. Ai Group submits that the need to consider contemporary circumstances (see paragraph **[9]** of this outline) is a favourable consideration, particularly the need within the fast food industry for flexibility to meet unpredicted demand and unexpected staff absences.

H J Dixon SC
A B Gotting
Counsel for Ai Group

23 February 2018



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. In sub-clause 25.5(a)(ii), inserting after the words “25% causal loading.” of clause 25.5(a)(ii):

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.

4. 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.

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

6. Deleting existing clause 26.2 (renumbered 27.2 in accordance with 5, 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:
 38 hours per week or an average of 38 hours per week averaged over a four week period; or
 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
 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.

7. 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

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¹ [insert citation].

² MA000003.

Schedule 2

List of Deponents

1. [Annabel Sarah Anderson](#) (Senior Employee Relations Advisor at McDonald's).
2. [Elizabeth Mary Montebello-Hunter](#) (National Field Human Resources Manager at Hungry Jack's).
3. [Ian Flemington](#) (Chief People Officer of Craveable Brands).
4. [Nicola Agostino](#) (director of Western Australian franchisee of McDonald's).
5. [Glenn Norman Sullivan](#) (partner of Victorian franchisee of Hungry Jack's).
6. [John Francis Chapman](#) (director of Queensland, NSW and Victorian franchisee of Hungry Jack's).
7. [Alexander Martinoli](#) (manager of NorWest Market Town (NSW) McDonald's restaurant).
8. [Kate Nicole Swan](#) (certified trainer at Cabramatta (NSW) Hungry Jack's restaurant).
9. [Leasa Kate Francis Guilk](#) (manager of Glendenning (NSW) Hungry Jack's restaurant).
10. [Katie Hossian](#) (Lawyer at Ai Group).

Schedule 3

Extract of Existing Part-Time Clause in the Fast Food Award

12. Part-time employees

12.1 A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the number of hours worked each day;
- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- that the minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and any variation to it will be retained by the employer and a copy given by the employer to the employee.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 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.

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in 26 - Overtime and penalty rates.

Schedule 4

Extract of Flexible Part-time Clause in McDonald's Agreement

14 Part-Time Employees

- 14.1 A part-time employee is an employee who:
- 14.1.1 Works less than 36 hours per week but shall work at least 10 hours per week.
 - 14.1.2 has reasonably predicted hours of work.
- 14.2 At the time of the employee first being employed the employer shall request a schedule of the availability of the employee to work and the employee shall complete such availability schedule and return it to the employer. When the employee's availability changes or upon the request of the employer the employee shall update their availability schedule. Where an employee seeks to request a reduction in their availability to work, the employer may discuss a reduction in their agreed number of hours of work per week. Any change to the employee's part-time contract regarding their availability for work or number of hours of work shall only take effect once both the employer and employee agree.
- 14.3 At the time of first being employed, the employer and the part-time employee will agree, in writing on paper or electronically, on the minimum number of hours to be worked each week which shall be not less than 10 hours and not more than 36 hours.
- 14.4 The employer shall give at least five days' notice to an employee of their rostered hours for the week. Such rostered hours shall be during the employee's advised availability. The roster shall include the days of the week on which the employee will work and the actual starting and finishing time on each day. The employer may offer more hours of work than the employee's agreed minimum number of hours and if the employee elects to work such hours they shall be paid in accordance with Clause 14.6 (up to a maximum of 38 hours per week). Such additional hours shall accrue entitlements such as annual leave, personal/carer's leave and long service leave. Whilst a part-time employee may work up to 38 hours without the payment of overtime, the Employer may not enter into an agreement for a part-time employee to have a maximum number of agreed hours of more than 36 hours per week.
- 14.5 No existing casual shall be required to change to part-time but an employee may mutually agree with the employer to change to part-time. An existing casual shall not be disadvantaged if they elect not to change to part-time.
- 14.6 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- 14.7 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 15.
- 14.8 An employer is required to roster a part-time employee for a minimum of 3 consecutive hours on any shift, subject to clause 21.2. The maximum number of starts in a week shall be five.

- 14.9 A part-time employee is to be rostered so as to have 2 consecutive days off per week, provided that a part time employee may agree otherwise.
- 14.10 A part-time employee is to be rostered so as to have 1 weekend off each 4 weeks, provided that a part time employee may agree otherwise.
- 14.11 The maximum number of consecutive days a part time employee shall work is 6, provided that a part time employee may agree otherwise.
- 14.12 The maximum number of ordinary hours a part time employee shall work in any day shall 9.5 hours excluding meal breaks.
- 14.13 Subclause 14.10, 14.11, 14.12 and 14.13 will not apply to Level 4 employees.