FAIR WORK COMMISSION

AM 49 of 2017

2014 FOUR YEARLY REVIEW
STAGE 4
FAST FOOD INDUSTRY AWARD

OUTLINE OF SUBMISSION IN REPLY OF AUSTRALIAN INDUSTRY GROUP

1. The Australian Industry Group ("**Ai Group**") has prepared this outline to respond to the submissions of:

   (a) the SDA undated but filed on 16 March 2018 (the "**SDA Submissions**"); and

   (b) the Retail and Fast Food Workers Union undated but filed on 9 March 2018 (the "**RAFFWU Submissions**").

SDA Submissions

2. Ai Group notes that the SDA supports Ai Group Claim 2 (relating to the proposed insertion of a flexible part-time work clause).

3. Ai Group submits that the Commission should reject the submissions of the SDA on Ai Group Claim 1 (relating to the insertion of a facilitative provision 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):

   (a) First, the emphasis of the SDA on the determination by the Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 that the end time of the evening penalty rate should be 6.00am (see SDA Submissions, par 24) misses the point of Ai Group Claim 1 – that there should be an effective mechanism to allow, by agreement, a change to that end time. The general determination of the end time says nothing on the existence or absence from the Fast Food Award of an effective mechanism to change, by agreement, the end time.

   (b) Secondly, contrary to the claim of the SDA (see SDA Submissions, par 25), the individual flexibility agreement clause in the Fast Food Award does not provide a sufficient (or effective) mechanism to change, by agreement, the end time of the evening penalty rate, especially for an employer with a large number of employees working or having the potential to work from 5.00am to 6.00am (see Anderson Supplementary Affidavit, pars 6, 8 (12,545 employees)) and with each individual flexibility agreement taking approximately 10 minutes to negotiate, prepare and execute (see Anderson Affidavit, par 58).

(c) Thirdly, contrary to the suggestion of the SDA (see SDA Submissions, par 28), the need to make and document the individual flexibility agreement is not confined to 3,102 employees (the number of employees required between 5.00am and 6.00am at McDonald's restaurants on any one day of operations) but extends to 12,545 employees (the number of employees who have indicated a willingness to work between 5.00am and 6.00am at McDonald's restaurants on any day of operations) (see Anderson Supplementary Affidavit, pars 6, 8) as any of those 12,545 employees may be called upon to work between 5.00am and 6.00am.

(d) Fourthly, contrary to the assertion of the SDA (see SDA Submissions, pars 32, 33), the need to make and document the individual flexibility agreements is not confined to an average of 3 to 4 agreements for each employer as:

(i) the SDA has significantly understated (by a factor of four) the number of employees who may need to make an agreement on any week day (see subparagraph (c) above);

(ii) the SDA has assumed that the identity of the employees (whether working or making themselves available to work) is the same each week day (an assumption that is factually inaccurate) (see Anderson Supplementary Affidavit, pars 6, 8);

(iii) the SDA has ignored the need for a large corporate employer (such as McOpCo), operating 152 restaurants (see Anderson Affidavit, par 6) over each of the five week days, to make literally hundreds (if not thousands) of agreements; and

(iv) the SDA has ignored the time needed to negotiate, prepare and execute each individual flexibility agreement (10 minutes) (see Anderson Affidavit, par 58).

(e) Fifthly, contrary to the bald assertion of the SDA (see SDA Submissions, par 38), there is no compromise (let alone an inherent one) of the integrity of the penalty rates system if a majority of employees agree to vary the end time of the evening penalty rates and, in any event, the Commission has included majority employee facilitative agreements in the Fast Food Award (see clause 30.2 of the Fast Food Award concerning the specification of a public holiday) and in other modern awards (see, for example, the clauses extracted in the table set out in Schedule R1 to this outline; see also the proposed change to the *Sugar Industry Award 2010* (which includes a majority employee facilitative agreement relating to the spread of hours) as foreshadowed by *Re Award Stage – Group 3* [2018] FWCFB 1405 at [186] per Ross J, Hamberger SDP, Clancy DP, Johns C)).

(f) Sixthly, the SDA raises arguments over the minimal cost of the penalty rates applying between 5.00am and 6.00am (see SDA Submissions, pars 44, 46, 47; see also par 61) in circumstances where Ai Group does not rely on the cost as justification for the Ai Group Claim 1 (but rather relies on the lack of an effective mechanism to change, by agreement, the end time).

(g) Seventhly, contrary to the bald assertion of the SDA (see SDA Submissions, par 50), there is no intent or desire by employers to avoid the need for genuine agreement – Ai Group accepts (readily and has never suggested otherwise) that genuineness (in the sense of an absence of coercion or duress) is essential for a majority employee agreement.

(h) Eighthly, contrary to the claim of the SDA (see SDA Submissions, par 59), there is no lack of clarity with the phrase "*majority of employees concerned*", particularly given that it is included in other modern awards (see the table set out in schedule R1).

4. Ai Group joins issues with each of the disputed submissions of the SDA relating to section 134 (see SDA Submissions, pars 55, 57, 58, 64) and repeats its earlier submissions relating to that provision (see Ai Group Submissions, pars 40 to 52).

RAFFWU Submissions

5. Ai Group notes that RAFFWU makes no submission on Ai Group Claim 1 (relating to the insertion of a facilitative provision 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).

6. Ai Group submits that the Commission should reject the submissions of RAFFWU on Ai Group Claim 2 (relating to the proposed insertion of a flexible part-time work clause):

(a) Firstly, the employee number figure cited by RAFFWU for the KFC Group (34,000) is apparently for all employees employed in all operations across Australia (including, say, head office and corporate functions), as opposed to only those employees working in restaurants or retail stores (compare RAFFWU Submission, par 11(e); see also Commonwealth of Australia, *Hansard (Senate)*, 24 August 2017, p22), with the result that the employee number figure cited by RAFFWU is higher than the actual number of employees working in KFC restaurants and retail stores and with the consequence that its criticism of the ABS data on total employee numbers in the fast food industry is misplaced (compare RAFFWU Submissions, par 13).

(b) Secondly, contrary to the bald assertion of RAFFWU that the Ai Group does not include material from entities to whom the Fast Food Award applies (see RAFFWU Submissions, pars 14, 19, 23, 24, 38, 44), the Ai Group relies on evidence from employers who apply the Fast Food Award currently (see Sullivan Affidavit, par 15; Chapman Affidavit, par 9; see also Flemington Affidavit, pars 14, 16, 18; Montebello-Hunter Affidavit, par 8; see further Ai Group Submissions, pars 22, 24, 25). (In any event, the fact that an enterprise agreement currently applies to an employer or employee does not preclude the employer or employee giving relevant evidence for the purposes of a review under section 156 (compare the evidence given by McDonald's employees, and accepted and relied upon by the Full Bench (see, for example, *Penalty Rates Decision* [2017] FWCFB 1001 at [1184], [1266], [1267], [1284], [1285], [1307], [1309], [1310], [1313], [1322])).)

(c) Thirdly, RAFFWU either misunderstands or ignores the effect of the submissions of the Ai Group on the discouragement of employment (compare RAFFWU Submissions, par 15) – the simple submission (supported by evidence relied upon by the Ai Group (summarised in Ai Group Submissions, par 63) and effectively supported by the SDA in its submissions (see SDA Submissions, par 9)) is that the current requirement of the Fast Food Award to pay overtime rates of pay for additional hours, and to record those additional hours in writing, acts to discourage employers from either employing part-time employees generally or using part-time employees to perform the additional hours specifically, with such discouragement being uninfluenced by the (theoretical but impractical) ability of employees to agree their hours before they such additional work.

(d) Fourthly, contrary to the implication of RAFFWU (see RAFFWU Submissions, pars 17, 22, 44), Ai Group does not suggest that the circumstances of its application (including the number of part-time employees in the fast food industry) are identical or similar to one aspect (the "*dead letter*" aspect) of the situation in the *Part-time and Casual Employment Decision* [2017] FWCFB 3541 but undoubtedly:

(i) there are aspects of the Fast Food Award (like those awards considered in the part-time flexibility provision claim in the *Part-time and Casual Employment Decision*) that discourage part-time employment or the greater use of part-time employment (in an industry (like those industries considered in the *Part-time and Casual Employment Decision*) that requires flexibility in the working of additional hours so as to meet fluctuating and variable work demands); and

(ii) there are other aspects of the reasoning of the Full Bench in the *Part-time and Casual Employment Decision* (especially that relating to the need to ensure that the relevant award meets contemporary circumstances) that supports its application (see Ai Group Submissions, pars 76, 78).

(e) Fifthly, contrary to the assertion of RAFFWU (see RAFFWU Submissions, par 19), the Ai Group is not simply demanding that employers be relieved of the burden of documenting short-term contractual variations but rather is seeking that the Fast Food Award be varied so that it operates practically in light of contemporary circumstances (particularly the need to respond quickly to unpredictable demand or unpredictable absences) and encourages greater levels of part-time employment.

(f) Sixthly, contrary to the implication of RAFFWU (see RAFFWU Submissions, par 25), there is no need for an employer survey or an employee survey to support a claimed variation as part of a review under section 156 of the FW Act, especially when other evidence establishes adequately the discouraging effect of the Fast Food Award (see also *Penalty Rates Award* [2017] FWCFB 1001 at [244], [253], [269](2)).

(g) Seventhly, contrary to the contention of RAFFWU (see RAFFWU Submissions, par 27; see also par 36), there is no "*notoriety*" of employees being "*substantially worse off financially*" if covered by an enterprise agreement than the Fast Food Award and such alleged "*notoriety*" is not established by RAFFWU referring (without

acknowledgment) to its own submission (unsupported by evidence) to the Senate Education and Employment References Committee (a submission that was not the basis of a finding or recommendation of the Committee) and the reporting by Fairfax Media of its own dealings with Fairfax Media (see RAFFWU Submissions, footnote 14) but in any event such alleged "*notoriety*" is not relevant to the statutory task under section 156 of the FW Act. (The Ai Group also relies on its analysis of the Senate Education and Employment References Committee in schedule R2 to this outline.)

(h) Eighthly, the alleged "*very real prospect of applications to terminate*" enterprise agreements (see RAFFWU Submissions, par 29) is at best speculative (as no application has been lodged and might never be lodged) but in any event is not relevant to the statutory task under section 156 of the FW Act.

(i) Ninthly, contrary to the bald assertion of RAFFWU (see RAFFWU Submissions, pars 34, 35), there is no evidence that employers have avoided obligations under the NES or a modern award or avoided paying overtime.

(j) Tenth, the submission of RAFFWU is littered with broad assertions and linguistic flourishes (including as to motivation of employer parties) not based upon or supported by evidence (see RAFFWU Submissions, pars 27 to 38).

(k) Eleventh, contrary to the submission of RAFFWU (see RAFFWU Submissions, pars 37, 39), the current terms of the Fast Food Award do not permit an employer to avoid paying overtime rates of pay for additional hours if the employee agrees to the additional hours in writing.

(l) Twelfth, contrary to the implication of RAFFWU (see RAFFWU Submissions, par 39), the relative living standards and needs of low paid employees for the purposes of section 134(1) of the FW Act are not assessed by considering the starting and finishing time of employees (and the degree of knowledge of such hours) but by reference to earnings (and the benchmark of two-thirds of the median full-time earnings) (see *Penalty Rates Decision* [2017] FWCFB 1001 at [165]-[173]);

(m) Thirteenth, contrary to the assertion of RAFFWU (see RAFFWU Submissions, par 40), the loss of casual loading for a casual employee who becomes a part-time employee is not without other benefits, including the accessing of a guaranteed minimum number of hours per week (see AI Group Submission, par 67(a)) and the accessing of leave entitlements and public holiday entitlements (see Ai Group Submissions, par 67(c)), and those other benefits are at least equivalent to the loss of casual loading such that there is no diminished relative living standards for the purposes of section 134(1)(a) of the FW Act.

(n) Fourteenth, contrary to the claim of RAFFWU (see RAFFWU Submissions, par 41), "*social inclusion*" for the purposes of section 134(1)(c) of the FW Act is not some broad concept concerning family and community engagement but is related to "*workforce participation*" (see the terms of section 134(1)(c); see also *Penalty Rates Decision* [2017] FWCFB 1001 at [179]) and there can be no sensible suggestion that

the claimed adverse consequences from a lack of knowledge of starting and finishing time (an alleged inability "*to plan ahead*") adversely impacts workforce participation.

(o) Fifteenth, contrary to the contention of RAFFWU (see RAFFWU Submissions, par 42), availability is not relevant to the submissions of the Ai Group concerning overtime rates of pay for additional hours – under the proposed variation, where additional hours are required to be worked by an employer, a part-time employee will be offered those hours and may accept or reject the offer (with the part-time employee not required to work the additional hours if they chose to reject the offer, such that unavailability is not relevant (as an employee is to be permitted to reject the offer)).

(p) Sixteenth, contrary to the claim of RAFFWU (see RAFFWU Submissions, par 43), there is no complexity introduced by a clause that specifies the rate of pay for additional hours and removes the requirement for a written agreement (in fact the latter aspect removes complexity).

7. Ai Group joins issue with each of the disputed submissions of RAFFWU relating to section 134 (see RAFFWU Submissions, pars 39, 40, 41, 43) and repeats its earlier submissions relating to that provision (see Ai Group Submissions, pars 40 to 52).

8. Ai Group submits that the Commission should reject the claimed "*denial*" by RAFFWU of the application for a variation (see RAFFWU Submission, par 45).

9. Ai Group notes that it has included some additional notes and submissions concerning the Senate Penalty Rates Report in Schedule R2 to this outline.

Outcome

10. Ai Group submits that the Commission should make the proposed variations in accordance with the draft determinations filed 24 April 2018.

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26 June 2018

Schedule R1

Analysis of "Majority of Employee Concerned" Clauses

11. The Ai Group has prepared a table that records 61 examples of clauses in modern awards that contain the phrase "*majority of employees concerned*" (or a similar phrase).

12. The Ai Group notes that the clauses relate to:

    (a) the averaging of ordinary hours of work (see clause 27.3(b)(i) of the *Airport Employees Award 2010*, clause 22.3 of the *Asphalt Industry Award 2010,* clause 8.3(b)(vi) of the *Australian Capital Territory Public Sector Enterprise Award 2016*, clause 28.3 of the *Clerks – Private Sector Award 2010*, clause 25.2(a) of the C*oncrete Products Award 2010*, clause 30.3(c) and clause 30.4(b) of the *Food, Beverage and Tobacco Manufacturing Industry Award 2010*, clause 25.3 and clause 26.2 of the *Legal Services Award 2010,* clause 36.3(c) of the *Manufacturing and Associated Industries and Occupations Award 2010,* clause 33.3 of the *Meat industry Award 2010,* clause 35.5(a) and clause 35.6 of the *Pastoral Award 2010,* clause 23.3(c) and clause 23.4(b) of the *Seafood Processing Award 2010* and clause 29.3(a) and clause 32.1(b) of the *Sugar Industry Award 2010*);

    (b) the spread of ordinary hours of work (see clause 28.2(c) of the *Airline Operations – Ground Staff Award 2010,* clause 8.2(d)(ii) of the *Australian Capital Territory Public Sector Enterprise Award 2016,* clause 21.2 of the *Educational Services (Post-Secondary Education) Award 2010*, clause 21.2(b) of the *Funeral Industry Award 2010,* clause 24.1(c) of the *Legal Services Award 2010* and clause 35.4 of the *Pastoral Award 2010*);

    (c) the duration of a shift (see clause 27.3(c)(ii) and clause 27.3(c)(iii) of the *Airport Employees Award 2010,* clause 24.5 of the *Electrical, Electronic and Communications Contracting Award 2010,* clause 25.2(b)(i) of the *Concrete Products Award 2010,* clause 21.2(c) of the *Funeral Industry Award 2010,* clause 17.1(b) of the *GrainCorp Country Operations Award 2015* and clause 24.3(c) and clause 24.4(b) of the *Poultry Processing Award 2010*);

    (d) the start-time and end-time of shifts (see clause 27.3(e) of the *Airport Employees Award 2010* and clause 21.5 of the *Gas Industry Award 2010*);

    (e) the times taken for meal breaks and rest breaks (see clause 21.5 of the *Aluminium Industry Award 2010*, clause 33.10(b) of the *Meat industry Award 2010,* clause 21.1 of the *Professional Diving Industry (Recreational) Award 2010* and clause 30.2 of the *Sugar industry Award 2010* and clause 29.1 of the *Timber Industry Award 2010*);

    (f) the days taken as public holidays (see, for example, clause 20.5(d) of the *Aquaculture Industry Award 2010,* clause 31.5(d) of the *Food, Beverage and Tobacco Manufacturing Industry Award 2010,* clause 31.4 of the *Legal Services Award 2010* and clause 37.5(d) of the *Manufacturing and Associated industries and Occupations*

Award 2010 and clause 24.5(d) of the *Seafood Processing Award 2010*);

(g) annual leave (see clause 24.2 of the *Commercial Sales Award 2010*, clause 34.2 of the *Food, Beverage and Tobacco Manufacturing Industry Award 2010,* clause 37.3 of the *Graphic Arts, Printing and Publishing Award 2010,* clause 25.4 of the *Horticulture Award* 2010, clause 41.2 of the *Manufacturing and Associated industries and Occupations Award 2010,* clause 23.2 of the *Marine Tourism and Charter Vessels Award 2010,* clause 23.2 of the *Pastoral Award,* clause 27.2 of the *Seafood Processing Award 2010,* clause 23.9(d) of the *Telecommunication Services Award 2010* and clause 33.2 and clause 33.11(g) of the *Timber Industry Award 2010*); and

(h) rostered days off (see clause 28.7 of the *General Retail Industry Award 2010,* clause 22.4(d) of the *Storage Services and Wholesale Award* 2010, clause 33.1 and clause 33.2 of the *Textiles, Clothing, Footwear and Associated Industries Award 2010* and clause 53.5(a) of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*).

Review of Modern Awards containing "majority of employees concerned"

Award	Facilitative Provision	Wording of Clause
Airline Operations - Ground Staff Award 2010	28.2(c) – spread of ordinary hours for day workers may be altered by one hour at either end of spread	**28.2 Ordinary hours of work—day work** **(c)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am and 6.00 pm. The spread of hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned.
Airport Employees Award 2010	27.3(b)(i) – averaging of hours of work over a period greater than 28 days	**27.3 Ordinary hours of work—shiftworkers** **(b) Hours** **(i)** The ordinary hours of work must be 38 or an average of 38 per week inclusive of meal time and must not exceed 152 hours within a period of 28 consecutive days. Provided that where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 hours is achieved over a period which exceeds 28 consecutive days.
	27.3(c)(ii) – ordinary hours of more than eight hours per day	**(c) Duration of shift** **(ii)** Subject to clause 8.5, in any arrangement of ordinary working hours where the ordinary working hours are to exceed eight on any day, such arrangement of hours will be subject to the agreement of the employer and the majority of employees concerned.
	27.3(c)(iii) – ordinary hours of up to twelve hours per day	**(iii)** By agreement between the employer and the majority of employees concerned, ordinary hours not exceeding 12 on any day may be worked, subject to clause 8.8 and: • proper health and safety monitoring procedures being introduced; • suitable roster arrangements being made; • proper supervision being provided; and • consideration being given to family responsibilities. • minutes must be allowed to shiftworkers each shift for a meal, which must be counted as time worked.
	27.3(e) – variations to methods of working shifts and commencement and finishing times of shifts	**(e) Variation by agreement** **(i)** Subject to clauses 27.3(b) and (d), the method of working shifts may in any case be varied by agreement between the employer and the majority of employees concerned. **(ii)** The time of commencing and finishing shifts, once having been determined, may be varied by agreement between the employer and the majority of employees concerned to suit the operational requirements at an airport. **(iii)** The provisions of clause 27.3(e) will operate subject to clause 8.5.

Award	Facilitative Provision	Wording of Clause
Aluminium Industry Award 2010	21.5(c) – overtime meal break for un-rostered overtime	**21.5 Rest breaks—un-rostered overtime** **(c)** An employer and the majority of employees concerned may agree to any change to this clause to meet operational needs, provided the employer is not required to make any payment in excess of or less than 20 minutes.
Aquaculture Industry Award 2010	20.5(d) – choosing public holiday shift when shift split across two days	**20.5 Rate for working on Sunday and public holiday shifts** **(d)** Where shifts fall partly on a public holiday, the shift which has the major portion falling on the public holiday must be regarded as the public holiday shift. By agreement between the employer and the majority of employees concerned, the shift which has the minor portion falling on the public holiday may be regarded as the public holiday shift instead.
Asphalt Industry Award 2010	22.3(b) – averaging of hours over a period greater than 28 days but less than 12 months	**22.3 Hours of work** **(b)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.
Australian Capital Territory Public Sector Enterprise Award 2016	8.2(d)(ii) – variation to span of hours (ten-hour span)	**(ii)** The span of hours may be varied from that contained in paragraph 8.2(c)(i) within the limits of 7.00 am and 6.00 pm Monday to Friday subject to a 10-hour span, by agreement between the employer and the majority of employees concerned. Where such variation is effected, the alternative commencing and finishing time will be read in substitution for those specified in paragraph 8.2(c)(i).
	8.3(b)(vi) – averaging of hours over period greater than 28 days but less than twelve months (shift workers)	**8.3 Ordinary hours of work – shiftworkers** **(b) Hours** **(vi)** In respect of classifications listed in Table 3 of Schedule A, by agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours under paragraph 8.3(b)(ii) is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months. This agreement will be made and recorded in accordance with clause 5—Facilitative provisions.
Clerks – Private Sector Award 2010	28.3 – hours of work may be averaged over a period greater than 28 days	**28.3 Ordinary hours of work** **(a)** The ordinary hours of work for shiftworkers are to be an average of 38 hours per week and must not exceed 152 hours in 28 consecutive days. **(b)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months. **(c)** Not more than 10 ordinary hours are to be worked in any one day.

Award	Facilitative Provision	Wording of Clause
Commercial Sales Award 2010	24.2 – conversion of annual leave entitlement to an hourly entitlement	**24.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease.
Concrete Products Award 2010	25.2(a) – averaging of hours for continuous shift workers over a period greater than 28 days	**25.2 Hours—continuous work shifts** **(a)** This subclause will apply to shiftworkers on continuous work. The ordinary hours of shiftworkers will average 38 per week inclusive of crib time and will not exceed 152 hours in 28 consecutive days. Provided that, where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days. Subject to the provisions of this subclause, shiftworkers will work at such times as the employer may require.
	25.2(b)(i) – ordinary hours of more than eight hours per shift for continuous shift workers	**(b)** A shift will consist of not more than 10 hours inclusive of crib time; provided that: **(i)** in any arrangement of ordinary working hours where the ordinary working hours are to exceed eight on any shift, the arrangement of hours will be subject to the agreement of the employer and the majority of employees concerned; and
Contract Call Centres Award 2010	27.9(c) – annual close down for more than two periods	**27.9(c)** an employer and the majority of employees concerned may agree to close down for more than two periods
Educational Services (Post-Secondary Education) Award 2010	21.1(a) – alteration of spread of hours by one hour at either end of spread	**21.1 Ordinary hours of work—general staff** **(a)** Ordinary hours of work are defined as those hours worked continuously, except for meal breaks, on any of the days from Monday to Friday (inclusive) between 7.00 am and 7.00 pm and from 7.00 am to 12.30 pm on a Saturday provided that an employee may be required to work until 8.00 pm up to a maximum of eight weekdays within a 28 day period without the entitlement to overtime if the ordinary hours worked do not exceed the number of hours within the nominated cycle. Provided further that the spread of hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned.

Award	Facilitative Provision	Wording of Clause
Electrical, Electronic and Communications Contracting Award 2010	24.5 – introduction of twelve-hour shifts	**24.5 Twelve hour shifts** By agreement between the employer and the majority of employees concerned, ordinary hours not exceeding 12 on any day may be worked subject to: **(a)** proper health monitoring procedures being introduced; **(b)** suitable roster arrangements being made; and **(c)** proper supervision being provided.
Food, Beverage and Tobacco Manufacturing Industry Award 2010	30.3(c) – averaging of hours over a period greater than 28 days but less then twelve months (continuous shift workers)	**30.3 Ordinary hours of work—continuous shiftworkers** **(c)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.
	30.4(b) – averaging of hours over a period greater than 28 days but less then twelve months (non-continuous shift workers)	**30.4 Ordinary hours of work—non-continuous shiftworkers** **(b)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.
	31.5(d) – choosing public holiday shift when shift split across two days	**31.5 Rate for working on Sunday and public holiday shifts** **(d)** Where shifts fall partly on a holiday, the shift which has the major portion falling on the public holiday must be regarded as the holiday shift. By agreement between the employer and the majority of employees concerned, the shift which has the minor portion falling on the public holiday may be regarded as the holiday shift instead.
	34.2 – conversion of annual leave entitlement to hourly entitlement	**34.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (i.e. 152 hours for a full-time employee entitled to four weeks of annual leave and 190 hours for a shiftworker as defined in clause 34.3).
Funeral Industry Award 2010	21.2(b) – spread of hours altered by one hour at either end of spread	**21.2 Spread of ordinary hours of work** **(b)** The ordinary hours of work will be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am and 7.00 pm. The spread of hours may be altered by up to one hour at either end of the spread by agreement between an employer and the majority of employees concerned.

Award	Facilitative Provision	Wording of Clause
	21.2(c) – ordinary hours between eight and ten hours per day	**(c)** The number of ordinary hours worked in a day will not exceed 10 hours. Where the ordinary hours worked in a day exceed eight hours, the arrangement of hours will be subject to the agreement of the employer and a majority of employees concerned.
	22.2(a) – averaging of hours over a period of greater than four weeks (shift workers)	**22.2 Ordinary hours of shiftworkers** **(a)** The ordinary hours of shiftworkers will not exceed an average of 38 per week over a cycle of up to four weeks. However, where the employer and a majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds four weeks.
Gas Industry Award 2010	21.5(d) – alterations to commencement and finishing times (shift workers)	**(d)** The time of commencing and finishing shifts, once having been determined, may be varied by agreement between the employer and the majority of employees concerned to suit the circumstances of business.
General Retail Industry Award 2010	28.7 – substitution of rostered days off	**28.7 Substitute rostered days off (RDOs)** **(a)** An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with a roster arrangement for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation. **(b)** By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off.
GrainCorp Country Operations Award 2015	17.1(b) – ordinary hours of between eight and ten hours a day	**17.1 Ordinary hours of work** **(b)** The ordinary hours of work shall not exceed 10 on any day, provided that where the ordinary hours are to exceed eight on any day the arrangement of hours shall be subject to agreement between GrainCorp and the majority of employees concerned.
Graphic Arts, Printing and Publishing Award 2010	37.3 – conversion of annual leave entitlement to hourly entitlement	**37.3 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in the NES to an hourly entitlement for administrative ease (i.e. 152 hours for a full-time employee entitled to four weeks' annual leave and 190 hours for a shiftworker as defined in clause 37.4).
Horticulture Award 2010	25.4 – conversion of annual leave entitlement to hourly entitlement	**25.4 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (e.g. 152 hours for a full-time employee entitled to four weeks annual leave).

Award	Facilitative Provision	Wording of Clause
Legal Services Award 2010	24.1(c) – alteration of spread of hours by one hour at either end of spread	**24.1 Weekly hours of work** **(c)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 7.00 am to 6.30 pm, Monday to Friday. The spread of hours may be altered by up to one hour at either end of the spread, by agreement between the employer and the majority of employees concerned.
	25.3 – averaging of hours of work over period greater than 28 days but less than twelve months (continuous shift workers)	**25. Ordinary hours of work (continuous shiftworkers)** **25.3** By agreement between an employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.
	26.2 – averaging of hours of work over period greater than 28 days but less than twelve months (non-continuous shift workers)	**26. Ordinary hours of work (non-continuous shiftworkers)** **26.2** By agreement between an employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.
	31.4(e) – choosing public holiday shift when shift split across two days	**31.4 Rate for working on Sunday and public holiday shifts** **(e)** By agreement between an employer and the majority of employees concerned, the shift which has the minor portion falling on the public holiday may be regarded as the public holiday shift instead of the above.
Manufacturing and Associated Industries and Occupations Award 2010	36.3(c) – hours of work may be averaged over a period greater than 28 days	**36.3(c)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months

Award	Facilitative Provision	Wording of Clause
	37.5 – choosing public holiday shift when shift split across two days	**37.5 Rate for working on Sunday and public holiday shift** **(d)** Where shifts fall partly on a holiday, the shift which has the major portion falling on the public holiday must be regarded as the holiday shift. By agreement between the employer and the majority of employees concerned, the shift which has the minor portion falling on the public holiday may be regarded as the holiday shift instead.
	41.2 – conversion of annual leave to hourly entitlement	**41.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (i.e. 152 hours for a full-time employee entitled to four weeks of annual leave and 190 hours for a shiftworker as defined in clause 41.3).
Marine Tourism and Charter Vessels Award 2010	23.2 – conversion of annual leave entitlement to hourly entitlement	**23.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (i.e. 152 hours for a full-time employee entitled to four weeks of annual leave).
Meat Industry Award 2010	33.3 – averaging of hours of work for shift workers over period greater than 28 days but less than twelve months	**33.3** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months. In the absence of such agreement, by the employer giving not less than seven days' notice to each employee of such proposed change of times.
	33.10(b) – time of taking of meal break	**33.10 Meal break** A shiftworker except when engaged on a three-shift system, may either be allowed a: **(b)** crib time of 30 minutes after working five hours, which will be counted as time worked and to be taken at a time agreed between the employer and a majority of employees directly concerned.
Pastoral Award 2010	23.2 – conversion of annual leave entitlement to hourly entitlement	**23.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (e.g. 152 hours for a full-time employee entitled to four weeks' annual leave).
	35.4 – alteration of span of hours for shift workers by one hour at either end of the span	**35.4** By agreement between the employer and the majority of employees concerned, the span of hours over which shifts may be worked may be altered by up to one hour at either end of the span.

Award	Facilitative Provision	Wording of Clause
	35.5(a) – averaging of hours of work over greater period than 28 days but less than 26 weeks for continuous shift workers	**35.5 Continuous work hours** **(a)** This subclause will apply to shiftworkers on continuous work as defined in clause 35.3(b). The ordinary hours of shiftworkers will average 38 per week inclusive of crib time and must not exceed 152 hours in 28 consecutive days. Provided that, where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed a maximum of 26 weeks.
	35.6(a) – averaging of hours of work over greater period than 28 days but less than 26 weeks for shift workers	**35.6 Other than continuous work hours** **(a)** This subclause will apply to shiftworkers not upon continuous work as defined in clause 35.3(b). The ordinary hours of shiftworkers will average 38 per week inclusive of crib time and must not exceed 152 hours in 28 consecutive days. Provided that, where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed a maximum of 26 weeks.
Poultry Processing Award 2010	24.3(c) – ordinary hours of up to twelve hours per shift (day worker)	**(c)** By agreement between the employer and the majority of employees concerned the ordinary hours for a day worker may be up to 12 hours per day.
	24.4(b) – ordinary hours of up to twelve hours per shift (shift worker)	**24.4 Shiftworkers** **(b) Hours of work** The ordinary hours for a shiftworker are up to 10 hours per day, inclusive of meal breaks, Monday to Sunday. By agreement between the employer and the majority of employees concerned the ordinary hours for a shiftworker may be up to 12 hours per day, inclusive of meal breaks, Monday to Sunday.
	27.9(b) – annual close down to be not more than one period	**27.9 Annual close-down** **(b)** the close-down occurs on not more than one occasion per year, unless otherwise agreed between an employer and the majority of employees concerned; and
Professional Diving Industry (Recreational) Award 2010	21.1(c) – timing of taking of meal breaks	**21. Breaks** **21.1** An employee is entitled to an unpaid meal break at a time fixed by agreement between the employer and the majority of employees concerned, provided that no employee works more than five hours without a meal break.

Award	Facilitative Provision	Wording of Clause
Seafood Processing Award 2010	23.3(c) – averaging of hours over a period greater than 28 days but less than twelve months (continuous shift workers)	**23.3 Ordinary hours of work—continuous shiftworkers** **(c)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.
	23.4(b) – averaging of hours over a period greater than 28 days but less than twelve months (non-continuous shift workers)	**23.4 Ordinary hours of work—non-continuous shiftworkers** **(b)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.
	24.5(d) – determination of public holiday shift (where shift falls across two days)	**24.5 Rate for working on Sunday and public holiday shifts** **(d)** Where shifts fall partly on a public holiday, the shift which has the major portion falling on the public holiday must be regarded as the public holiday shift. By agreement between the employer and the majority of employees concerned, the shift which has the minor portion falling on the public holiday may be regarded as the public holiday shift instead.
	27.2 – conversion of annual leave entitlement to hourly entitlement	**27.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the Act to an hourly entitlement for administrative ease (i.e. 152 hours for a full-time employee entitled to four weeks of annual leave and 190 hours for a shiftworker as defined in clause 27.3).
Storage Services and Wholesale Award 2010	22.4(d) – substitution of rostered day off	**22.4 Rostered days off** **(d) Rostered days off—substitute days** Notwithstanding clause 22.4(b), an employer with the agreement of the majority of employees concerned may substitute a rostered day off for another day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

Award	Facilitative Provision	Wording of Clause
Sugar Industry Award 2010	29.3(a) – averaging of hours over period greater than 28 days but less than twelve months (other than field sector)	**29.3 Other than field sector** **(a)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.
	30.2(c) – combining of rest pauses into single rest pause	**30.2 Rest break** **(c)** While rest pauses must not be eliminated, by mutual agreement between the employer and the majority of employees concerned, rest pauses may be taken in such a manner which results in both rest pauses being combined and the day then being divided into three approximately equal working periods.
	32.1(b) – averaging of hours of period greater than 28 days but less than twelve months (shift workers)	**32.1 Ordinary hours of work—shiftwork** **(b)** By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.
Telecommunication Services Award 2010	23.9(b) – annual close down for more than two periods	**23.9(b)** An employer may close down for one or two periods. Where there is agreement between the employer and the majority of employees concerned, an employer may close down for more than two periods.
Textile, Clothing, Footwear and Associated Industries Award 2010	33.1 & 33.2 – substitution of rostered day off	**33.1 In the case of:** **(a)** breakdown in machinery, or failure or shortage of electric power; or **(b)** requirements of the business in the event of rush orders; or **(c)** some other emergency situation, an employer may, by agreement with the majority of employees concerned, substitute the rostered day off agreed to for another day. **33.2** By agreement with the majority of employees concerned, the employer may substitute the rostered day off agreed to for another day provided in accordance with clause 8.3.
Timber Industry Award 2010	29.1 – timing of meal break on short day	**29. Breaks—day workers and shiftworkers** **29.1 Alteration of meal breaks** In any establishment where the ordinary hours of work are worked on the basis of four days of eight ordinary hours each and one day of six ordinary hours in a weekly work cycle, by agreement between the employer and the majority of employees concerned the six ordinary hour day may be worked without a lunch break.

Award	Facilitative Provision	Wording of Clause
	33.2 – conversion of annual leave entitlement to hourly entitlement	**33.2 Conversion to hourly entitlement** An employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in s.87 of the NES to an hourly entitlement for administrative ease.
	33.11(g) – three separate annual close down periods	**33.11 Annual close-down** **(g)** the employer and the majority of employees concerned may agree to the enterprise or part of it being closed down pursuant to clause 33.10 for three separate periods in a year provided that one of the periods is a period of at least 14 days including non-working days; and
Vehicle Manufacturing, Repair, Services and Retail Award 2010	53.5(a) – substitution of rostered day off	**53.5 Substitute day** **(a)** An employer, with the agreement of the majority of employees concerned, may substitute the day an employee is to take off for another day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

Schedule R2

Analysis of Senate Penalty Rates Report

13. In October 2017, the Senate Education and Employment References Committee (the "**Committee**") published its report on "Penalty Rates".

14. The report of the Committee comprises a majority report, a dissenting report, an additional comments report of the Australian Greens and an additional comments report of the NXT Party.

15. In terms of the majority report, the Committee did not make a finding to the effect that it was "*notorious*" that workers were "*worse off financially*" under enterprise agreements (either generally or specifically) than the Fast Food Award (compare RAFFWU Submission, par 27).

16. In terms of the majority report, the Committee described the position of RAFFWU as a "*suggestion*" that employees were worse off financially under enterprise agreements than the Fast Food Award (with no endorsement of the "*suggestion*") (see Committee Report, par 2.50).

17. In terms of the majority report, the Committee noted that evidence presented to it indicated that the actual rates paid to employees covered by enterprise agreements were higher than the rates contained in the enterprise agreements (see Committee Report, par 2.50). The Committee also noted that some of the submissions put to it on this topic did not consider the existence of higher loaded rates elsewhere in the week (see Committee Report, par 2.48). The Committee further noted that some of the submissions put to it disputed the "*suggestion*" (see Committee Report, par 2.56). Finally, the Committee noted that the conclusion of the Department of Education that small businesses by and large preferred to avoid using enterprise agreements because such agreements resulted in better pay and conditions for workers (see Committee Report, par 2.67).

18. The Committee did not make a recommendation based on the "*suggestion*" that employees were worse off financially under enterprise agreements (see Committee Report, par 2.91; pars 2.84 to 2.90). (The Committee made one recommendation that has not been reflected in legislation (see Committee Report, par 2.91).)