

From: Chambers - Ross J
Sent: Wednesday, 18 July 2018 4:41 PM
To: Leanne Cruden; 'Katie-Maree O'Brien'; Katie Biddlestone; Josh Cullinan; Matthew Galbraith (matt@sda.org.au)
Cc: AMOD
Subject: AM2017/43 - Findings sought - submissions in reply

Dear parties,

We have received correspondence from the [SDA](#) and [RAFFWU](#) indicating which of the findings sought by Ai Group are contested. We have collated the responses in the attached document. The Full Bench will deal with this document at the commencement of tomorrow's hearing.

Kind regards,

Casey Sutton
Associate to The Hon. Justice IJK Ross
President

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AM2017/43: Fast Food Industry Award 2010 – substantive issues

The following [findings](#) sought by Australian Industry Group are **not contested**:

Finding
<p>6. In early 2018, an estimated 103,136 employees worked in corporate (non-franchised) and franchised stores for McDonald’s (see Anderson Affidavit, pars 21), including:</p> <p style="padding-left: 40px;">(a) an estimated 22,856 employees on a part-time basis (see Anderson Affidavit, pars 23, 24); see also Agostino Affidavit, par 13 (121 part-time employees)); and</p> <p style="padding-left: 40px;">(b) an estimated 73,201 employees on a casual basis (see Anderson Affidavit, pars 23, 24; see also Martinoli Affidavit, par 10 (47 of 59 crew members); see further Agostino Affidavit, par 13 (75 of 362 employees)).</p>
<p>7. 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:</p> <p style="padding-left: 40px;">(a) 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)); and</p> <p style="padding-left: 40px;">(b) an estimated 389 on a casual basis (see Montebello-Hunter Affidavit, par 12).</p>
<p>8. In early 2018, the number of employees working in franchised stores for Hungry Jack’s is not known (see Montebello-Hunter Affidavit, pars 13, 16), including the number of employees engaged on a part-time and casual basis, but some franchised stores have high numbers of employees engaged on a casual basis (see also Sullivan Affidavit, par 19 (165 casuals of 178 employees); Chapman Affidavit, par 11 (97 casuals of 123 employees)).</p>
<p>15. Currently, under the McDonald’s Enterprise Agreement 2013 (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 stores 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 stores 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 stores do not need to offer an incentive (such as a loading) to fill the period 5.00am to 6.00am.</p>
<p>23. The existing part-time clause in the Fast Food Award 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).</p>
<p>29. Currently, some 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 store 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</p>

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 onboarding costs if they used part-time employees (see Anderson Affidavit, par 87; Montebello-Hunter Affidavit, par 43; Flemington Affidavit (Exhibit AiG 1), par 55; Sullivan Affidavit, par 41; Guilk Affidavit, par 29; see also Martinoli Affidavit, par 50).

31. Many employees would benefit from part-time employment including:

(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);

...

(c) accessing leave entitlements (see Anderson Affidavit, par 85; Montebello-Hunter Affidavit, par 42; Flemington Affidavit (Exhibit AiG 1), 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).

The following [findings](#) sought by Australian Industry Group in the document of the same name dated 9 July 2018 are **contested**:

Finding	Contested by
1. In 2016, the fast food industry comprised an estimated 170,023 employees (Fair Work Commission Fast Food Industry Profile Table 1 row 1).	RAFFWU: on the basis the finding is of the “fast food industry”, MFI-1 speaks for itself and does not represent the ‘fast food industry’.
2. In 2016, an estimated 23,345 employees in the fast food industry worked on a full-time basis and an estimated 138,438 employees in the fast food industry worked on a part-time (that is, less than 35 hours per week) basis (Fair Work Commission Fast Food Industry Profile Table 1 row 2). (The employees working on a part-time basis include casual employees.)	RAFFWU: on the basis the finding is of the “fast food industry”, MFI-1 speaks for itself and does not represent the ‘fast food industry’.
3. In 2016, an estimated 100,952 employees in the fast food industry were full-time students and an estimated 7,535 employees in the fast food industry were part-time students (Fair Work Commission Fast Food Industry Profile Table 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).	RAFFWU: on the basis the finding is of the “fast food industry”, MFI-1 speaks for itself and does not represent the ‘fast food industry’.
4. In 2016, an estimated 103,385 employees in the fast food industry were aged 15-19 years (Fair Work Commission Fast Food Industry Profile Table 1 row 5).	RAFFWU: on the basis the finding is of the “fast food industry”, MFI-1 speaks for itself and does not represent the ‘fast food industry’.
5. In 2016, an estimated 92,643 employees in the fast food industry worked one to fifteen hours per week and an estimated 28,821 employees in the fast food industry worked sixteen to twenty four hours per week (Fair Work Commission Fast Food Industry Profile Table 1 row 7).	RAFFWU: on the basis the finding is of the “fast food industry”, MFI-1 speaks for itself and does not represent the ‘fast food industry’.
9. In early 2018, an estimated 11,977 employees worked in corporate (non-franchised and franchised stores for Craveable Brands and trading under the names Red Rooster, Chicken Treat and Oporto (see Flemington Affidavit (Exhibit AiG 1), pars 9, 23), including: <p style="margin-left: 40px;">(a) an estimated 3,714 employees engaged on a part-time basis (see Flemington Affidavit (Exhibit AiG 1), pars 28, 29); and</p> <p style="margin-left: 40px;">(b) an estimated 7,304 employees engaged on a casual</p>	RAFFWU: the estimate is assumed, in the circumstances where actual data is available but was not obtained.

basis (see Flemington Affidavit (Exhibit AiG 1), pars 28, 29).	
10. Currently, a large number of employer groups in the fast food industry are covered by enterprise agreements but some employers in those groups apply the <i>Fast Food Industry Award 2010</i> (“ Fast Food Award ”) (see Sullivan Affidavit, par 15; Chapman Affidavit, par 9; Flemington Affidavit (Exhibit AiG 1), pars 16, 18; Exhibit AiG 2).	RAFFWU: notes the use of the word “large”.
11. Currently, some employers in the fast food industry (such as some employers operating McDonald’s stores) open their stores between 5.00am and 6.00am as part of normal trading hours (see Anderson Affidavit, par 10).	SDA RAFFWU
12. Currently, other employers in the fast food industry (including some employers operating McDonald’s stores) prepare their stores for opening between 5.00am and 6.00am (see Anderson Affidavit, par 14).	SDA RAFFWU
13. 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) and as many as 12,545 employees each Monday to Friday who make themselves available to work between 5.00am and 6.00am (see Anderson Supplementary Affidavit, pars 6, 8). 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).	SDA RAFFWU
14. Currently, it is not practical to make and document individual flexibility arrangements for as many as 10,962 or 12,545 employees (with the process of making and documenting taking approximately 10 minutes per arrangement) (see Anderson Affidavit, par 58).	SDA RAFFWU
15. Currently, under the McDonald’s Enterprise Agreement 2013 (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 stores 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 stores 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 stores do not need to offer an incentive (such as a loading) to fill the period 5.00am to 6.00am.	SDA comment: Findings are incomplete for reasons to be articulated in closing submissions. RAFFWU: basis unclear

<p>16. 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).</p>	<p>SDA RAFFWU: basis unclear</p>
<p>17. Currently, in the stores that are preparing their stores for opening between 5.00am and 6.00am, they do not generate income from sales during these preparation times (see Anderson Affidavit, par 47).</p>	<p>SDA comment: the Commission should conclude the validity of the finding on the evidence relates to a minority of McDonald’s restaurants only. RAFFWU: basis unclear</p>
<p>18. 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 (Exhibit AiG 1), 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)).</p>	<p>RAFFWU: contested to the extent it purports to identify the main, major or all factors taken into account in the preparation of crew rosters, when the factors identified are not all, nor necessarily the major or main, factors that are taken into account.</p>
<p>19. 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), par 41) and attending family or social commitments (see Agostino Affidavit, par 32; Flemington Affidavit (Exhibit AiG 1), par 41).</p>	<p>RAFFWU: the finding sought is of “low or no relevance”.</p>
<p>20. Currently, customer demand in the fast food industry fluctuates significantly for a variety of reasons, including special</p>	<p>RAFFWU: contests use of the word “significantly”.</p>

<p>events (such as sporting events) (see Anderson Affidavit, pars 73, 78; Montebello-Hunter Affidavit, par 30; Flemington Affidavit (Exhibit AiG 1), 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), 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).</p>	
<p>21. 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 (Exhibit AiG 1), par 47), illness and injury (see Anderson Affidavit, par 78; Flemington Affidavit (AiG 1), 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).</p>	<p>RAFFWU: contested because it uses the unqualified term “commonly”. There is no evidence of that fact, nor is the word “commonly” of assistance because it is vague and imprecise.</p>
<p>22. 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 (Exhibit AiG 1), 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).</p>	<p>RAFFWU: contested because of the use of the word “many”. There is no evidence of that fact, nor is the term “many” of assistance because it is vague and imprecise. We reserve our position to the extent the last sentence of paragraph [22] purports to be a finding.</p>
<p>24. 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</p>	<p>RAFFWU</p>

<p>42; see also Sullivan Statement, par 39; Guilk Affidavit, par 53), given the regularity of employees changing their own availability (see paragraph [19] of these findings; 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 [22] of these findings).</p>	
<p>25. 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 (Exhibit AiG 1), par 60, 61; Sullivan Affidavit, par 39; Martinoli Affidavit, pars 21, 25; Swan Affidavit, pars 48, 50; Guilk Affidavit, par 54).</p>	RAFFWU
<p>26. 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).</p>	RAFFWU
<p>27. Currently, some 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 (Exhibit AiG 1), 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 (Exhibit AiG 1), 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).</p>	RAFFWU: contested because it uses the word “some”. The evidence is that “three employing entities which employ 301 employees representing less than one fifth of one percent of employees in the industry” have expressed this opinion.
<p>28. Currently, some 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 (Exhibit AiG 1), par 44).</p>	RAFFWU: contested because it uses the word “some”. The evidence is that “three employing entities which employ 301 employees representing less than one fifth of one percent of employees in the industry” have expressed this opinion. We note the typographical mistake at the first “employees”.
<p>30. Currently, some employers covered by the Fast Food Award would employ (and roster and use) part-time employees in lieu of</p>	RAFFWU: contested because it uses the word “some”. The

<p>casual employees if the Fast Food 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).</p>	<p>evidence is that “three employing entities which employ 301 employees representing less than one fifth of one percent of employees in the industry” have expressed this opinion.</p>
<p>31. Many employees would benefit from part-time employment including:</p> <p>...</p> <p>(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 (Exhibit AiG 1), 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);</p> <p>...</p>	<p>RAFFWU</p>