FAIR WORK COMMISSION

AM 49 of 2017

2014 FOUR YEARLY REVIEW
STAGE 4
FAST FOOD INDUSTRY AWARD

WRITTEN SUBMISSION IN REPLY OF AUSTRALIAN INDUSTRY GROUP

1. The Australian Industry Group ("**Ai Group**") has prepared this written submission in reply to respond to the closing submission of:

   (a) RAFFWU ("**RAFFWU Closing Submissions**"); and

   (b) the SDA ("**SDA Closing Submissions**").

2. The Ai Group maintains its submissions put in these proceedings to date, including:

   (a) its outline of submissions dated 23 February 2018 (as amended on 12 July 2018) ("**Ai Group Submissions in Chief**");

   (b) its outline of submissions in reply dated 26 June 2018 (as amended on 12 July 2018) ("**Ai Group Submissions in Reply**");

   (c) its supplementary outline of submissions in reply dated 18 July 2018 ("**Ai Group Supplementary Submissions in Reply**"); and

   (d) its oral submissions made on 19 July 2018 (see Transcript, 19 July 2018, PN 1916 to PN 2115) ("**Ai Group Oral Submissions**").

3. The Ai Group also maintains its application for the variations sought in the draft determination filed 24 April 2018.

RAFFWU Closing Submissions

4. The Ai Group joins issue with the RAFFWU over the RAFFWU Closing Submissions.

5. In summary, the Ai Group submits that the RAFFWU Closing Submissions:

   (a) misrepresent the bases of reliance by the Ai Group on the *Part-time and Casual Employment Decision* [2017] FWCFB 3541; (2017) 269 IR 125 (compare paragraphs 4 to 9 of the RAFFWU Closing Submissions);

   (b) discount without a proper basis probative evidence (especially probative evidence of (i) Messrs Sullivan and Chapman, (ii) Ms Swan and Ms Guilk, (iii) the variability in labour demand, (iv) the current clause acting as a disincentive and (v) the time taken to document an agreement in writing) (compare paragraphs 9, 10, 12, 13, 15, 49, 50, 52, 55, 56, 58, 59, 60, 66 and 88 of the RAFFWU Closing Submissions);

(c) focus too heavily on one of the original purposes of part-time employment and ignore recent developments concerning part-time employment, including the developments in the *Part-time and Casual Employment Decision*, as well as the characteristics of employees working in the fast food industry (compare paragraphs 41 to 46, as well as paragraph 93, of the RAFFWU Closing Submissions);

(d) mischaracterise the effect of the *Fast Food Award Variation Decision* [2010] FWAFB 379 (see paragraphs 67 to 69 of the RAFFWU Closing Submissions);

(e) ignore many of the submissions put by the Ai Group prior to 20 July 2018;

(f) are based on assertions not established or supported by evidence (including evidence from its members);

(g) are based on assertions that were not put to the Ai Group witnesses it required for cross-examination (and which as a matter of fairness should have been put to the Ai Group witnesses) (compare paragraphs 28, 55, 73 and 78 of the RAFFWU Closing Submissions); and

(h) are based on assertions that should have been put to each of the Ai Group witnesses (including those Ai Group witnesses that RAFFWU did not require for cross-examination) (compare paragraphs 28, 55, 73 and 78 of the RAFFWU Closing Submissions).

6. The Ai Group also denies that the in terms of misrepresenting the bases of reliance on the *Part-time and Casual Employment Decision* [2017] FWCFB 3541*:*

(a) the Ai Group set out in its submissions the bases upon which it was relying on the *Part-time and Casual Employment Decision* (see paragraph 6(e) of the Ai Group Submissions in Reply; see also Transcript, 19 July 2018, PN 2107 to PN 2109), including that:

(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;

(b) RAFFWU ignores those bases and instead emphasises the "*dead letter*" aspect of the *Part-time and Casual Employment Decision* (see paragraphs 4 to 7 of the RAFFWU Closing Submissions);

(c) RAFFWU seems to proceed on the footing that reliance may only be placed on an earlier authority where the factual circumstances are identical or closely similar to

those in the earlier authority (and thus RAFFWU seems to ignore the appropriateness of identifying and applying principles revealed in earlier authorities, including the principles contained in the *Part-time and Casual Employment Decision*); and

(d) RAFFWU erects a number of "straw man" arguments tied to its misrepresentation (including the need for roster analysis (see paragraphs 10 and 13 of the RAFFWU Closing Submissions) and the need for a survey (see paragraphs 20 and 29 of the RAFFWU Closing Submissions)) when the Ai Group application is not put on the misrepresented basis.

7. In terms of discounting evidence without a proper basis:

(a) RAFFWU seeks to suggest that evidence of Messrs Sullivan and Chapman has no probative value (see paragraphs 55, 56, 60 and 66 of the RAFFWU Closing Submissions) but:

(i) each of the witnesses set out in clear terms the bases for their non-engagement and non-use of part-time employees currently, including their understanding of the operation of the part-time clause in the Fast Food Award, the cost and administrative impacts of that clause and the disincentive that the clause provides to them to engage or use part-time employees (see Sullivan Affidavit (Exhibit AiG 9), pars 15, 19, 31, 36, 38, 39, 41; Chapman Affidavit (Exhibit AiG 10), pars 9, 11, 20, 21, 22, 23, 28, 29, 31; see also further Flemington Cross Examination (29 June 2018, PN 336));

(ii) RAFFWU did not cross-examine either of the witnesses;

(iii) as a matter of fairness, RAFFWU ought to have put the claims of assertion (unsupported by facts) to both of the witnesses to afford them an opportunity to respond; and

(iv) RAFFWU appears to proceed on the misunderstanding that, as the evidence of the two witnesses only relates to 301 employees (178 employees for the stores operated by Mr Sullivan and 123 employees for the stores operated by Mr Chapman), the Commission should (or will) attach no weight to the evidence (when the Commission acts on the basis that evidence led in a review (as was led in the *Penalty Rates Decision* [2017] FWCFB 1001 and the *Part-time and Casual Employment Decision* [2017] FWCFB 3541) is indicative of the position of other participants in the industry more generally (at least in the absence of demonstration to the contrary and RAFFWU has not sought to demonstrate to the contrary));

(b) RAFFWU simply ignores the evidence of Ms Swan and Ms Guilk, including their evidence that part-time employees are engaged and offered additional hours (and casual employees are not engaged at all) in stores that have the proposed flexible part-time arrangements under an enterprise agreement (see Swan Affidavit (Exhibit 12), pars 29, 30, 31; Guilk Affidavit (Exhibit 13), pars 42, 43, 47, 48); and

(c) RAFFWU seeks to suggest that the evidence of Mr Flemington, Ms Anderson and Ms Montebello-Hunter should be discounted as it was not based on analysis of costs or data (see paragraphs 50, 52, 58 and 59 of the RAFFWU Closing Submissions) but:

(i) no analysis was capable of being undertaken, given that the concern of the Ai Group was the non-allocation of additional hours to part-time employees (due to the administrative burden and costs associated with the current part-time employment clause in the Fast Food Award) and no additional hours were in fact allocated to part-time employees;

(ii) no analysis was necessary as it is axiomatic that the costs associated with overtime rates for part-time employees are higher under the Fast Food Award than the costs associated with ordinary rates and casual loadings for casual employees; and

(iv) the primary concern of the Ai Group is not cost but rather the disincentive to engaging part-time employees (who are otherwise regarded as valuable, experienced and reliable workers) through the administrative burden associated with the current part-time employment clause in the Fast Food Award.

The Ai Group submits that the Commission should accept the evidence of all of its witnesses, including those six witnesses identified in this paragraph.

8. In terms of the heavy focus on one of the original purposes of part-time employment:

(a) RAFFWU emphasises the original purpose of part-time employment in awards generally was to address the circumstances of employees with major family or other personal commitments in their lives (see, for example, *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [93], [97] (see also (historically) at [87]));

(b) RAFFWU emphasises such a purpose to the exclusion of all other factors;

(c) RAFFWU ignores a more recent consideration relevant to part-time employment, being the need for flexibility in working hours and the rostering of working hours (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [518], [525]), especially if there is variable workload and client demand in the relevant industry connected with special events, tourist groups, weather and seasonal factors (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [518], [519]);

(d) RAFFWU ignores a more recent development, namely the recognition of the need to balance regularity and certainty of working hours with patterns of (actual) work in the relevant industry (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [525]);

(e) RAFFWU ignores an important characteristic of the fast food industry that there is a limited number of employees with family responsibilities (see also Martinoli Affidavit (Exhibit AiG 11), pars 11, 12; Swan Affidavit (Exhibit AiG 12), pars 10, 20; Guilk Affidavit (Exhibit AiG 13), par 10; see also Chapman Affidavit (Exhibit AiG 9), par 20);

(f) RAFFWU ignores that there is a significant need for flexibility in working hours in the fast food industry, including because of departures in fact from hours contained in rosters issued by employers (see paragraph 57 of the Ai Group Submissions in Chief); and

(g) RAFFWU ignores that there is significant variable workload and significant variable client demand in the fast food industry, including connected with special events, tourist groups, weather and seasonal factors (see paragraph 56 of the Ai Group Submissions in Chief).

9. In terms of mischaracterising the effect of the *Fast Food Award Variation Decision* [2010] FWAFB 379:

(a) RAFFWU claims that Fair Work Australia in the *Fast Food Award Variation Decision* [2010] FWAFB 379 rejected the disincentive associated with paying part-time employees at overtime rates for additional hours (see paragraphs 67 and 68 of the RAFFWU Closing Submissions). However, the tribunal did not reject such disincentive at all:

(i) the tribunal acted on the basis that "*overtime should not be payable to part-time employees when they agreed in writing additional hours within the other limits on ordinary hours*" (see [2010] FWAFB 379 at [8]) and thus proceeded on the foundation that overtime should not be required to be paid to part-time employees working for additional hours within the ordinary 38 weekly hours; and

(ii) the tribunal did not address (and acted on the basis that there was no) administrative burden associated with the requirement of the employer and employee agreeing "*in writing*" (see [2010] FWAFB 379 at [8]); and

(b) RAFFWU in any event ignores that there is a different factual foundation to the Ai Group application, especially given the evidence of the administrative burden of the requirement for writing.

10. In terms of ignoring the submissions put by the Ai Group to date, RAFFWU raises:

(a) a claim that the Ai Group application is presented as being synonymous with the *Part-time and Casual Employment Decision* (see paragraph 3 of the RAFFWU Closing Submissions) but then ignores the submissions of the Ai Group that outlines the reliance on (and makes plain that there is no claimed synonymy with) the *Part-time and Casual Employment Decision* (see paragraph 6(e) of the Ai Group Submissions in Reply; see also Transcript, 19 July 2018, PN 2107);

(b) a claim that there is no "*probative basis at all*" for removing set start and finish times for part-time employees in the fast food industry (see paragraph 102 of the RAFFWU Closing Submissions; see also paragraph 107 of the RAFFWU Closing Submissions) but then ignores the submissions of the Ai Group that set rosters (with set start and finish times) are impracticable due to constant fluctuation in sales and continual changes to employee actual availability to work (see paragraph 5 of Ai Group Supplementary Submissions in Reply) and the evidentiary references that

support such a lack of impracticability (see paragraph 5 of Ai Group Supplementary Submissions in Reply); and

(c) a claim that proposed clause 12.7 is "*devoid of content*" as employee silence more than 24 hours after posting of the roster could constitute an acceptance of an offer of additional hours (and therefore an agreement) (see paragraph 113 of the RAFFWU Closing Submissions) but then ignores the submissions of the Ai Group that the same result could occur under the current part-time clause in the Fast Food Award and under the current enterprise agreements and there is no evidence or suggestion in cross-examination that such clauses cause difficulties for employees (see paragraph 11 of the Ai Group Supplementary Submissions in Reply).

11. In terms of assertions not supported by evidence (which assertions should be rejected by the Commission), they include:

(a) the claim that basic roster preparation in the fast food industry is "*very different*" to basic roster preparation in the club industry and hospitality industry (compare paragraph 13 of the RAFFWU Closing Submissions);

(b) the claim that rostering workers for availability is "*a practice that is inherently likely to increase variability in labour supply*" (compare paragraph 15 of the RAFFWU Closing Submissions);

(c) the claim that rostering workers for availability "*will result in uncertainty and insecurity and increase the likelihood that changes [in availability] will be required*" (compare paragraphs 15, 16, 39 and 91 of the RAFFWU Closing Submissions);

(d) the claim that proposed clauses 12.2 "*introduces serious instability into the lives of part-time employees*" (compare paragraph 104 (see also paragraph 39) of the RAFFWU Closing Submissions);

(e) the claim that potential part-time employees who provide restricted availability are "*less likely to be engaged*" than potential part-time employees who provide wider availability (compare paragraph 104 (see also paragraph 39) of the RAFFWU Closing Submissions);

(f) the claim that potential part-time employees with carers responsibilities (of which there is very limited evidence (see Agostino Affidavit (Exhibit AiG 6), par 17)) are "*disadvantaged*" under proposed clause 12.2 (seemingly on the basis that part-time employees with carers responsibilities are unable to specify wider availability) (compare paragraphs 39, 92 and 104 of the RAFFWU Closing Submissions);

(g) the claim that part-time employees "*must nominate the widest window possible to secure the best opportunity of securing additional hours*" (compare paragraphs 15 and 105 of the RAFFWU Closing Submissions);

(h) the claim that part-time employees "*are deprived of an opportunity at all to work 'ad hoc' additional hours*" (compare paragraph 105 (and possibly paragraph 91) of the RAFFWU Closing Submissions);

(i) the claim that part-time employees must "*commit to the same availability window each week*" (compare paragraph 105 of the RAFFWU Closing Submissions);

(j) the claim that part-time employees who do not commit to the same availability window each week are "*deprived of the opportunity to be considered for additional hours*" (compare paragraph 105 (and possibly paragraph 91) of the RAFFWU Closing Submissions);

(k) the claim that part-time employees who have wider availability are "*unable to plan ahead*" and cannot make (or have difficulties in making) "*short notice arrangements*" (compare paragraph 106 (as well as paragraph 91) of the RAFFWU Closing Submissions);

(l) the claim that part-time employees without "*set start and finish times*" are disadvantaged (compare paragraph 107 of the RAFFWU Closing Submissions);

(m) the claim that part-time employees are "*more likely to make concessions to their employees to secure the opportunity to work additional hours*" (compare paragraph 90 of the RAFFWU Closing Submissions);

(n) the claim that proposed clause 12.6 (addressing "*genuine and ongoing change*" in availability) introduces "*significant and detrimental restrictions to part-time employees*" (compare paragraph 109 of the RAFFWU Closing Submissions);

(o) the claim that part-time employees must "*commit to those [additional] hours on an ongoing basis*" (compare paragraphs 110 and 111 of the RAFFWU Closing Submissions); and

(p) the claim that proposed clause 12.7 (addressing additional hours) introduces "*significant and detrimental restrictions to part-time employees*" (compare paragraph 111 of the RAFFWU Closing Submissions).

Additionally, RAFFWU ignores the ability under the proposed determination to vary hours of work by mutual agreement (see proposed clause 26.2), a mechanism that allows some of the claimed "*disadvantages*" to be overcome and that permits "*short term arrangements*" to be made.

12. In terms of not putting assertions to the witnesses:

(a) none of the factual issues in the previous paragraph were put to the witnesses made available in cross-examination;

(b) the suggestion that the evidence of Mr Sullivan and Mr Chapman was "*assertion unsupported by facts*" and "*speculation and assertion*" (see paragraphs 28 and 55 of the RAFFWU Closing Submissions) was not put at all;

(c) the suggestion that Ms Guilk did not estimate accurately the time taken to record the agreement (compare paragraph 73 of the RAFFWU Closing Submissions) was not put at all (including the suggestion that she was unable to estimate accurately because of an alleged lack of experience); and

(d) the suggestion that Ms Guilk conflated the time to find a replacement employee and the time to document the agreement (compare paragraph 75 of the RAFFWU Closing Submissions) was not put at all.

13. RAFFWU adopts an internally inconsistent approach in its Closing Submissions – it initially urges the Commission to accept its estimates of the number of employees in the fast food industry (see paragraph 6 of the RAFFWU Closing Submissions), even though it refers to no material upon which its estimate is based, but then objects to the Commission accepting estimates of an employer (see paragraph 7 of Annexure 1 to the RAFFWU Closing Submissions), even though the employer sets out the basis, and reasonableness of the basis, for its estimate.

14. RAFFWU claims that one of the witnesses gives evidence about part-time employees in circumstances where the witness engages no such employees (see paragraph 11 of the RAFFWU Submissions). However, the claim is false – the witness (in unchallenged evidence) engages 15 part-time employees (see Chapman Affidavit (Exhibit AiG 10), par 11).

15. RAFFWU suggests (without evidence) that variability in labour requirements can be planned for in advance (see paragraph 12 of the RAFFWU Submissions) and simply ignores unchallenged evidence of unpredictable fluctuations in demand (as summarised, for example, in paragraphs 56, 57 and 58 of the Ai Group Submissions in Chief).

16. RAFFWU asserts that there is no evidence of a change since the making of the Fast Food Award in 2010 (see paragraph 14 of the RAFFWU Closing Submissions). However:

(a) there is no requirement for such a change (let alone a material one) 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; *Re Family and Domestic Violence Leave* [2018] FWCFB 1691 at [57] per Ross J, Gooley DP, Spencer C; *Re Family Friendly Working Arrangements* [2018] FWCFB 1692 at [64] per Ross J, Gooley DP and Spencer C);

(b) one significant change since the making of the Fast Food Award was the publication of the *Part-time and Casual Employment Decision* [2017] FWCFB 3541, including the insertion of a flexible part-time employment provision into the *Hospitality Industry (General) Award 2010*, the *Restaurant Industry Award 2010* and the *Registered and Licensed Clubs Award 2010* (see also the comparison table prepared by the Ai Group at the request of the Commission); and

(c) there is the evidence in these proceedings of the disincentive of the engagement and use of part-time employees due to the administrative burden associated with the requirement in writing, as well as the costs associated with overtime rates of pay for additional hours of work, that was not available and not considered at the time of the making of the Fast Food Award (or at the time of the determination of the *Fast Food Award Variation Decision* [2010] FWAFB 379) (see also Transcript, 19 July 2018, PN 2052).

17. RAFFWU contends that there is an absence of surveys and analysis to support the Ai Group application (see paragraphs 19, 20, 29, 36 and 52 of the RAFFWU Closing Submissions). However:

(a) the application is based largely on industrial merit (and there is a limited need for evidence when the application is grounded in that way (see, for example, *Penalty Rates Decision* [2017] FWCFB 1001 at [269]; see also paragraph 13 of the "Review" document issued by the Commission on 18 July 2018));

(b) the survey material in the *Part-time and Casual Employment Proceedings* related to the number of part-time employees engaged by 455 establishments in the hospitality industry (see *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [440]) in circumstances where numbers of part-time employees are available for large groups in the fast food industry (see Flemington Affidavit (Exhibit AiG 1), pars 28, 29; Anderson Affidavit (Exhibit AiG 3), pars 23, 24; Montebello-Hunter Affidavit (Exhibit AiG 7), par 12; see also Ai Group Submissions in Chief, pars 18, 19, 20) and thus a survey was not necessary when the numbers of such employees are otherwise part of the evidence;

(c) the first type of claimed analysis (which RAFFWU appears to suggest should be have been completed) relates to the number of casual hours worked in comparison to the number of non-casual hours worked (see paragraph 33 of the RAFFWU Closing Submissions) when:

(i) the primary concern of the Ai Group is the non-allocation of additional hours (not total hours) to part-time employees (not non-casual employees) and so a comparison of total hours worked (encompassing ordinary and additional hours) by casual employees to total hours worked (encompassing ordinary and additional hours) by non-casual employees (encompassing both full-time and part-time employees) would not be relevant;

(ii) there is no suggestion that the employers maintained data in their systems on the additional hours worked by casual employees in comparison to the additional hours worked by part-time employees; and

(iii) for some employers it is clear that such analysis could not be performed as:

(A) there is clear (uncontested) evidence that part-time employees are engaged and offered additional hours (and casual employees are not engaged at all) in stores that have the proposed flexible part-time arrangements under an enterprise agreement (see Swan Affidavit (Exhibit 12), pars 29, 30, 31; Guilk Affidavit (Exhibit 13), pars 42, 43, 47, 48); and

(B) there is clear (uncontested) evidence that casual employees are engaged and offered additional hours (and part-time employees are not engaged at all or only engaged minimally) in stores that do not have the proposed flexible part-time arrangements (see Sullivan Affidavit (Exhibit AiG 9), pars 38, 39); see also Chapman Affidavit

(Exhibit AiG 10), pars 22, 23); and

(d) the second type of claimed analysis (which RAFFWU seems to suggest should have been undertaken) relates to cost (including overtime cost) when:

(i) the primary concern of the Ai Group relates to the reason for employers not offering additional hours to part-time employees (which related to (i) administrative burden and (ii) obvious (for which no analysis is required) extra costs associated with overtime rates of pay than ordinary rates of pay); and

(ii) if the employers do not offer the additional hours to part-time employees the overtime costs are not incurred and so the claimed analysis (even if it was conducted) could not be completed.

18. RAFFWU claims that there is an "*insufficient evidentiary foundation*" for the Ai Group application, including that the witnesses called by the Ai Group "*did not have sufficient experience*", gave "*unqualified opinion*" or expressed views "*without any proper basis*" (compare paragraphs 18, 20, 21 and 23 of the RAFFWU Closing Submissions). However, the evidence led by the Ai Group:

(a) comprised nine witness statements, including five witnesses (Messrs Sullivan, Chapman and Martinoli and Ms Swan and Ms Guilk) who were not cross-examined at all and who all had (unchallenged) levels of "*experience*";

(b) was not (in the main) based on "*experience*" or "*opinion*" or a "*view*" – the evidence (including that of Flemington, Anderson and Montebello-Hunter) addressed the current operations (including an analysis of data recorded in business systems maintained by large employer), the current rostering practices in fast food stores, the benefits of part-time employment, the obvious increase in costs by paying overtime rates rather than ordinary rates and the increased administrative burden associated with documenting in writing an agreement to work additional hours;

(c) was to a consistent effect across all witnesses (particularly concerning rostering practices, the benefits of part-time employment, the obvious increase in costs from overtime rates and the existence of administrative burdens associated with writing); and

(d) was not shown to be inaccurate (such that even if there was limited consultation by some of the corporate witnesses their evidence on current operations and rostering practices was not inaccurate and not shown to be inaccurate).

19. RAFFWU criticises the lack of knowledge of one witness of detailed aspects of current operations and current rostering practices (see paragraph 23 of the RAFFWU Closing Submissions) in circumstances where:

(a) the business employees over 103,000 employees across 972 stores throughout Australia (and no person could be expected to have knowledge (off the top of their head) of those aspects (without first gathering the information from other employees and data sources)); and

(b) it is not clear how knowledge of such details would be of assistance to the Commission (such as it not being clear how knowledge on the number of delivery drivers, the existence or absence of a rostering manager in each store or the alternative means (apart from face-to-face, email or telephone) of contacting employees to contact employees to offer additional hours would assist the Commission in conducting the review (and determining the fairness and relevance of the part-time arrangements in the Fast Food Award) under section 156 of the FW Act).

Additionally, such lack of knowledge does not undermine (and has not been shown to undermine) the evidence of the witness relating to:

(c) current operations of the employer (see Anderson Affidavit (Exhibit AiG 3), pars 15 to 25);

(d) current rostering practices of the employer (see Anderson Affidavit (Exhibit AiG 3), pars 64 to 83);

(e) benefits of part-time employment (see Anderson Affidavit (Exhibit AiG 3), pars 84 to 88);

(f) the increased costs of overtime rates rather than ordinary rates (see Anderson Affidavit (Exhibit AiG 3), par 90); and

(g) the likely administrative burden of written documentation of additional hours (see Anderson Affidavit (Exhibit AiG 3), par 93).

20. RAFFWU suggests that a misunderstanding by a witness of "*basic industrial concepts*" entails that their evidence is to be discounted (see paragraph 26 of the RAFFWU Closing Submissions). However, the misunderstanding related only to the operation of the Fast Food Award and did not impact (and has not been demonstrated as impacting) on the evidence of the witness relating to:

(a) current operations of the employer (see Montebello-Hunter Affidavit (Exhibit AiG 7), pars 8 to 23);

(b) current rostering practices of the employer (see Montebello-Hunter Affidavit (Exhibit AiG 7), pars 24 to 40);

(c) benefits of part-time employment (see Montebello-Hunter Affidavit (Exhibit AiG 7), pars 41 to 48);

(d) the likely administrative burden of written documentation of additional hours (see Montebello-Hunter Affidavit (Exhibit AiG 7), pars 52 to 54); and

(e) the increased costs of overtime rates rather than ordinary rates (see Montebello-Hunter Affidavit (Exhibit AiG 7), par 55).

RAFFWU criticises the evidence of the same witness on the basis that she was allegedly "*difficult and obstructionist*" (see RAFFWU Closing Submissions, par 27) yet it identifies no basis for such serious (and unfounded) allegations.

21. RAFFWU in substance disputes the evidence of the Ai Group on the extent of the engagement and use of part-time employees over casual employees if the proposed part-time flexibility clause was introduced into the Fast Food Award, even though the evidence of the Hungry Jack's and Craveable Brands' witnesses demonstrates the likely increased engagement and use of part-time employees following the inclusion of the proposed part-time flexibility clause in the Fast Food Award (see Chapman Affidavit (Exhibit AiG 10), pars 22, 23; Sullivan Affidavit (Exhibit AiG 9), par 41; see also Flemington Affidavit (Exhibit AiG 1), par 44).

22. RAFFWU also seems to proceed on the basis that the engagement or use of part-time employees is binary (in that the part-time employees are either engaged or not engaged or alternatively used or not used). However, the engagement or use is not binary – there may be some additional engagement or some additional use from the inclusion of the proposed flexible part-time clause in the Fast Food Award.

23. RAFFWU emphasises that the evidence led by the Ai Group relates to a small number of establishments in the fast food industry (see paragraphs 31 and 34 of the RAFFWU Closing Submissions). However, the significant aspect of the evidence is not the number of establishments but rather the number of employees the subject of the evidence relating to current operations and rostering practices (over 131,000 employees (103,058 employees at McDonald's; 16,134 employees at Hungry Jack's and 11,977 employees at Red Rooster, Oporto and Chicken Treat) (see Anderson Affidavit (Exhibit AiG 3), par 22; Montebello-Hunter Affidavit (Exhibit AiG 7), pars 11, 12; Flemington Affidavit (Exhibit AiG 1), pars 28, 29))) in an industry comprising approximately 171,000 employees (see MFI 1 row 1).

24. RAFFWU contends that proposed clause 12.6, through the requirement of "*genuine and ongoing change*" in personal circumstances, introduces a restriction on part-time employees making changes to their availability, including temporary changes to their availability (see paragraph 109 of the RAFFWU Closing Submissions). However, the purpose of proposed clause 12.6 is to facilitate an alteration in the guaranteed minimum hours in light of ongoing changes to availability (see, for example, *Part-time and Casual Employment Decision* [2017] FWCFB 3541 at [532]) and proposed clause 12.6 does not address, and does not preclude, temporary changes in actual availability (as occurs under current practices and as will continue to occur under the proposed clause 12.6 in the future).

25. RAFFWU asserts (wrongly) that proposed clause 12.7 requires that a part-time employee must accept additional hours permanently (subject to a 14 day notice requirement) (see paragraph 111 of the RAFFWU Closing Submissions). However, proposed clause 12.7 allows the additional hours to be offered on either a temporary or a permanent basis and the employee has the choice whether to agree to work those additional hours on either basis.

26. RAFFWU suggests (incorrectly) that the only justification for the proposed clause 12.7 is for employers to achieve a reduction in costs for additional hours (see paragraph 112 of the RAFFWU Closing Submissions). However, the proposed clause 12.7 also produces the benefit that part-time employees, as opposed to casual employees, are more likely to be offered the additional hours (and in that sense that benefit is not confined to employers but extends to part-time employees).

27. RAFFWU claims that proposed clause 12.7 does not contain a balancing of interests of employers and employees (see paragraph 112 of the RAFFWU Closing Submissions).

However, proposed clause 12.7 addresses the interests of employers (through the benefit of removing an administrative burden and being able to pay ordinary rates, rather than overtime rates, for additional hours worked during agreed availability) and of employees (through the benefit of being offered (and, if acceptable to the employee, agreeing) to work additional hours that could have been offered (and worked by) casual employees).

28. RAFFWU contends that proposed clause 12.7 is "*devoid of content*" as it does not specify the manner in which the additional hours might be offered (see paragraph 113 of the RAFFWU Closing Submissions). However, a failure to prescribe the mechanism of offering hours (with it being left to the parties to devise or agree on appropriate mechanisms) does not mean that the proposed clause 12.7 is devoid of content.

Statement of Principle

29. RAFFWU claims that the Commission should adopt some additional principles in considering the Ai Group application (see paragraphs 1 and 2 of the RAFFWU Closing Submissions). However:

    (a) RAFFWU refers to the additional principles in terms of a "*state of satisfaction*" when section 156 (as well as sections 134 and 138) of the FW Act are not framed in terms of a "*state of satisfaction*" at all (compare, for example, section 157(1) and section 186(2) of the FW Act; compare also the usual basis of describing the task of the Commission when conducting a review under section 156 as performing an "*evaluative function*" and making an "*evaluative judgment*" (see also paragraphs 7 and 8 of the "Review" document issued by the Commission on 18 July 2018); and

    (b) RAFFWU seems to contend that the Commission must obtain necessary evidence if it does not have such evidence before it when the Commission is not obliged to act in that manner at all (compare section 590(1) of the FW Act).

30. To the extent that RAFFWU implies, by reference to the principle of the Commission must not act on the basis of "*assertion or speculation or incomplete evidence*", that the Ai Group application proceeds on such a basis (see paragraph 2 of the RAFFWU Submissions), RAFFWU ignores the extensive (and in many instances unchallenged) evidence filed in support of the application, including from nine witnesses.

Contested Factual Findings

31. On 9 July 2018, the Ai Group filed a document containing the findings that it sought from the Commission (see Findings Sought by the Ai Group dated 9 July 2018; see also amended Findings Sought by the Ai Group dated 12 July 2018).

32. RAFFWU objects to a number of the findings sought (see, for example, paragraph 95 of the RAFFWU Closing Submissions and Annexure 1 to the RAFFWU Closing Submissions).

33. The Ai Group maintains each of the findings sought.

34. The Ai Group responds to some of the objections specifically.

35. RAFFWU claims that the Commission should not make the first five findings sought (see paragraph 1 of Annexure 1 to the RAFFWU Closing Submissions). However, the findings are

based upon the ABS data from the 2016 Census and are not contradicted by any evidence from RAFFWU. The findings are also consistent with the approach of the Commission in the *Penalty Rates Decision* [2017] FWCFB 1001 at [1272], [1273], [1275], [1352], [1353] and reflect an update to the evidence referenced in those paragraphs of the *Penalty Rates Decision*.

36. RAFFWU asserts that the Commission should not accept the ninth finding sought on the basis that it is sourced in an estimate rather than actual data (see paragraph 7 to the RAFFWU Closing Submissions). However, there is an identified and reasonable basis for the estimate (see Flemington Affidavit (Exhibit AiG 1), pars 27, 28) and there is no reason to doubt the accuracy of the estimate.

37. RAFFWU objects to the terms of the eighteenth finding sought on the basis that the finding purports to identify all, or the major, rostering factors (see paragraph 10 of Annexure 1 to the RAFFWU Closing Submissions). However, the eighteenth finding sought only identified (and only purported to identify) some of the rostering factors (especially given the use of the phrase "among other things" when describing those factors) and did not seek to assign the weight attributable to those factors.

38. RAFFWU opposes the twentieth finding sought on the purported ground that there is "*no real evidence of these matters*" (see paragraph 11 of Annexure 1 to the RAFFWU Closing Submissions). However, the nineteenth finding is supported in terms by specified evidentiary references, including from restaurant managers who were not cross-examined, and was confirmed and reiterated by the cross-examination of Ai Group witnesses (see also Anderson Cross Examination (16 July 2018, PN 908, PN 1001), Agostino Cross Examination (16 July 2018, PN 1301, PN 1333); Agostino Re-Examination (16 July 2018, PN 1433); Montebello-Hunter Cross Examination (16 July 2018, PN 1596, PN 1597, PN 1664)).

39. RAFFWU claims that the Commission should not make some of findings sought due to the use of descriptors such as "*some*", "*large*", "*significant*", "*commonly*" and "*many*" (see paragraphs 6, 8, 11, 12, 13, 15 and 16 of Annexure 1 to the RAFFWU Closing Submissions). However, each of the descriptors is an accurate word to specify the effect of the evidence and the Commission should readily make the findings sought. At the same time, the Ai Group accepts that it is open to the Commission to use alternative words or phrases to describe the effect of the evidence.

40. Finally, RAFFWU appears to suggest that evidence of three operators in the fast food industry cannot be used to make factual findings in these proceedings (see paragraph 16 of Annexure 1 to the RAFFWU Closing Submissions). However, this Commission has long proceeded on the basis in four yearly reviews that the evidence of a small number of participants in the relevant industry may support factual findings (see, for example, the approach in the *Penalty Rates Decision* [2017] FWCFB 1001 and the *Part-time and Casual Employment Decision* [2017] FWCFB 3541).

SDA Closing Submissions

41. The Ai Group endorses the SDA Closing Submissions insofar as they support the proposed variation to clause 12 of the Fast Food Award so as to insert a flexible part-time clause (especially paragraphs 15, 16, 17, 18, 20, 23, 23, 25, 26, 30, 32, 33, 35 and 42 of the SDA Closing Submissions).

42. The Ai Group joins issue with the SDA over the SDA Closing Submissions insofar as those submissions oppose the variation to clause 25.5(a)(ii) of the Fast Food Award to insert an alternative facilitative provision.

43. The SDA asserts (without elaboration) that the proposed variation would result in the Fast Food Award not meeting the modern awards objective (see paragraphs 8, 45 and 57 of the SDA Closing Submissions). However, the proposed variation merely introduces a facilitative provision, alternative to the individual flexibility agreement provision contained in clause 7 of the Fast Food Award, that will only be utilised if a majority of employees concerned agree to make an agreement varying the end time of the evening penalty (as opposed to some unilateral act of the employer). The inclusion of such a facilitative provision is (like the concept of an individual flexibility agreement that permits such a variation in the end time of the evening penalty rate) consistent with the modern awards objective (and clause 7 of the Fast Food Award, including its ability to vary working arrangements, would not continue to be contained in the Fast Food Award if it did not meet the modern awards objective). The inclusion of such a facilitative provision is also consistent with the modern awards objective as the Fast Food Award will continue to contain a "*fair*" and "*relevant*" minimum safety net of terms and conditions for employees in the fast food industry but will additionally provide a collective bargaining mechanism (thereby meeting the consideration in section 134(1)(b)) that allows the parties to genuinely agree to vary the safety net so as to deliver benefits to both employers (in terms of an earlier end time for the penalty rate) and employees (in terms of the benefits that the employees will receive for agreeing to the earlier end time for the penalty rate). The inclusion of such a facilitative provision is further consistent with section 139(1)(b) of the FW Act.

44. The SDA claims that the proposed variation is "*strikingly unfair for employees*" (see paragraphs 8 and 45 of the SDA Closing Submissions). However, the proposed variation provides an alternative facilitative provision to the individual flexibility agreement and will be only utilised if a majority of employees concerned agree to make an agreement varying the end time of the evening penalty. There is no "*striking unfairness*" in providing employees with a means of making an agreement to be exercised only if they wish to make such an agreement.

45. The SDA contends that the proposed variation is not "*necessary*" to meet the modern awards objective as it alleges that the Fast Food Award already meets the modern awards objective (see paragraphs 7 and 46 of the SDA Closing Submissions). However, the Fast Food Award does not currently meet the modern awards objective insofar as it only permits individual flexibility arrangements to vary the end time of evening penalties in circumstances where a large employer with over 18,000 employees (see Anderson Affidavit (Exhibit AiG 3), par 23) may be required to enter thousands of individual agreements (see Anderson Affidavit (Exhibit AiG 3), par 42; Anderson Supplementary Affidavit (Exhibit AiG 4), par 4) to vary that end time and where the Fast Food Award fails to contain the alternative facilitative provision.

46. The SDA asserts that the Commission determined in the *Penalty Rates Decision* [2017] FWCFB 1001 that the end time of the evening penalty should be 6.00am (see paragraphs 47 and 52 of the SDA Closing Submissions). However, the Commission was not asked to rule upon, and did not determine the question of, the inclusion of a majority of employees concerned facilitative provision into the Fast Food Award which would permit, if a majority of employees were so minded, to vary the end time of the evening penalty to 5.00am.

47. The SDA claims that there is no cogent reason supported by probative evidence that provides the foundation for the proposed variation (see paragraphs 51 and 65 of the SDA Closing Submissions). However, there is unchallenged evidence of the large number of individual flexibility agreements that would need to be made, including (across all McDonald's stores) as many as 10,962 individual agreements on any given week day (see Anderson Affidavit (Exhibit AiG 3), par 42; Anderson Supplementary Affidavit (Exhibit AiG 4), par 4) and (across all McDonald's stores) as many as 12,545 across the five week days (see Anderson Supplementary Affidavit (Exhibit AiG 4), pars 6, 8), and the need to make individual flexibility agreements of that large number (and to explain individually such agreements prior to their entry – see paragraph 14 of the Ai Group Supplementary Submissions in Reply) provides the cogent reason and the proper foundation for the proposed variation.

48. The SDA contends (without any basis for doing so) that the proposed variation is designed to entitle a fast food employer to avoid current obligations in the Fast Food Award (see paragraph 56 of the SDA Closing Submissions). However, the proposed variation is intended to enable an employer to comply with (and not circumvent) the Fast Food Award by providing an alternative mechanism to permissibly (rather than illegally) alter by agreement (and not unilaterally) the operation of the end time of the evening penalty so as to produce mutual benefits to both employer and employees.

49. The SDA highlights that the Fast Food Award contains an individual facilitative provision that effectively allows a fast food employer to achieve the same result as that sought by the proposed variation (see paragraph 56 of the SDA Closing Submissions). However, the Fast Food Award currently fails to provide an effective mechanism to vary the end time of the evening penalty, due to the impracticability associated with the making (and explaining) of thousands of individual flexibility arrangements.

50. The SDA asserts that the agreement made pursuant to the proposed facilitative provision would provide "*nothing in return*" for employees (see paragraphs 58 and 80 of the SDA Closing Submissions). However, a majority of employees will not make an agreement to vary the end time of the evening penalty unless they obtain "*something in return*" (with the benefit or benefits varying from employee to employee but including increased allocation of hours of work over a week or more convenient or favourable times to work the same number of allocated hours across the week).

51. The SDA claims that an administrative burden is insufficient to justify inclusion of the proposed facilitative agreement into the Fast Food Award (see paragraph 80 of the SDA Closing Submissions). However, at the most basic level, an award that imposes impractical administrative burdens can hardly be described as a "*modern award*" or achieving the consideration of a "*simple … and sustainable modern award system*" (see section 134(1)(g) of the FW Act) or fulfilling the purpose of providing a "*fair*" and "*relevant*" minimum safety net of terms (see section 134(1) of the FW Act). Equally, a facilitative provision that overcomes such administrative burdens can readily be described as a modern award that achieves the consideration of a simple and sustainable modern award system.

52. The SDA contends that the proposed facilitative provision actually provides for the reduction in the minimum safety net (see paragraph 80 of the SDA Closing Submissions). However, the proposed facilitative provision does not "*actually provide*" for the reduction but merely contains an alternative mechanism for an agreement (not a unilateral act) to reduce the evening penalty by one hour. Additionally, the individual flexibility agreement provision in

clause 7 of the Fast Food Award already contains a similar mechanism for an agreement to reduce the evening penalty rate yet clause 7 is (inexplicably) not characterised by the SDA in the same way.

53. The SDA puts a range of submissions concerning the factors contained in section 134 of the FW Act (see paragraphs 86 to 119 of the SDA Closing Submissions). However:

(a) each of the submissions is premised not on the inclusion of the proposed facilitative provision itself into the Fast Food Award but rather on the outcome of the use of the facilitative provision once it has been included in the Fast Food Award (an agreement to vary the end time of the evening penalty) (see, for example, paragraphs 86, 88, 89, 93, 96, 103 and 105 of the SDA Closing Submissions);

(b) each of the submissions assumes that there is no benefit to the employees in entering the agreement (and only a disadvantage in the form of a reduction in pay) (see paragraphs 88, 89, 93, 95 and 105 of the SDA Closing Submissions);

(c) one of the submissions asserts a "*potential*" reduction in the "*bargaining position*" of employees (see paragraph 92 of the SDA Closing Submissions) but does not specify a basis (let alone identify evidence) for the assertion;

(d) many of the submissions characterise a factor as "*not supportive*" of the proposed variation even if the proper classification of the consideration is "*neutral*" (see paragraphs 97, 100 and 106 of the SDA Closing Submissions);

(e) one of the submissions asserts "*ambiguity*" and "*uncertainty*" over the proposed facilitative provision (see paragraph 108, 110 and 115 of the SDA Closing Submissions) in circumstances where many awards contain majority of employees facilitative provisions (see also Schedule R1 of the Ai Group Submissions in Reply) and there is no demonstrated ambiguity or uncertainty (particularly if there are changes in the workforce) with such provisions;

(f) one of the submissions claims difficulty (or "*virtual impossibility*") in the enforcement of majority of employees facilitative provisions (see paragraph 112 of the SDA Closing Submissions) yet there is no demonstrated difficulty (or impossibility), especially in light of the prevalence of such provisions in other awards; and

(g) one of the submissions assumes that an employee will bear the burden of disproving an agreement made under a majority of employees facilitative provision (see paragraphs 112 and 114 of the SDA Closing Submissions) when the employer (as the party asserting the existence of an agreement) will carry the onus of establishing the making of a valid agreement.

54. Finally, the SDA contends (without evidence) that there is a "*real potential*" for "*disharmony*" in the workplace following the making of a majority of employees agreement (see paragraph 116 of the SDA Closing Submissions) yet there is no demonstrated disharmony despite the prevalence of such provisions in awards (see also Transcript, 19 July 2018, PN 2057) and despite the prevalence of enterprise agreements made by a majority of employees only (see also Transcript, 19 July 2018, PN 2060 to PN 2063).

Contested Factual Findings

55. On 9 July 2018, the Ai Group filed a document containing the findings that it sought from the Commission (see Findings Sought by the Ai Group dated 9 July 2018; see also amended Findings Sought by the Ai Group dated 12 July 2018).

56. The SDA objects to a number of the findings sought (see the annexure to the SDA Closing Submissions).

57. The Ai Group maintains each of the findings sought.

58. The Ai Group responds to some of the objections specifically.

59. The SDA claims that the Commission should not make the eleventh and twelfth findings as they only relate to McDonald's stores (see page 1 of the annexure). However, the findings are in essence only expressed to relate to McDonald's stores and the Ai Group is content for the findings to be so confined.

60. The SDA asserts that there is no proper basis to make the thirteenth and fourteenth findings (see pages 2 and 3 of the annexure). However, the Ai Group maintains that an adequate foundation exists (in the evidentiary references cited in support of both findings and in light of paragraphs 14 and 15 of the Ai Group Supplementary Submissions in Reply).

61. The SDA contends that the Commission should not make the sixteenth finding (see pages 5 and 6 of the annexure). However, the Ai Group maintains that an adequate foundation exists (in the evidentiary reference cited in support of the finding).

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[2] August 2018