IN THE FAIR WORK COMMISSION (AM2017/49)
Fair Work Act 2009

s 156 – 4 yearly review of modern awards
Fast Food Industry Award 2010 **(Stage 4)**

CLOSING SUBMISSIONS
SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

INTRODUCTION

1. In this review proceeding, the Shop Distributive and Allied Employees' Association (**SDA**):

   a. does not oppose the application by Australian Industry Group (**AiG**) to vary the *Fast Food Industry Award 2010* (**Award**) in respect of part time flexibility as set out in the draft determination filed with the Fair Work Commission (**Commission**) on 24 April 2018;[1]

   b. opposes the application to vary clause 25.5(a)(ii) of the Award to incorporate a facilitative provision into the end time of the evening penalty rate.

2. In this review proceeding, it is necessary for the Commission to review the Award, by reference to the matters in s 134(1) of the *Fair Work Act 2009* (Cth) (**Act**) and any other consideration consistent with the purpose of the objective, to come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.[2]

3. As the Commission has previously stated, previous decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission is entitled to proceed on the basis that prima facie the Award achieved the modern awards objective at the time it was made in the absence of cogent reasons suggesting otherwise (as the Full Bench stated at paragraph [60(3)] of its decision *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues*).

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1 The SDA does not oppose the variations set out in paragraphs A1, A2, A4, A5, A6 and A7 of the draft determination.

2 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [29] (per Allsop CJ, North and O'Callaghan JJ).

4. Further, in light of the changes proposed in the draft variation, AiG's submissions are to be accompanied by probative evidence properly directed to demonstrating the facts supporting the variation.[3]

5. The purpose of this is, of course, to enable the Commission to make the requisite value judgment based on an assessment of the considerations in s 134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.[4]

6. The SDA does not oppose the application concerning part time flexibility because there is evidence which demonstrates that it is necessary to vary the Award in the manner proposed so the Award achieves the modern awards objective in s 134 of the Act.

7. The SDA opposes the application concerning the inclusion of a facilitative provision into the end time for the evening penalty, because it is not necessary to make the variation to ensure the Award meets the modern awards objective. The Award already meets the modern awards objective in respect of penalty rates.

8. In this regard, the applicant has failed to advance cogent reasons together with probative evidence, to demonstrate that it is necessary to vary the Award in the manner proposed to enable the Award to meet the modern awards objective. If the Award is varied as proposed, the Award will not meet the modern awards objective. In particular, the variation would be strikingly unfair for employees, within the meaning of s 134 of the Act.

9. The SDA relies on its submissions dated 20 February 2018 and 16 March 2018.

10. The SDA's objections to the findings sought by are AiG are **attached** to these submissions in the table headed "SDA: Objections to findings sought by AiG".

THE MODERN AWARDS OBJECTIVE

11. Section 134(1) of the Act contains the modern awards objective. It provides as follows:

> *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
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> *(a) relative living standards and the needs of the low paid; and*
> *(b) the need to encourage collective bargaining; and*

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3 *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* (2014) 241 IR 189, [60(1)(d)].

4 *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* (2014) 241 IR 189, [60(1)(d)] and [60(5)].

(c) the need to promote social inclusion through increased workforce participation; and

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

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective****.*

12. In *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368, the Full Court of the Federal Court made the following observations about the modern awards objective:

a. It requires the Commission to perform a value judgment based on an assessment of the considerations in s 134(1)(a) to (h) (see paragraph [48]);

b. The considerations in s 134(1)(a) to (h) inform the evaluation of what might constitute a fair and relevant minimum safety net of terms and conditions but they do not necessarily exhaust matters which the Commission might properly consider to be relevant to that standard, in the particular circumstances of a review (see paragraph [48]);

c. The factors in (a) to (h) are broadly conceived and will involve competing value judgments about broad questions of social and economic policy. The Commission is to perform the required evaluative function by taking into account the s 134(1)(a) to (h) matters and assessing the qualities of the safety net by reference to the criteria of fairness and relevance. The Commission is entitled to conceptualise those criteria by reference to the potential universe of facts, relevance being determined by implication from the subject matter, scope and purpose of the Act (see paragraph [49]);

d. The perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a

permissible conception of a fair and relevant safety net taking into account the s 134(a)-(h) matters (see paragraph [53]);

e. Contemporary circumstances can be taken into account, but they do not exhaust the universe of considerations mandated by s 134(a) to (h) (see paragraph [51]).

13. The Full Federal Court accepted that it is permissible to have regard to the historical context applicable to each modern award when determining what is a fair and relevant minimum safety net of terms and conditions (see paragraph [55]).

APPLICATION TO INTRODUCE PART TIME FLEXIBILITY INTO THE AWARD

Overview

14. The SDA submits that the application to introduce part time flexibility into the Award is supported with cogent reasons and probative evidence. The proposed variation is necessary to enable the Award to meet the modern awards objective.

15. The SDA submits that there is potential benefit for employees in the fast food industry, in a real sense, in that the amendments could lead to greater permanency of employment (in the form of part time employment) in an industry which has traditionally been characterised by high rates of casual employment.

16. The evidence in these proceedings shows that:

a. employers who operate under the Award tend to employ employees on a casual basis rather than a part time basis in an effort to avoid the costs associated with paying overtime as well as the administrative burden of entering into a written agreement to vary the regular pattern of work;[5]

b. employers who have access to part time flexibility arrangements for their employees under various enterprise agreements in the fast food industry, tend to utilise more part time employers than those operating under the Award;[6] and

c. if employers with access to part time flexibility arrangements for their employees were to instead apply the Award, they would likely use more casuals than part timers because of the costs associated with paying

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5 See Exhibit AiG9 Affidavit of Glenn Norman Sullivan dated 22 February 2018, [15], [19], [30], [38] and [39] and Exhibit AiG10 Affidavit of John Francis Chapman dated 21 February 2018, [9], [11], [22], [28] and [31].

6 See for example, Exhibit AiG3 Affidavit of Annabel Sarah Anderson dated 23 February 2018, [15], [23], [24] and [25] and Exhibit AiG7 Affidavit of Elizabeth Mary Montebello-Hunter dated 22 February 2018, [8], [9], [12].

overtime and/or the administrative burden of entering into a written agreement to vary the regular pattern of work.[7]

17. The SDA notes that before McDonald's corporate and franchisee restaurants commenced operating under the *McDonald's Enterprise Agreement 2013* in June 2013, McDonald's restaurants employed a higher proportion of casual employees as compared with part time employees than McDonald's restaurants currently do. McDonald's employed a total of 89,704 employees comprised of 9,127 full timers, 7,639 part timers and 72,938 casuals.[8] The SDA submits that the greater utilisation of part time employees by McDonald's may be partly explained by the fact that the *McDonald's Enterprise Agreement 2013* introduced flexible arrangements with respect to part time employees at McDonald's restaurants.

18. Although one of the aspects of the proposed variation is that overtime will not be paid for additional hours within a part time employee's agreed availability, any detriment in the sense of a part time employee losing overtime by the proposed variation is likely to be theoretical, rather than real. There is no evidence before the Commission which shows that overtime is actually paid to part time employees in this industry.

19. The SDA originally opposed AiG's initial application to vary clause 12 as set out in AiG's submission dated 30 November 2017. It was opposed because what was sought did not sufficiently protect the interests of employees in the fast food industry.

20. The draft determination dated 24 April 2018 is more beneficial to employees than the original application made by AiG in the following respects:

    a. There is a minimum engagement of 8 hours per week for part time employees (rather than an averaging of 8 hours) (see proposed clause 12.1(a) and 12.4);

    b. There is a requirement that a part timer has 'reasonably predictable hours of work' (see proposed clause 12.1(b));

    c. There is a mechanism for an employee to change the employee's agreed availability where there has been a genuine and ongoing change in the

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7 See for example, Exhibit AiG3 Affidavit of Annabel Sarah Anderson dated 23 February 2018, [90] to [94], Exhibit AiG7 Affidavit of Elizabeth Mary Montebello-Hunter dated 22 February 2018, [52] to [55] and Exhibit AiG1 Affidavit of Ian Flemington dated 23 February 2018, [57] to [61].

8 See transcript of hearing on 19 July 2018, at PN1887 to PN1889. See also [23] and [24] of Exhibit AiG3 Affidavit of Annabel Sarah Anderson dated 23 February 2018.

employee's personal circumstances on 14 days written notice to the employer. It is only if an employer cannot *reasonably accommodate* the change, that the employee's guaranteed minimum hours will not apply and the employer and employee will need to reach a new agreement in writing concerning guaranteed minimum hours (see proposed clause 12.6);

d. It is made clear that additional hours are paid at ordinary rates (including penalties) and accrue entitlements (i.e. annual leave, personal and carers leave) (see proposed clause 12.7(c));

e. An employee may withdraw from any agreement to work additional hours with 14 days written notice (see proposed clause 12.7(d));

f. It makes plain that overtime will still apply (see proposed clause 27.3);

g. A "savings provision" for existing employees who already have a written agreement with their employer is included. These employees are entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement under clause 12.2 (see proposed clause 12.8);

h. It provides a "ratcheting up" of agreed minimum hours (where an employee has for at least 12 months regularly worked a number of hours that exceeds the guaranteed minimum, they can request in writing to increase the agreed minimum hours). An employer may only refuse a request upon reasonable business grounds, and such a refusal must be in writing and specify the grounds for refusal (see proposed clause 12.9);

i. Rostering is now expressly included for this industry (see proposed clause 26).

21. The SDA turns to the criteria in the modern awards objective.

Relative living standards and the needs of the low paid (s 134(1)(a))

22. The SDA does not accept that the proposed variation will likely cause a negative impact on the relative living standards and the needs of the low paid.

23. Although the proposed variation does not require a part time employee to be paid overtime in the absence of a written agreement, the SDA submits that this industry is not characterised by employees being paid overtime. The SDA submits that this industry, where the Award applies, is more typically characterised by employers utilising casual staff who are not entitled to overtime.

24. The proposed variation, on the other hand, has the real potential to see some employees obtain more hours than they otherwise would (if they were employed as casuals or, indeed, as part timers under current clause 12 of the Award). A minimum engagement of 8 hours per week is provided for (see proposed clause 12.1), there is the opportunity to obtain additional hours each week if the employee wants them (see proposed clause 12.7) and there is a process facilitating the "ratcheting up" of additional hours (see clause 12.8). Importantly, employees engaged on a part time basis are able to access leave (which they would not otherwise be entitled to receive if they were to be employed on a casual basis).

25. The SDA also considers that the proposed variation provides sufficient protection to employees in relation to rostering, because employees will only be required to work their minimum hours during the precise periods of time they have indicated availability to work (see proposed clause 12.2). Part time employees will also be able to request a variation to their agreed availability (see proposed clause 12.7). For short term changes to availability, there is still the scope for mutual agreement to vary the hours they work (see proposed clause 26.2). Under current clause 12 of the Award, there is the requirement for an agreement between the employer and the employee whenever there is a change to the regular pattern of work (see clauses 12.2 and 12.3). It should also be observed that a part time employee under proposed clause 12.7 is not required to accept any offer of additional hours (acceptance is discretionary).

26. To the extent that the proposed variation does not suit an existing part time employee who has a regular pattern of work in accordance with current clause 12.2 of the Award, they will be entitled to continue to be rostered in accordance with that agreement, unless and until that agreement is replaced (see proposed clause 12.8).

The need to encourage collective bargaining (s 134(1)(b))

27. There is already extensive collective bargaining in this industry. The SDA submits that this is a neutral factor.

The need to promote social inclusion through increased workforce participation (s 134(1)(c))

28. The SDA submits that the proposed variation has the potential to promote social inclusion through an increase in participation in the workforce.

29. For example, the variation provides for the first time in the Award:

a. a minimum number of guaranteed hours for part time employees (8 hours) (see proposed clause 12.1); and

b. the opportunity for part time employees to be offered more hours and for a "ratcheting up" of further hours after a 12 month period (see proposed clauses 12.7 and 12.9).

30. There is uncontested evidence before the Commission from employers who operate under the Award, that they would seek to employ part timers over casuals if there was more flexibility and if there wasn't the requirement to pay overtime if an employee was to be employed outside of their regular pattern of work without a written agreement (as required by current clauses 12.2 and 12.3).[9]

The need to promote flexible modern work practices and the efficient and productive performance of work (s 134(1)(d))

31. As contended at paragraph [8] of the SDA's submissions dated 16 March 2018, the proposed variation is likely to promote flexible modern work practices and the efficient productive performance of work.

32. The proposed variation deals with the realities of unpredictable changes in customer demand and unpredictability of staff unavailability in the fast food industry, but in a coherent and transparent way. For example:

a. there will be a written document containing the employee's agreed availability (see proposed clause 12.2(b)) and a part time employee still needs to have 'reasonably predictable hours of work" (see proposed clause 12.1(b));

b. part time employees may be offered more hours, within their agreed availability, but they do not have to accept them (see proposed clause 12.7);

c. there is scope to vary the guaranteed minimum hours in writing (see proposed clause 12.5);

d. there is scope to vary the employee's agreed availability in writing (see proposed clause 12.6); and

e. there is rostering which is intended to provide more certainty for employees and employers alike (see proposed clauses 12.7 and 26) and the ability for

[9] See Exhibit AiG9 Affidavit of Glenn Norman Sullivan dated 22 February 2018, [15], [19], [30], [38] and [39] and Exhibit AiG10 Affidavit of John Francis Chapman dated 21 February 2018, [9], [11], [22], [28] and [31].

the roster to be changed at any time by mutual consent of the employer and employee.

The need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays (s 134(1)(da))

33. As referred to at paragraphs [18] and [23] above, the SDA submits that although overtime for additional hours outside of a written agreement is no longer a requirement, given the industry practice of using casuals over part timers, the current award provisions are not actually having the effect of providing greater remuneration for overtime.

34. The proposed variation is therefore unlikely to have any detrimental impact on additional remuneration for employees working overtime.

35. In any event, the variations do not 'do away' with overtime for part time employees. A part time employee will still receive overtime in accordance with clause 27.3, namely if the employee works:

    a. in excess of 38 hours per week; or

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

    c. eleven hours on any one day; or

    d. outside the employee's availability; or

    e. outside the ordinary hours of work.

36. Further entitlement to overtime is made available in accordance with proposed clause 27.4, subject to the qualification in proposed clause 27.5.

37. Section 134(1)(da)(ii) of the Act is a neutral factor, particularly given the existence of proposed clause 12.1(b) which requires a part time employee to have "reasonably predicable hours of work". Section 134(1)(da)(iii) of the Act is also a neutral factor.

The principle of equal remuneration for work of equal or comparable value (s 134(1)(e))

38. The expression 'equal remuneration for work for equal or comparable value' is defined in s 302(2) of the Act to mean 'equal remuneration for men and women workers for work for equal or comparable value'. As the Full Bench in *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1 stated at paragraph [207], the appropriate approach to the construction of s 134(1)(e) of the Act is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work for equal or comparable value'.

39. This factor is therefore a neutral factor given that the part time flexibility amendments do not discriminate as between men and women, and would apply to both genders.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s 134(1)(e))

40. It is unclear what exact impact the proposed variation may have on employment costs. If casuals aren't used, then there wouldn't be the obligation to pay the causal loading. Of course, if part timers are used, employers will incur the costs associated with leave entitlements.

41. There is some evidence that the proposed variation may lead to some savings in employment costs in terms of retraining costs, and the use of part timers with minimum weekly hours may lead to efficiencies and increased productivity.[10]

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(f))

42. The fact there will be flexibility does not mean that the Award will produce uncertainty for part time employees. There are sufficient parameters around flexibility to ensure that the Award remains simple and easy to understand for employees and employers alike (in this regard see paragraph [32] above).

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[10] See for example, Exhibit AiG3 Affidavit of Annabel Sarah Anderson dated 23 February 2018, [86] and [87], Exhibit AiG7 Affidavit of Elizabeth Mary Montebello-Hunter dated 22 February 2018, [43] and [44] and Exhibit AiG1 Affidavit of Ian Flemington dated 23 February 2018, [52] and [55].

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s 134(1)(g))

43. There is no evidence that the proposed variation will impact on employment growth, inflation, and the sustainability, performance and competitiveness of the national economy. This factor appears to be neutral.

APPLICATION TO INTRODUCE A FACILITATIVE PROVISION INTO THE END TIME FOR EVENING WORK

Overview

44. The SDA strongly opposes the application to introduce a facilitative provision into clause 25.5(a)(ii) of the Award.

45. No cogent reason has been advanced by AiG to support this change. In fact, the evidence demonstrates that this variation would not allow the Award to meet the modern awards objective. The amendment would be strikingly unfair to employees.

46. The SDA submits that the Award, including clause 25.5(a)(ii) in respect of penalty rates, already provides the fair and relevant minimum safety net together with the national employment standards.

47. The issue of the end time of the evening penalty rate was determined by a Full Bench of the Commission in *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1. The Full Bench inserted an end time into clause 25.5(a)(ii), and aligned that time with the end time for evening work in the Restaurant Industry Award 2010 (which it reduced from 7am to 6am). The Commission did so in answer to 2 claims in respect of the evening penalty rate:

    a. a claim by AiG to adjust the commencing time of the evening penalty rate in clause 25.5(a)(i) of the Award from 9pm to 10pm (see paragraph [1161] in *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1); and

    b. a claim by RCI to vary clause 25.5(a) of the Award so that only a penalty rate of 5% would be paid for work between midnight and 5am (see paragraph [1164] in *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1).

48. In dealing with RCI's claim, the Full Bench noted that it was not submitted (at least expressly) that the variation proposed would lead to an increase in the operating hours of fast food businesses, or to an increase in employment. Nor did the Commission find there was much (if any) direct, probative evidence to support

such a contention (see paragraph [1344] in *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1).

49. In rejecting the claim by RCI, the Commission stated that a sufficient merit case had not been advanced to support the extent of the changes proposed (see paragraph [1392]). At paragraph [1393] the Commission held that:

> *As mentioned earlier, RCI is also seeking to vary the late night penalty in the Restaurant Award in the same terms as its proposed variation to the Fast Food Award. We have dealt with that proposal in Chapter 7.4.5(i) of our decision and have decided that the current 15 per cent loading be payable between midnight and 6 am (not 7 am as it is in the current award term). We adopt the same view in respect of the Fast Food Award. We note that the Fast Food Award does not presently prescribe the span of hours during which the loading is paid. For the reasons set out above ([1331]-[1335]) we propose to align the span of hours in the Fast Food Award with that provided in the Restaurant Award.*

50. It is evident that the Commission turned its mind to the issue of the end time for evening work in the fast food industry. The Commission was clearly asked to do this, and considered it was appropriate to align the end time with the time stipulated in the Restaurant Award.

51. There is no cogent reason supported by probative evidence advanced by AiG in this proceeding, as to why it is necessary to amend the Award by introducing the proposed facilitative provision.

52. Further, no evidence has been led by AiG to seek to demonstrate that there is no disutility for employees working in the fast food industry between the hours of 5am and 6am. In this regard, there is no cogent reason for the Commission to depart from the implicit finding it made in this regard when it inserted the reference to the end time of 6am into the Award, aligning it with the Restaurant Industry Award 2010.

53. The fact that there may be examples of other modern awards containing different types of facilitative provisions, provides no justification for the insertion of the proposed facilitative provision into clause 25.5(a)(ii) of the Award. As the Full Bench stated at paragraph [60(7)] in *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* (2014) 241 IR 189, the characteristics of employees and employers covered by modern awards may vary between modern awards. To some extent the determination of a fair and relevant minimum safety

net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.

54. In this review proceeding, AiG elected to support its application in respect of clause 25.5(a)(ii) with only 2 witnesses from McDonald's (Ms Anderson and Mr Agostino). Despite calling 7 other witnesses from other employers in the fast food industry in support of AiG's application for part time flexibility, these 7 other witnesses provide no evidence to support the application to vary clause 25.5(a)(ii).

55. Moreover, in relation to this application no evidence has been adduced from any employer who operates under the Award. For example, there is no evidence which shows that any employers experience difficulty in paying the penalty rate between 5am and 6am, that they are somehow less productive as a result of paying this penalty rate, or that they are altering their business activities as a result of the obligation to pay the penalty rate during this hour. Equally, there is also no evidence from Mr Agostino or Ms Anderson that the businesses they each represent would likely face such difficulties if they were to operate under the Award and apply the penalty, instead of the *McDonald's Enterprise Agreement 2013*.

56. In light of this, the SDA submits that the application to include a facilitative provision into clause 25.5(a)(ii) would simply entitle a fast food employer to avoid current Award obligations. The provision would simply operate to relieve an employer who operates under the Award in the fast food industry of the present obligation to:

    a. pay the penalty between the hours of 5am and 6am; or

    b. enter into an individual flexibility arrangement with an employee to avoid the penalty rate, a mechanism which is already available pursuant to clause 7 of the Award, for reasons of "administrative convenience" for the employer, but conditioned upon individual employees being better off overall if they forgo the penalty rate entitlement.

57. Neither the avoidance of Award obligations or 'administrative convenience' provide a valid justification for the imposition of a facilitative provision.[11] Imposing a facilitative provision on such limited bases would be inconsistent with the modern awards objective.

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[11] See the principles in respect of facilitative provisions expressed in *Third Safety Net Adjustment & Section 150A Review – October 1995 decision* (1995) 61 IR 236 at 255-257 referred to in paragraph [30] of *Re 4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* (2015) 252 IR 256, pp 268-270.

58. The proposed variation would result in 'unfairness' to employees. Employees would lose a penalty entitlement, and a reduction in their pay, but would gain nothing in return. Contrary to AiG's submissions, it is no answer that the penalty rate would be avoided by the "mutual consent" of the majority of employees concerned, and that McDonald's has no difficulty attracting employees to work between 5am and 6am.

59. One could conceive of circumstances where employees in the fast food industry may agree to forgo their penalty rate in the hope of obtaining more hours. This is because:

    a. the majority of employees are low paid;

    b. the majority of employees are young[12] and pursuant to the Award would only be entitled to receive junior rates;[13]

    c. the majority of employees are full time or part time students[14] (tertiary or secondary) who have limited availability to work during ordinary business hours. The fact that some may wish to work between 5am or 6am, or indeed even earlier, is likely because of their limited availability to work and earn money at other times of the day because of unavailability;

    d. the majority of employees are only able to access limited hours per week, namely 57.3% can only access 1 to 15 hours and 17.8% can only access 16 to 24 hours.[15]

60. The facilitative provision would, however, provide a small benefit to employers by accessing a cost saving. However, there is no evidentiary basis to AiG's submission that an employee may receive more hours as a result of the facilitative provision and the majority of employees agreeing to forgo the penalty rate between 5am and 6am.[16]

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12 MFI1 shows that 60.7% of employees in the Takeaway Food Services Industry were 15 to 19 years of age and a further 18.8% were 20 to 24 years of age according to the 2016 Census.

13 See Clause 18 of the Award which provides employees under 16 years of age receive 40% of the weekly wage, employees who are 16 years of age receive 50%, employees who are 17 years of age receive 60%, employees who are 18 years of age receive 70%, employees who are 19 years of age receive 80% and employees who are 20 years of age receive 90%.

14 MFI1 shows that 59.6% of employees in the Takeaway Food Services Industry were full time students and 4.3% were part time students according to the 2016 Census.

15 MFI1 at page 2.

16 See *Supplementary Outline of Submission in Reply of Australian Industry Group* dated 18 July 2018.

61. The evidence adduced in relation to this application demonstrates that many McDonald's employees are already required to work between 5am and 6am in any event because:

    a. the majority of restaurants are already trading between 5am and 6am (71.29% of all McDonald's restaurants).[17] The majority of McDonald's restaurants actually trade 24 hours a day 7 days per week (61.63%).[18] Self-evidently, many of McDonald's employees actually commence their shift before 5am. Indeed, Mr Agostino confirmed that two thirds of all employees who work between 5am and 6am at each of the 3 McDonald's restaurants operated by Agostino Group Holdings Pty Ltd Holdings Pty Ltd will have commenced their shifts before 5am, namely at 11pm, 10pm or 12 o'clock (although this varies);[19]

    b. a minority of McDonald's restaurants may not trade between 5am and 6am on weekdays (20.68%), but some employees are nevertheless required to work during this time to prepare the restaurant to open at 6am.[20]

62. No evidence has been led from a single witness that *more employees* will be offered *more work* between 5am and 6am if the Award contained the proposed facilitative provision, or if the majority of employees concerned agreed to forgo the penalty rate between 5am and 6am. As referred to at paragraph [55] above, nor was there any evidence that the requirement to pay a penalty rate between 5am and 6am was impacting, or might impact, on decisions regarding trading hours or on the productivity of any individual employer in the fast food industry.

63. Instead, the rationale advanced for the variation according to Ms Anderson is that if McDonald's corporate or franchisee restaurants were ever to apply the Award, rather than the enterprise agreement, they would seek to utilise the facilitative provision to take advantage of decreasing the 15% penalty presently payable to employees.[21]

64. The following 3 reasons in support the amendment are discernible from AiG's submissions and the evidence of Ms Anderson and Mr Agostino:

    a. that the nature of the work performed between 5am and 6am is preparatory work to trade;

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17 AiG3 Affidavit of Annabel Sarah Anderson, [13].
18 AiG3 Affidavit of Annabel Sarah Anderson, [11].
19 See Transcript of hearing on 16 July 2018, at PN1218 to PN1220.
20 AiG3 Affidavit of Annabel Sarah Anderson, [14].
21 AiG6 Affidavit of Annabel Sarah Anderson, [56].

b. that employees will make themselves available to work between 5am and 6am regardless of whether or not they are paid a loading to do so; and

c. that utilising an individual flexibility arrangement under clause 7 of the Award may be administratively burdensome for McDonald's corporate and franchisee restaurants and a more 'effective' option is instead the proposed facilitative provision.

65. For the reasons that follow, these are not "cogent" reasons to vary clause 25.5(a)(ii) of the Award consistent with the modern awards objective.

Nature of work as preparatory

66. The fact that work performed in a minority of McDonald's restaurants between 5am and 6am may be preparatory to trade commencing at 6am, does not demonstrate any necessity to vary the Award as contemplated.

67. First, as referred to above at paragraph [61], only 20.68% of McDonald's restaurants do not trade between 5am and 6am on Monday to Friday. The overwhelming majority (71.29%) already trade during this time, with 61.3% of all restaurants actually trading on a 24 hours / 7 days per week basis. Clearly, the majority of employees working at McDonald's restaurants could not be described as doing 'preparatory work' to trade,[22] yet the proposed variation would affect their entitlement to receive a penalty (if the Award ever applied to them).

68. Second, with the minority of employees working between the hours of 5am and 6am in stores that are not trading, the work they perform is important[23] and without it, trade could not ultimately occur.[24]

69. Third, and most relevantly, the nature of the work performed by an employee is not relevant as to whether or not an employee ought to receive a penalty rate for working an unsocial hour. The question is whether or not there is disutility in working an unsocial hour.[25] No evidence has been led to demonstrate that there isn't disutility in working between 5am to 6am, or indeed any earlier unsocial hour when a fast food employee might make themselves available to work (for example, between 10pm and 5am, when an employee might also indicate availability to work around their other commitments, including study).

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22 Transcript of hearing on 16 July 2018, PN656.
23 Transcript of hearing on 16 July 2018, PN1224 and PN1225.
24 Transcript of hearing on 16 July 2018, PN662.
25 *4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1, [201].

Employee preferences

70. Contrary to AiG's submissions, the fact that McDonald's corporate and franchisee restaurants say that they presently have no difficulty in attracting employees to work between 5am and 6am does not demonstrate there is any necessity to vary the Award as contemplated.

71. First, McDonald's corporate and franchisee restaurants operate under the *McDonald's Enterprise Agreement 2013* which provides a higher base rate than the Award for employees of equivalent classification. Therefore, one is not comparing "apples with apples" and caution should be applied when seeking to make conclusions about employee preferences in an industry generally, when considering employees who are subject to different terms and conditions of employment than under an award.

72. Second, as submitted at paragraph [59] above, there are reasons why employees might make themselves available to work between the hours of 5am and 6am. It would not be surprising if an employee made themselves available to work between 5am and 6am, given their limited access to work hours during the week, given the fact that many would be on junior rates under the Award and given that the majority are students who have study commitments during ordinary business hours (meaning they necessarily need to make themselves available to work at other times, including unsocial times, in order to earn money). The fact that an employee may make themselves available does not indicate that there is no disutility in working between the hours of 5am and 6am, or indeed at any earlier time in the early hours of the morning. There is clear disutility in working between 5am to 6am which is an unsocial hour. No evidence has been led to the contrary.

Utilising an individual flexibility arrangement under clause 7 of the Award would be administratively burdensome for McDonald's and a more 'effective' option is the proposed facilitative provision

73. In its reply submissions dated 26 June 2018, AiG makes plain at paragraph [3(a)] that it seeks what it describes as an 'effective mechanism' to vary the end time of the evening penalty rate. It is said that individual flexibility arrangements under the Award may be 'administratively burdensome' for McDonald's.

74. In support of this argument, AiG relies on the evidence of one witness, Ms Anderson, on behalf of McDonald's, who provides a view that it might take McDonald's about 10 minutes to enter into, and document, an individual flexibility arrangement for each individual employee. This is not tested as McDonald's does not currently enter into such arrangements.

75. Although it may take some time for an individual employer to enter into an individual flexibility arrangement with an employee - if the individual employer indeed wished to avoid paying the penalty rate for work performed between the hours of 5am and 6am on Monday to Friday - this does not demonstrate that there is a necessity to vary the Award.

76. As for the extent of any burden, there is likely to be less administrative burden for a single operator McDonald's franchisee to enter into an individual flexibility arrangement than for McDonald's corporate restaurants.[26] Out of the 972 McDonald's restaurants in Australia, 821 are operated by franchisees.[27] Each franchisee will have fewer employees to enter into individual flexibility arrangements, if they ever decided to avoid the penalty rate between 5am and 6am (in the event that the Award one day applied to their business).

77. In any event, there is likely to be an administrative burden for an employer seeking to utilise the proposed facilitative provision. The SDA submits that the proposed facilitative provision would be difficult to implement in practice and would require careful continuous monitoring by an employer. An employer would need to devise a robust and transparent process to record the expressed wishes of the majority of the employers concerned, to engage with the guardians of any minors, and to continuously monitor whether the 'majority of employees concerned' continue to agree to forgo the penalty rate.

78. Compliance with an individual flexibility arrangement could potentially result in less administrative burden. This is because an individual flexibility agreement only needs to be entered into once (see clause 7 of the Fast Food Industry Award). It may only be terminated in accordance with clause 7.8. Absent receiving a notice of termination from an employee, there isn't any requirement for an employer to continuously monitor whether there is any change to the agreement of the "majority of employees concerned" to forgo the penalty rate.

79. Nevertheless, there is likely to be a burden for an employer to comply with both provisions (Clause 7 of the Award or the proposed facilitative provision). It might go without saying, but there is clearly a burden with complying with all award conditions, including paying wages, but that provides no reason for the award obligation to be avoided via a facilitative provision.

80. Ultimately, the Commission need not resolve which provision might involve more administrative burden. The SDA submits that the mere fact that there may be an

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26 Transcript of hearing on 16 July 2018 at PN1714 – PN1715.

27 Exhibit AiG3 Affidavit of Annabel Sarah Anderson, [6].

administrative burden with complying with the Award is not a sufficient reason, consistent with the modern awards objective, to impose the proposed facilitative provision. After all, modern awards, together with the national employment standards, represent the fair and relevant minimum safety net of terms and conditions of employment. It would be inconsistent with the modern awards objective to enable a facilitative provision which actually provides for the reduction in the minimum safety net. The SDA submits this is precisely what the proposed facilitative arrangement does, because nothing is provided in return to employees.

81. At paragraph [9] of its submissions dated 23 February 2018, AiG surprisingly contends that the need to consider this variation from the perspective of the employee and the employer is a 'neutral' consideration. This is plainly incorrect. The modern awards objective must be considered from the perspective of both the employer and the employee.

82. Although AiG makes this submission, it is clear that AiG's focus in this application is on the "effectiveness" of individual flexibility arrangements from the perspective of employers only, because of the administrative burden involved with entering into such arrangements.

83. The SDA submits that the issue of effectiveness of individual flexibility arrangements should not be considered in this isolated way. The modern awards objective demands that the perspective of employees also be considered. To the extent that there is a need for a fast food employer to seek to avoid paying the penalty rate between 5am and 6am – although none is disclosed on the evidence - the employer may enter into individual flexibility arrangements with all of the safeguards that entails for employees.

84. These are not small safeguards, given the characteristics of many of the employees in the fast food industry, including many who are under 18 years of age. Relevantly, it would:

    a. mandate the involvement of guardians for those under 18 (see clause 7.4(a) of the Award);

    b. provide for the employee to be "better off overall" in some way, and for this to be communicated to the employee in the agreement – so the employee may decide whether to accept it or not (see clauses 7.3(b) and 7.4(d) of the Award). This factor is particularly relevant given the number of juniors who work in the fast food industry and the lack of hours they are able to access;

c. enable either party to terminate the agreement with a clear process of written notice or written agreement (see clause 7.8 of the Award).

85. The SDA turns specifically to the factors in s 134(1) of the Act.

Relative living standards and the needs of the low paid (s 134(1)(a))

86. Employees in the fast food industry are generally low paid. The SDA submits that the proposed facilitative provision will plainly have an adverse impact on the relative living standards and needs of the low paid.

87. Contrary to paragraphs [40] to [41] of AiG's submissions dated at 23 February 2018, the very fact that the majority employees may 'agree' to the removal of the penalty rate does not mean that this clause will not negatively impact the needs of the low paid or their living standards.

88. The plain fact is that if the majority of employees concerned agree – which could occur, in the hope for more hours - they will receive less pay.

89. Contrary to AiG's submission, this reduction in pay ought not be viewed as insignificant for an employee, often a junior on junior rates, whose access to hours is very limited and who is working around their other commitments (such as education) (see paragraph [59] above).

90. This factor does not support the proposed variation.

The need to encourage collective bargaining (s 134(1)(b))

91. There is already extensive collective bargaining in this industry.

92. However, the SDA submits that this amendment may potentially lead to a reduction in the bargaining position of employees in enterprise negotiations.

93. Further, the proposed variation does not encourage the robust, fair and transparent system of collective bargaining provided under the Act. Notably, there is no requirement under the facilitative provision for an employee to receive anything in return (or indeed be "better off overall") if the employee decides to forgo the penalty rate for that hour.

94. This factor does not support the proposed variation.

The need to promote social inclusion through increased workforce participation (s 134(1)(c))

95. None of the evidence demonstrates that more employees would be employed in the fast food industry if the variation is made. Nor would current employees be offered

more hours. Employees at McDonald's are already required to work these hours, including at even earlier times (in this regard see paragraph [61] above)

96. Instead, what will occur is that there may be a small cost saving for the employers concerned (see paragraph [63] above).

97. This factor does not support the proposed variation.

The need to promote flexible modern work practices and the efficient and productive performance of work (s 134(1)(d))

98. The proposed variation will have no impact on the efficient and productive performance of work or promote flexible work practices.

99. The SDA submits that it would promote a work practice, which ought not be encouraged in any modern award. This would be a practice whereby individual flexibility arrangements (which are protective for employees) could essentially be avoided for the sake of administrative convenience in circumstances where employers appear to have no difficulty with filling shifts at unsocial hours like 5am to 6am, given the characteristics of the employees in the industry (see paragraph [59] above).

100. This factor does not support the proposed variation.

The need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays (s 134(1)(da))

101. This factor is not supportive of the proposed variation. The SDA submits that the Commission has already determined that there is a need to provide additional remuneration to employees who work the unsocial hours between 5am and 6am (*4 yearly review of modern awards – Penalty Rates* (2017) 256 IR 1).

102. None of the evidence in this proceeding disturbs this finding. The fact that some employees may make themselves available to work between 5am and 6am, or indeed at even earlier times, does not provide evidence that there is no disutility. It is a reflection that employees simply seek to access as many hours as possible, and fit work around their other commitments such as study (see paragraph [59] above).

103. AiG's contention at paragraph [45(a)] of its submissions dated 23 February 2018, that the facilitative provision will not affect the provision of additional remuneration for employees working unsocial hours or working shifts, should be rejected. The very point of the facilitative provision in this context, is to create a

mechanism which enables an employer to avoid paying the penalty rate between the hours of 5am and 6am, but with nothing provided in return for the employee.

The principle of equal remuneration for work of equal or comparable value (s 134(1)(e))

104. This is a neutral factor.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory (s 134(1)(f))

105. In circumstances where an employer and the majority of employees concerned agree to forgo the penalty rate, there will be a small reduction in employment costs for one hour. This represents a relatively small reduction for an employer, but a significant reduction for the employee given the characteristics of employees in the fast food industry (see paragraph [59] above).

106. There is no evidence before the Commission that there is likely to be any impact on the regulatory burden or that there is likely to be any increase in productivity if the variation is made.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(g))

107. The SDA submits that the proposed facilitative provision would introduce uncertainty into the Award. It is not simple, nor is it easy to understand.

108. The phrase 'majority of employees concerned' is ambiguous. For an employer like McDonald's corporate, would the majority of employees concerned be based on each individual restaurant or each relevant shift cohort in an individual restaurant, or would the majority of employees concerned be those of McDonald's corporate overall? Further, would the majority of employees concerned be all of McDonald's employees working as "crew members", or would they simply be the employees who make themselves available when the initial vote is cast? This begs the question, say if an employee or group of employees changes their mind?

109. In any event, the wishes of the majority of employees concerned (however that is defined) will necessarily change. In respect of the fast food industry:

> *Food and Beverage Employees were more likely to experience a shorter duration of employment with an employer than employees across all industries. Almost 4 in 10 employees had been with their employer for*

less than a year, whilst almost a third of employees in food and beverage had been with their employer for 1 to less than 3 years.[28]

110. This change will require careful scrutiny and monitoring by each employer to ensure that they keep abreast of whether the majority of employees concerned remain content to forgo the penalty rate.

111. For large employers this would be unworkable.

112. Moreover, it would be virtually impossible for an employee to enforce the provision, if they suspect that their employer has incorrectly invoked the facilitative provision and denied them their penalty entitlement. It would be particularly difficult for an employee to prove that the "majority of employees concerned" in fact did not agree to forgo the penalty rate in this hour.

113. On the other hand, pursuant to regulation 3.38 of the *Fair Work Regulations 2009* (Cth), an employer is obliged to make and keep a record of an individual flexible arrangement including a copy of a notice that terminates such an agreement. In the event that an employer fails to do so, the employee is protected in respect of a civil remedy proceeding because under s 557C of the Act, the employer will have the burden of disproving the allegation if they failed to retain the record.

114. No such protection is provided to an employee if the Award is varied as proposed by AiG.

115. This factor does not support the proposed variation. The current system under the Award for payment of penalty rates is simple and clear and avoids all of this uncertainty and complexity.

116. Lastly, the SDA submits that there is the real potential for disharmony within the workplace. Accepting that enterprise agreements are contingent upon a binding majority vote, the disharmony that the prevailing will of the majority might impose upon the opposing minority is at least mitigated by virtue of the fact that each voting employee must be "better off overall". In contrast, the proposed facilitative provision does not provide for the employee to be "better off overall", let alone that employees will receive anything else in return. In such circumstances, disharmony might emerge as employees vote away penalty entitlements under the Award in the hope to receive hours ahead of those who vote against a reduction in penalty rates.

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[28] See MFI1, p 3.

***The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s 134(1)(h)*)**

117. There is no evidence that the proposed variation will impact employment growth, inflation, and the sustainability, performance and competitiveness of the national economy.

118. There is, however, evidence from one employer witness, Ms Anderson, that McDonald's employers would likely utilise the provision to reduce employments costs for one hour. This is not what s 134(1)(h) of the Act is concerned with.

119. This factor does not support the variation.

CONCLUSION

120. The SDA:

a. does not oppose the variation to clause 12, and associated amendments, to introduce part time flexibility into the Award;

b. opposes the variation to clause 25.5(a)(ii) to introduce a facilitative provision to the end time for evening work. The end time of the evening penalty rate was previously considered by a Full Bench of the Commission. No cogent reason supported with probative evidence has been adduced in this hearing to show that it is necessary to vary the Award in the manner proposed to enable the Award to meet the modern awards objective. In fact, on the evidence, the proposed variation would be fundamentally inconsistent with the modern awards objective.

Dated: 26 July 2018

Darren A Bruno
Counsel for the SDA

SDA: Objections to findings sought by AiG

Paragraph(s)	Content	Ground
11	Currently, some employers in the fast food industry (such as employers operating McDonald's stores) open their stores between 5am and 6am as part of normal trading hours (Anderson affidavit, para [10]).	This finding is objected to because the only evidence before the Commission concerns McDonald's stores, not other fast food operators. The Commission has no evidence before it to make findings about the fast food industry generally and opening hours. There is also no evidence as to how many McDonald's restaurants actually 'open' between 5am and 6am, versus some other earlier time. In respect of the evidence before the Commission: 1.The majority of McDonald's restaurants are actually trading on a 24/7 basis (namely 599 out of the 972 restaurants, which is 61.63% of all stores (Exhibit AiG3 First Anderson Affidavit, [11])); 2. 693 McDonald's restaurants trade between 5am and 6am on Monday to Friday, which represents 71.29% of all stores (Exhibit AiG3 First Anderson Affidavit, [13]). This includes the 599 24/7 restaurants; 3. A large number of McDonald's restaurants have employees working during the night, including at 5am, given that they are trading. For example, see Exhibit AiG5 Agostino Affidavit and transcript at PN1218. Each of the 3 stores operated by Agostino Group Holdings Pty Ltd has 4 (out of 6) employees working at 5am, who will have started their shifts much earlier, either 10pm, 11pm or 12 o'clock (but it varies).
12	Currently, other employers in the fast food industry (including some employers operating McDonald's stores)	This is objected to because the only evidence before the Commission concerns McDonald's stores, not other fast food operators. The Commission has no evidence before it to make findings about the fast food industry generally and whether employees are engaging in preparatory work between 5am and 6am.

Paragraph(s)	Content	Ground
	prepare their stores for opening between 5:00am and 6:00am (see Anderson Affidavit, par 14).	In any event, only about 1/5th of all McDonald's stores are not open between 5am and 6am. According to Ms Anderson, only 201 McDonald's restaurants do not trade between 5am and 6am Monday and Friday, but some employees perform "preparatory work" in that period (before the restaurant opens at 6am). The 201 McDonald's restaurants which are not open between 5am and 6am represent only 20.68% of all McDonald's stores (Exhibit AiG3 First Anderson Affidavit, [14]). McDonald's does not distinguish between preparatory work to a store opening, or work occurring whilst trading. It is all important and permits trade (Agostino PN1224; Anderson PN661).
13	Currently, for one employer in the fast 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:am (see Anderson Supplementary Affidavit, pars 6, 8). Currently, the same employer only	Although the SDA does not dispute that McDonald's corporate and franchise restaurants may collectively have a large number of employees who make themselves available to work between 5am and 6am, and who also actually work between 5am and 6am in any given week, the precise number of employees who make themselves available (as advanced by Ms Anderson) is unreliable. Ms Anderson's evidence as to the number of employees was based on a sample size of only 4 stores, over two short roster periods. Although the stores were selected randomly, there are 972 McDonald's stores. The sample size is too small to make any real conclusions about the numbers (AiG3 First Anderson Affidavit, [39], [40], [41] to [43]). Moreover, the finding also seeks to conflate McDonald's corporate restaurants with all of the 821 franchisees as 'one employer' See Exhibit AiG3 First Anderson Affidavit [6] for the reference to the number of franchisee restaurants (821), versus corporate restaurants (151).

Paragraph(s)	Content	Ground
	requires an estimated 3,102 employees each week day to work between 5:00am and 6:00am (see Anderson Affidavit, para 42).	
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).	This finding is objected to for a number of reasons. First, there is no cogent reason advanced to suggest that it is *necessary* for either McDonald's corporate restaurants or indeed any individual franchisees to enter into individual flexibility arrangements with employees at all in respect of any employees who might work, or who may nominate availability to work, between 5am and 6am. Indeed, none of McDonald's restaurants, corporate or franchise restaurants, operate under the Award. Each apply the *McDonald's Enterprise Agreement 2013.* Second, there is no evidence to suggest that any of McDonald's restaurants, whether it be a corporate or franchise restaurant, would have any difficulty whatsoever with paying a 15% penalty rate between 5am or 6am if the penalty rate for this period applied to them. In this regard, it is noted that McDonald's actually pays a higher base rate under the Agreement than under the Award for an employee of equivalent classification. Third, the Commission has previously found (implicitly) there is disutility in working an evening shift up to 6am, when it set the end time in *4 yearly review of modern awards – Penalty Rates* (2017) 265 IR 1, [1393]. This finding remains undisturbed. Fourth, there is a burden in complying with all award conditions. Fifth, there is likely be time required for an employer to enter into an individual flexibility agreement with an employee.

Paragraph(s)	Content	Ground
		Sixth, there would also be burden with a facilitative provision, including for an enterprise like McDonald's corporate, because employees would need to be provided with information about a vote, the vote would need to be recorded, the guardians of minors would need to be engaged (which would be no small task in attempting to organise all of the guardians in an efficient manner, given they would be likely to have their own work and family commitments), and continuous monitoring of the expressed wishes of the 'majority of employees concerned' would be required as the composition of McDonald's employees changes or to ascertain whether any employees may have changed their mind. Seventh, to the extent that there is an administrative burden in the completion of individual flexibility arrangements, there is likely to be less administrative burden for McDonald's franchisees (which represent the majority of McDonald's restaurants (i.e. 821 (of 972) franchise restaurants)). See PN1714-1715. Eighth, the exact time that it might take to make and document an individual flexibility arrangement is really unknown and untested. Ninth, individual flexibility arrangements under clause 7 of the Award provide an important and protective mechanism to enable employees who may decide to forgo award entitlements, like penalty rates: 1. including involving guardians, where the employee is under 18 years of age; 2. providing that the employee be better off overall, if they do decide to forgo the penalty rate. Tenth, an individual flexibility arrangement may potentially result in less administrative burden than compliance with the proposed facilitative provision because an individual flexibility agreement only needs to be entered into once (see clause 7 of the Fast Food Industry Award). It may only be terminated in accordance with clause 7.8. It is not required to continually ascertain the expressed wishes of an employee, as the composition of employees changes. Eleventh, a facilitative provision to reduce the penalty rate would be unworkable and confusing. It would not be simple to follow. It would introduce uncertainty into the Award and could result in disharmony in the work place.

Paragraph(s)	Content	Ground
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.	Although the findings in this paragraph are not disputed, the Commission should make additional findings concerning an employee working these hours under the *McDonald's Enterprise Agreement 2013.* Employees under the Agreement receive a higher base rate than under the Award, for employment of equivalent classification. For an employee working under the Award between the hours of 5am and 8am on Monday to Friday (and therefore entitled to the penalty rate between 5am and 6am) they are paid less than an employee of equivalent classification under the Agreement who works the same hours (but who does not receive a penalty rate between 5am and 6am) (see [40] of the SDA's submissions dated 16 March 2018).
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	This finding is disputed because of the way it seeks to characterise employee preferences as to work hours. The research obtained by the Commission demonstrates that: - 59.6% of employees in the takeaway food services industry are full time students, and a further 4.3% are part time students (see MFI 1);

Paragraph(s)	Content	Ground
	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).	- 57.3% of takeaway food services employees are only able to access 1-15 hours per week, and a further 17.8% are only able to access 16-24 hours (see MFI1); - 60.7% of employees in the takeaway food services industry are aged between 15 and 19 years of age (see MFI1). Regarding McDonald's, the majority of employees study. They have limited availability during all of the operating hours of the business (First Anderson Affidavit [25(c)]. The majority of employees who work in the fast food industry are young students (school or tertiary); they nominate preferences to work outside of ordinary business hours because they have other commitments, such as study, during business hours. The fact that they do so, does not demonstrate there is no disutility in working between 5am and 6am. It demonstrates that such employees seek to access work at periods of time, which are not business hours (times when they are not available).
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).	This finding is not objected to, save that the SDA submits that the finding only pertains to a minority of McDonald's restaurants. There is no evidence before the Commission that there is any difficulty for any employer, or any class of employer, in the fast food industry to pay the 15% penalty rate between 5am and 6am. Even with McDonald's, there is no evidence that McDonald's corporate or any individual franchisees, would have financial difficulty paying the penalty rate, would seek to alter trading hours, or would be otherwise less productive as a result of paying the penalty pursuant to the Award. To the contrary, McDonald's franchisees and McDonald's corporate would simply seek to take advantage of decreasing the 15% penalty payable to reduce labour costs during this hour (AiG3 First Anderson Affidavit, [56]).