

Australian Industry Group

Application to vary the
Fast Food Industry Award 2010

Submission
(AM2020/20)

12 May 2020



AM2020/20 APPLICATION TO VARY THE FAST FOOD INDUSTRY AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) seeks a variation to the *Fast Food Industry Award 2010* (**Award** or **Fast Food Award**) in the terms set out at Attachment A to our application, filed on 1 May 2020. If granted, the proposed variation would result in the insertion of a new schedule to the Award (**Schedule H**), which would apply for a period of three months. The application is made and the variation is sought in light of the unprecedented challenges facing employers and employees in the context of the COVID-19 pandemic (**Pandemic**).
2. Consistent with the encouragement of the Full Bench in its decision of 8 April 2020¹, Ai Group has engaged in detailed and extensive discussions with the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Council of Trade Unions (**ACTU**) about the proposed variation. The ACTU and SDA consent to the variation sought. Ai Group and the SDA are the major registered organisations representing employers and employees, respectively, in the fast food industry.
3. Ai Group submits that the variation proposed is necessary to ensure that the Award achieves the modern awards objective. The bases for our submission are set out herein.
4. Crucially, the measures are aimed at maximising or at least saving employment opportunities in the face of unprecedented disruption to the sector.
5. The proposed clauses are targeted towards the circumstances of the Pandemic and provide employers with some limited capacity to avoid the more drastic step of implementing redundancies in the context of what is hoped to be, at least to some extent, a temporary shortage of work for such staff.

¹ *Re Variation of awards on the initiative of the Commission* [2020] FWCFB 1837 at [134].

6. Further, the proposed variations relating to part-time employment provide for a more flexible regime for the regulation of part-time employment than currently contained in the Award but which is broadly in line with provisions contained in the *Restaurant Industry Award 2010* (**Restaurant Award**) and the *Hospitality Industry Award 2010* (**Hospitality Award**). The proposal incorporates a series of specific safeguards and notably only applies with the agreement of an employee. The framework will assist employers to deal with dramatic changes to patterns in consumer demand that have emerged in the context of the Pandemic and will enable the retention of existing part-time jobs and facilitate the offering of additional hours of work to staff as opportunities arise.
7. The variations are opposed by the Retail and Fast Food Workers Union (**RAFFWU**), an association that is not registered under the *Fair Work (Registered Organisations) Act 2009*. RAFFWU is not an 'organisation', as defined in the *Fair Work Act 2009* (**Act**).
8. RAFFWU has not sought to constructively suggest any alternate proposals to address the crises faced by the Industry or the foreseeable additional job losses that will materialise if the proposed variations are not granted.

2. THE PANDEMIC AND ITS IMPACT ON WORK PERFORMED BY EMPLOYERS AND EMPLOYEES COVERED BY THE AWARD

9. An Information Note published by the Commission contains extensive detail about various measures that have been taken by State and Federal Governments for the purposes of endeavouring to slow the spread of the Pandemic. We refer to and rely upon that Information Note. It was most recently updated on 17 April 2020.²
10. Relevantly:
- (a) From midday on 23 March 2020, the Federal Government required that restaurants and cafes restrict their services to the provision of food and beverages for takeaway and delivery.
 - (b) From 26 March 2020:
 - (i) The Federal Government required that food outlets operating in food courts within shopping centres restrict their services to the provision of food and beverages for takeaway and delivery.
 - (ii) The Federal Government implemented a ban on international travel, subject to a limited number of exceptions.
 - (c) From 29 March 2020, the Federal Government advised people to stay at home unless partaking in a very limited range of activities:
 - (i) Shopping for what is needed – food and other essential supplies;
 - (ii) Medical or health care needs, including compassionate requirements;
 - (iii) Exercise in compliance with the public gathering requirement; and
 - (iv) Work and study, if it cannot be done remotely.

² Fair Work Commission, *Information note – Government responses to COVID-19 pandemic* (updated 17 April 2020).

- (d) From 29 March 2020, the Federal Government imposed a limitation on the number of persons that can gather together. The initial general requirement was not more than two persons, with the exception of people of the same household and family units.
11. In addition to the above, various states and territories have imposed restrictions on the ability of a person to cross state / territory borders.
 12. As a result of the aforementioned factors and the health risks posed by the Pandemic, the operations of employers covered by the Award have been significantly impacted. In particular, many fast food outlets have experienced a dramatic decline in demand from consumers. This appears to be attributable to:
 - (a) A prohibition on people dining in food courts in shopping centres.
 - (b) A prohibition on people dining in fast food restaurants.
 - (c) Reduced foot traffic in shopping centres given Government restrictions and advice concerning the number of people who may gather together and the limited purposes for which persons should be leaving their homes.
 - (d) Reduced foot traffic through airports given Government restrictions on travel and state / territory border crossings.
 - (e) Reduced foot traffic through central business districts given Government advice to work from home wherever possible.
 - (f) Reduced movement generally, including visiting standalone food outlets, in light of Government advice regarding the limited purposes for which persons should be leaving their homes.
 13. Since our application was filed, the Commonwealth, State and Territory Governments have made various announcements regarding the easing of certain restrictions previously imposed to stem the spread of the virus.
 14. Whilst the Commonwealth Government has outlined a three-staged plan for easing the relevant restrictions, State and Territory Governments are to

determine when the specific changes will be implemented. **Annexure A** to this submission identifies the relevant announcements made to date in this regard. As can be seen, different approaches are being taken in different States and Territories. Relevantly:

- (a) Though some restrictions have been eased in Victoria, no changes concerning the operation of restaurants and cafes has been announced.
 - (b) From 15 May 2020, cafes and restaurants in NSW may resume dining-in services and seat up to 10 patrons.
 - (c) From 18 May 2020, cafes and restaurants in Western Australia may resume dining-in services and seat up to 20 patrons.
15. The changes announced so far are incremental. They will not enable fast food outlets to return to 'business as usual'. They must also be understood in the context of Governments continuing to limit the number of persons that may gather together, encouraging persons to practice social distancing and the ongoing risk of community transmission of the virus. These factors collectively will, in our submission, continue to impact customer demand for the products and services offered by employers in the fast food industry. The recently announced changes will not restore customer demand or patterns of trade to pre-pandemic levels.
16. The pressures on employers covered by the Award are multifaceted and cumulative in nature. They include, most notably, concerns about dramatic reductions in demand for the products and services they provide and the consequential reductions in revenue and demand for labour.
17. As previously mentioned, the Pandemic has also resulted in changes in patterns of consumer demand. Not only do these changes mean that for many employers there is significantly less need for labour, but there is often also a misalignment between the days of the week or times when employees ordinarily work and the times at which there is actually a need for their services.

18. We also note that in a recent report³ prepared by Professor Borland for the Commission, the Professor identified the fast food industry as being one that “seem[s] most likely to experience decreases in employment as an immediate consequence of COVID-19”⁴. The Award was identified as an award “where it might be most valuable in the immediate term to allow extra flexibility in employment arrangements – in terms of the number of workers affected and the scope for adjustment in hours of work”⁵.
19. We also note that many employers in the fast food industry apply the Award to their employees (that is, they are not covered by an enterprise agreement). A recent information note published by the Commission in the context of matter AM2020/12 identifies that of the range of industries there considered by reference to ANZSIC categories, the ‘Accommodation and Food Services’ industry exhibits the higher proportion of award reliance, with some 44.9% of employers applying the relevant modern award. The Award is one such award.
20. In addition, in December 2019, the Commission terminated⁶ the enterprise agreement that applied to all McDonald’s outlets in Australia and to more than 100,000 McDonald’s employees. McDonald’s is the largest fast food chain in the country and the Award now applies to its employees.

³ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020).

⁴ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020) at page 3.

⁵ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020) at page 4.

⁶ *Re McDonald’s Australia Enterprise Agreement 2013* [2019] FWCA 8563.

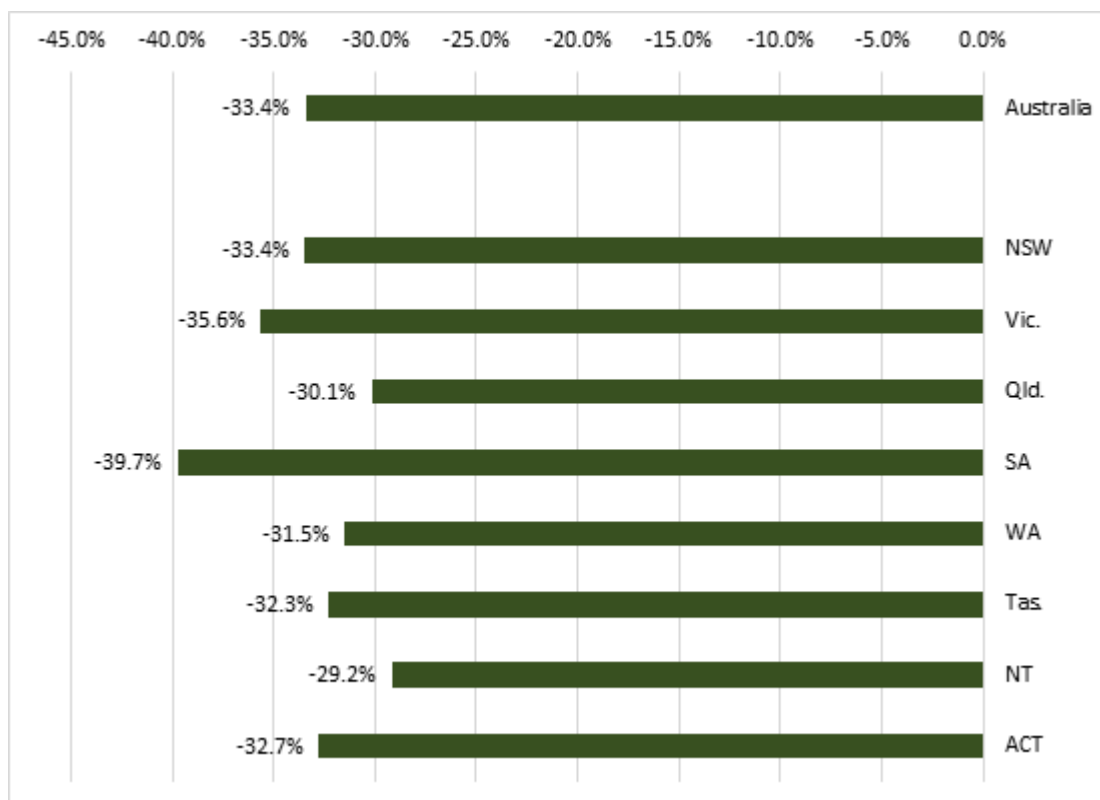
3. THE ECONOMIC IMPACT OF THE PANDEMIC ON THE FAST FOOD INDUSTRY

21. Economic data consistently demonstrates that the COVID-19 crisis is having a serious detrimental impact on the Australian economy. The following economic data is relevant to the fast food industry, which falls within the broader category of 'Accommodation and Food Services'. It demonstrates that the industry has and continues to experience deteriorating conditions as a result of the Pandemic.

ABS, Estimates of employment changes (14 March to 18 April 2020)

22. On 5 May 2020, the ABS [reported](#) that the Accommodation and Food Services industry continued to be the most impacted by COVID-19, with a drop of more than one in three paid jobs (33.4%) in the industry between 14 March and 18 April.

Changes in Accommodation and food services industry jobs between 14 March and 18 April, by state and territory



**Commonwealth Department of Education, Skills and Employment, COVID-19
Impacts on Businesses and Recruitment, 1 May (1 May 2020)**

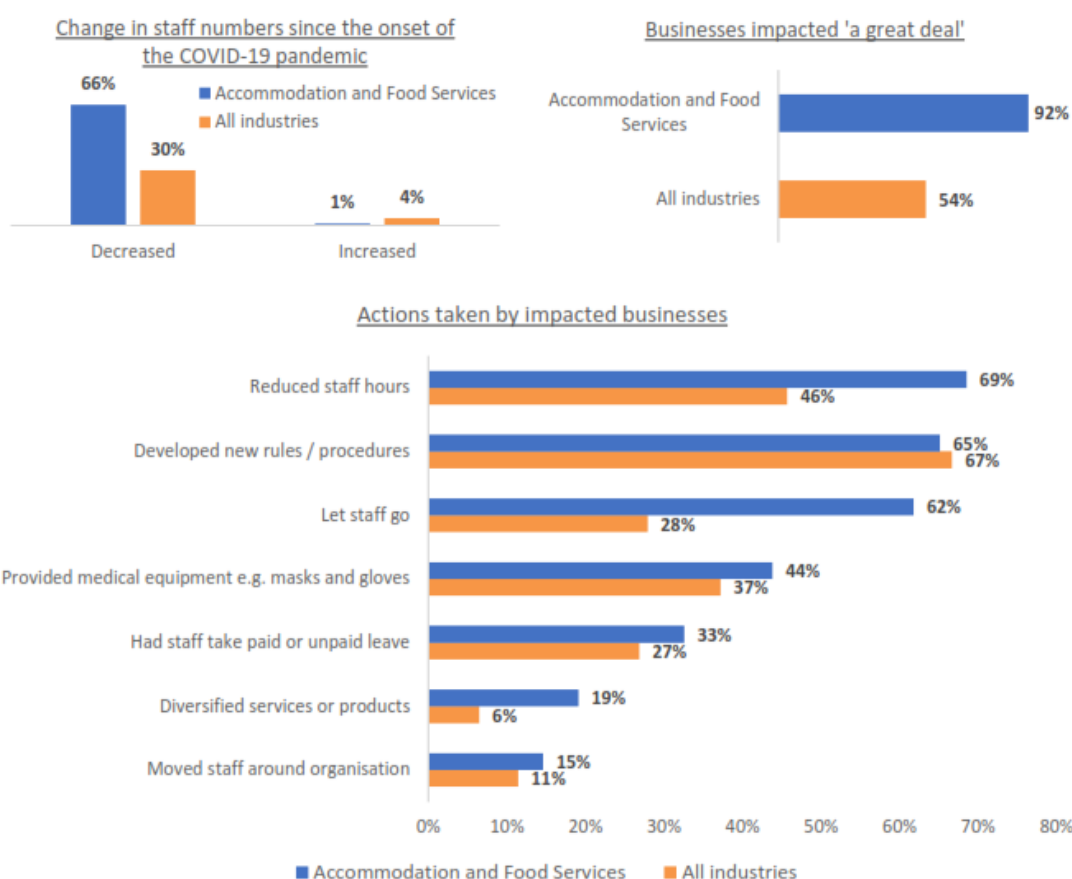
23. The Commonwealth Department of Education, Skills and Employment is conducting a weekly survey of businesses to measure the impact of COVID-19. Data is collected on staffing changes, business impacts, actions taken by businesses in response to the Pandemic, and future expectations.

24. The 1 May [report](#) contains the following relevant information:

[see next page]

Accommodation and Food Services

- Businesses in the Accommodation and Food Services industry were more likely to have decreased in staff since the onset of the COVID-19 pandemic (66 per cent) compared with all industries (30 per cent). Some 92 per cent of businesses in Accommodation and Food Services reported being affected 'a great deal' by the COVID-19 pandemic.
- Accommodation and Food Services businesses were more likely to have reduced staff hours (69 per cent), let staff go (62 per cent) and diversified their services e.g. introducing takeaway (19 per cent) compared with averages for all industries.



Comments from businesses in the Accommodation and Food Services industry:

- *My business is down 25 per cent on what it was. I am currently rotating staff as I want to keep them all and do not want to have to rehire or retrain new staff when I need them again. (Fast food)*
- *We have had to let a large number of staff go. What staff we have left, we will be putting on part-time hours, as we are only doing takeaway now. (Restaurant)*

Ai Group, Performance and Business Index (April 2020)

25. The [Australian Industry Group Australian Performance of Business Index \(Australian PBI\)](#) fell a further 12.6 points to 27.2 in April – the lowest monthly result in the Australian PBI and the largest single-month drop since the series commenced in 2005 (results below 50 points in the Australian PBI indicate deteriorating business conditions, with lower numbers indicating a faster pace of deterioration in the month).
26. Retail Trade and Hospitality fell to 25.4 points.

Ai Group, Performance of Services Index, (April 2020)

27. Australia's services industries continue to struggle through a difficult period of pandemic-related closures and restricted activity, with the Australian Industry Group Australian Performance of Services Index (**Australian PSI®**) plunging 11.6 points to 27.1 in April – both the largest single monthly fall and the lowest result in the history of the series (results below 50 points indicate contraction, with the distance from 50 points indicating the strength of the decrease).
28. Below is a relevant extract from the [report](#) relating to activity in the Retail trade and Hospitality sector:

Retail trade & hospitality

- The retail and hospitality sector (including retail shops, restaurants, cafes, take-aways and hotels) produced \$121.5bn in real value-added output in the year to Q4 2019 (equal to 6.4% of gross domestic product).
- It employed 2,195,100 people in February 2020 (17% of total employment). The majority of retail & hospitality workers are part-time (under 35 hours per week).
- The index for the retail trade & hospitality sector fell by 5.7 points to 25.4 points in April. This was the lowest monthly result for this sector in the series' history (trend).
- All indicators for retail and hospitality were strongly negative and deteriorated in April.
- Restrictions in activity and trade have resulted in some businesses closing, while others reported limited trade. Only a handful of food retailers reported higher sales.



Westpac-MI Consumer Confidence Survey, (April 2020)

29. The Westpac-Melbourne Institute Index of Consumer Sentiment plunged 17.7% to 75.6 in April from 91.9 in March, taking it to levels previously observed only in recessions.

30. The survey report relevantly stated:

Unsurprisingly, the highest incidence of lay-offs and unpaid stand downs – running at 47.5% – is amongst those in the accommodation, café and restaurant sector.

4. THE RELEVANT LEGISLATIVE REQUIREMENTS

31. Ai Group's application is made pursuant to s.157 of the *Fair Work Act 2009 (Act)*.
32. Section 157 of the Act empowers the Commission to vary modern awards if necessary to achieve the modern awards objective.
33. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, having regard to the matters set out in s.134(1) of the Act.
34. In its recent decision about variations the *Clerks – Private Sector Award 2010 (Clerks Award)* in the context of the Pandemic, the Commission characterised the contextual considerations surrounding the application there made as follows:

[41] The context in which the Joint Application is being advanced and the character of the variations proposed are important contextual considerations. In particular, the variations are:

(a) are temporary in nature;

(b) are advanced by consent;

(c) are seen as necessary, based on the party's experience of the COVID-19 Pandemic, the Governments response and the impact these are cumulatively having on employment, employment relationships and working arrangements; and

(d) are aimed at providing employers and employees with the various flexibilities in working arrangements that are now seen as necessary options to preserve, as best as can be, on-going employment, paid hours of work and alternatives to standing down employees without pay or making employees redundant.⁷

35. In our submission, those contextual considerations are also relevant to this application and lend support to the grant of the variation sought. In particular, we consider that the consent of the major registered industrial associations with an interest in the Award, in itself, demonstrates the critical situation the parties and their constituencies find themselves in. The opposition of RAFFWU (which is not a registered employee organisation) does not detract from the weight that should be afforded to the consent position.

⁷ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [41].

36. The circumstances warrant a variation to the minimum safety net that reflects a 'trade off' between additional operational flexibilities against some employment benefits, with a view to maintaining the viability of employers and the ongoing employment of their employees.

5. THE PROPOSED VARIATIONS

37. The key aspects of the proposed variations are explained hereunder.
38. We note at the outset that the proposed variations would apply to an employer and their employees only where they do not qualify for the recently introduced Jobkeeper scheme. That is, flexibilities afforded by Part 6-4C of the Act and the flexibilities afforded by the proposed new Schedule H are mutually exclusive. The proposed schedule would provide flexibilities that are, however, similar to some of those afforded to employers eligible for the Jobkeeper scheme.
39. Accordingly, the proposed variations are designed to fill the regulatory gap left by the Jobkeeper scheme and provide employers who cannot access the flexibilities now contained in the Act with a combination of measures that may be implemented to moderate the impacts of the Pandemic. We note in this regard that the industry consists of a number of large employers or chains of employers that employ the majority of employees in the industry. As the Commission observed in its decision of 2017 regarding a proposal to reduce penalty rates in the Award:
- [1266]** ... In terms of employee numbers the industry is dominated by the QSR major chains which employ about 86 per cent of the 214,265 Fast Food industry employees. Just under half (98,911 employees; 46 per cent) of Fast Food industry employees are employed in McDonald's outlets.⁸
40. By virtue of the size and scope of some of these employers, they may not satisfy the eligibility criteria for the Jobkeeper scheme. This may be so notwithstanding a significant reduction in demand for their services and products and a corresponding reduction in work for their staff either across the board or within some of their restaurants. The most prominent example of an employer in this position is McDonalds.
41. Some employers (including individual franchisees of major chains with more than one restaurant or store) may qualify for the Jobkeeper scheme because declines in revenue in one store are moderated by less severe declines in other stores.

⁸ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [1266].

42. Some employees covered by the Award may also not satisfy the various relevant eligibility criteria. Schedule H would apply in all such circumstances.

43. The proposed provisions deal without the following subject matters:

(a) A right for employers to request that employees take accrued annual leave if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment. This right to request is accompanied by a corresponding obligation on employees not to unreasonably refuse to take the leave.

(b) A capacity to require employees to take paid annual leave or unpaid leave in circumstances where the business closes down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19

(c) A scheme for the flexible use of part-time employment that operate for 3 months which will only operate by agreement with relevant employees. In short, the scheme affords employers greater flexibility to vary the precise hours that part-time employees may be rostered to work, albeit within the parameters of the days and times that the employee nominates that they are available to work.

The scheme also creates an ability for employees to be offered additional ordinary hours of work beyond their 'guaranteed hours' instead of mandating that such additional hours would be overtime, subject to various safeguards and limitations, including notably at any hours worked beyond 38 per week would be overtime.

44. The scheme contains a number of similar flexibilities to those provided by the Jobkeeper regime, albeit that it operates subject to different and in some respects additional safeguards to those applicable to businesses covered by the Jobkeeper scheme. The part-time provisions are not an element of Jobkeeper, albeit we observe that the recent changes to the Act provide employers covered

by the Jobkeeper scheme with significant rights to alter employees' hours of work (or at least to issue that cannot be unreasonably be refused).

45. The proposed variations provide a more modest, although still meaningful, level of flexibility than is available under the Jobkeeper regime. They do not afford employers with the same capacity as afforded under the legislation to:

- reduce hours of work
- alter the days or times that employees work
- alter the work that is undertaken by employees
- alter the location at which work is performed

46. We do not here contend that the abovementioned flexibilities would not be beneficial to industry or that they would not have a role to play in saving jobs if they were replicated in the Award. Indeed, we contend that a capacity to reduce hours of full-time and part-time employees would, in particular, provide assistance desperately needed by some employers in the sector to avoid implementing redundancies. We observe that the evidence that we advance in support of this application makes this apparent. Nonetheless, a consent position has been achieved in the context of what were very difficult negotiations between Ai Group, the ACTU and SDA notwithstanding the genuine efforts made by all. As such, a claim for such flexibilities is not a feature of this application.

47. Similar flexibilities to what we are now seeking (in part) are also a feature of the ‘COVID-19 Schedules’ inserted in the following awards as a short term mechanism for dealing with circumstances flowing from the Pandemic (albeit that these schedules did not contain all of the limitations and safeguards in the provisions proposed in this application):
- Hospitality Award
 - *Clerks – Private Sector Award 2010*
 - Restaurant Award
 - *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (Vehicle Award)*
48. It is trite to observe that there are parallels between the circumstances of employers operating under the Hospitality Award, Restaurant Award and the Fast Food Award (a point to which we will return).
49. The proposed flexibilities relating to annual leave and shut-downs are relevantly similar to some of the flexibilities recently implemented by the Commission in the context of the Vehicle Award.⁹ Although unlike the changes in the Vehicle Award, the proposed clauses do not;
- Permit an employer to issue directions regarding operational flexibility (clause J.2.1);
 - Allows an employer to issue a direction temporarily reduce the hours of work for full-time and part-time employees, in certain circumstances and subject to safeguards (clause J.2.2).

⁹ [2020] FWCFB 2356

The differing approach to the inclusion of the ‘three general safeguards’ included in the Vehicle Award

50. We here note that that the proposed variations to the Fast Food Award do not include a clause dealing discretely with what has been described as ‘three general safeguards’ built into schedule J of the Vehicle Award.¹⁰ These general safeguards were described the Commission as constituting the following¹¹:
- (a) Any direction or request given by an employer under Schedule J must be given in writing.
 - (b) Any direction given by an employer under Schedule J does not apply to the employee if the direction is unreasonable in all of the circumstances.
 - (c) Any dispute regarding the operation of Schedule J may be referred to the Commission in accordance with clause 9—Dispute Resolution of the Vehicle Award. Further, any direction given by an employer under Schedule J is not valid unless the employee is advised in writing that the employer consents to a dispute arising from the direction being settled by the Commission.
51. We also acknowledge the Commission’s endorsement of these safeguards and the weight given to their inclusion in reaching its decision to make the relevant variations to the Vehicle Award.¹²
52. Although we have not included a separate clause dealing with such safeguards in the proposed schedule for the Fast Food Award, similar protections have been worked into elements of the proposed provision in accordance with the consent position reached between the parties. The divergent approach proposed in the context of the Fast Food Award is, in part, a product of the more limited flexibilities contemplated by the current application.

¹⁰ [2020] FWCFB 2367 at 90

¹¹ Ibid

¹² Ibid at 90 to 94

53. Relevantly, the general safeguards largely deal with the issue of a 'direction'. This is not relevant in the context of the proposed annual leave clause or the proposed provisions relating to part-time employment advanced in the context of the Fast Food Award. These clauses are not drafted to operate by reference to an employer 'direction'.
54. The general safeguards contained in Schedule J in the Vehicle Award relating to what can be described for simplicity as 'consent arbitration' and the stipulation that "Any direction given by an employer under Schedule J does not apply to the employee if the direction is unreasonable in all of the circumstances" similarly do not appear to apply in the context of corresponding provisions in the Vehicle Award dealing with requests to take annual leave and with close downs. Those clauses do not deal with 'directions'. The safeguards instead have application in the context of the provisions in Schedule J dealing with operational flexibility and reductions in hours – issues which we have not to date been able to achieve a consent position on with the SDA and ACTU in the context of the Fast Food Award.
55. In advancing these submissions we accept that this may be a matter of semantics given the difference between a "requirement" and a "direction" is somewhat artificial and that as such it might be argued that the general safeguards do have broader application.
56. Although we have not included the specific 'general safeguards, we nonetheless observe that in the context of closedown, proposed clause H.9.3 to be inserted the Fast Food Award provides access to consent arbitration over disputes relating to any requirement to take leave pursuant to H.9.1. Clause H.9.3 also requires that notice of the requirement to take leave under clause H.9.1 must be provided in writing.
57. We have not included a requirement that any such request under H.9.1 be 'reasonable in all the circumstances.' Such a requirement was not a part of the consent position reached. Further, introducing a fetter on an employer's ability to require employees to take annual leave in the context of a close down would somewhat undermine the utility of such a provision, unless there is nonetheless

a right to direct employees to take unpaid leave for the duration of the close down.

58. Ultimately, given the temporary nature of the clause's operation, combined with the fact that the clause only permits an employee to require employees to take annual leave in the narrow and extraordinary circumstances of a close down that is implemented for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19, we contend that the provision would operate in conformity with s.93(3). That is, the requirement to take the leave would be reasonable in all circumstances.
59. We do however acknowledge that the Commission's decision in the context of the Vehicle Award appears to rest on the understanding that the general safeguards relating to consent arbitration and the requirement for all directions to be 'reasonable' have application in the context of the clauses dealing with annual leave and close downs.
60. If the Commission forms the view that the safeguards provided within the proposed clause are insufficient to ensure that the requirements of s.93(3) are satisfied, we accept that it is open to it to vary the Award in a manner other than that which we have proposed. Moreover, we consider that the Full Bench should take such a step, rather than declining to grant the application, if it forms the view that it is necessary. We nonetheless note that such a step has not been taken in the context of the Commission's decision to insert similar provisions in the Restaurants Award, Clerks Award or the Hospitality Award.
61. In advancing this submission we also acknowledge the reasoning of the Full Bench at paragraphs [91] to [94] of its decision to vary the Vehicle Award:

[91] The safeguards provided in Schedule J are similar to those which apply to all 'JobKeeper enabling directions' under Part 6-4C of the Act, in particular:

- A JobKeeper enabling direction does not apply to an employee if it is unreasonable in all the circumstances (s 789GK).
- A JobKeeper enabling direction does not apply to an employee unless the employer gave the employee written notice of the employer's intention to give the direction (s 789GM).

- The Commission may deal with a dispute about the operation of Part 6-4C by arbitration (s 789GV).

[92] As noted in the Joint Employer submission the safeguards in Schedule J are intended to ensure that 'employees receiving directions pursuant to Schedule J are not in a materially different position to those receiving directions pursuant to Part 6-4C of the Act'.

[93] In circumstances where an application to vary a modern award proposes flexibilities which are the same or analogous to those which apply to JobKeeper enabling directions and requests under Part 6-4C of the Act it is entirely appropriate that such a variation also incorporate the relevant safeguards provided in Part 6-4C. Indeed, in the context of this Application, we have given significant weight to the provision of the safeguards in Schedule J set out above at [91] in our consideration of whether the variation of the Vehicle Award in the manner proposed would ensure that the Award provides 'a fair and relevant minimum safety net of terms and conditions' within the meaning of s.134(1).¹³

62. If the Full Bench considers that the absence of any of the 'general safeguards' contained in the Vehicle Award schedule would prevent the proposed variation to the Fast Food Award forming a necessary part of a fair and relevant minimum safety net, we would, as a position in the alternate to our original claim, support the inclusion of comparable provisions in the Fast Food Award.

Clause H.7 – Part-time employment

63. Clause H.7 provides a temporary and alternate scheme for part-time employment. In circumstances where it applies, clause 12 would not apply.

64. The proposed provisions would operate as follows:

- (a) The provision operates for a period of three months from the date of operation of Schedule H.
- (b) It would apply to pre-existing part-time employees and new employees employed pursuant to these provisions, only where the employer and employee reach agreement in accordance with clause H.7.2. Clause H.7.2 contemplates that an employer and employee may reach agreement in writing upon both of the following:

¹³ [2020] FWCFB 2356

- (i) The number of hours of work that the employee is guaranteed to be provided and paid for each week or roster cycle, as relevant (**Guaranteed Minimum Hours**).
 - (ii) The days of the week and the periods in each of those days when the employee will be available to work (**Agreed Availability**).
- (c) An employee's Guaranteed Minimum Hours may be changed by written agreement.
- (d) The clause requires that an employee must not be rostered to work for less than 3 consecutive hours in any shift and that the Guaranteed Minimum Hours must be at least eight hours per week. Together, these aspects of the proposed clause impose a floor on the number of hours that an employee may be required to work in a shift and in a week, respectively.
- (e) An employee's hours of work are further regulated by the proposed definition of part-time employment, which relevantly states that a part-time employee will have reasonably predictable hours of work.
- (f) An employee may be offered ordinary hours of work within their Agreed Availability in addition to their Guaranteed Minimum Hours, provided that the various conditions at clause H.7.6(a) – (h) are met. We do not propose to set out all of those conditions but highlight that:
- (i) Additional hours of work are to be paid at ordinary rates (unless they constitute overtime, in accordance with clause 26). The proposed model of engagement of part-time employment enables an employer to provide permanent employees with paid hours of work despite reduced customer demand in a more flexible and agile way. Specifically, an employer can increase the number of ordinary hours to be worked by an employee in the event of, for instance, an unexpected spike in customer demand or a need to cover staff absences, without the cost imposition of overtime rates. It also enables an employer to continue to engage part-time employees on the basis of what might be a more conservative guaranteed number

of ordinary hours in a week than what is currently agreed under clause 12; with the prospect of increasing those hours as needed.

- (ii) Importantly, an employee cannot be required to work additional hours. An employee can refuse to work additional hours when offered on any occasion. An employee can also subsequently withdraw their agreement to work those hours, provided that the employer is provided with 14 days' notice.
 - (g) Clause 12, which regulates part-time employment, would not apply where an employer and employee have reached agreement pursuant to clause H.7.
 - (h) At clause H.7.7 and clause H.7.8, the proposal deals with the manner in which employees who have reached an agreement under clause H.7.2 will revert to part-time or casual employment under the Award when Schedule H ceases to operate.
65. Clause H.7 reflects a carefully constructed and sophisticated mechanism for enabling the provision of paid work on an ongoing and permanent basis, whilst providing for greater flexibility in relation to the treatment of hours worked by an employee that are in addition to their Guaranteed Minimum Hours. Various elements of the clause are deliberately designed to ensure that employees are offered work in accordance with their indicated availability and to ensure that employees have an ability to refuse to work any additional hours offered to them.
66. Clause H.7 is an appropriate temporary measure that will facilitate the sustainable and ongoing employment of part-time employees in what is a dynamic and unprecedented environment warranting the grant of greater flexibility than that which is currently afforded by clause 12 of the Award.
67. Crucially, the proposed clause will provide a mechanism to assist employers to better align the hours of work of part-time employees with the changes in patterns of consumer demand that have arisen since the onset of the Pandemic and Government initiatives to prevent its transmission.

68. In the context of the uncertainty visited upon the fast food industry by the Pandemic, the current structure of clause 12 fails to reflect the needs of the industry.
69. In advancing this claim we acknowledge the Commission has previously declined to grant an application for a similar provision which would have applied on an ongoing basis.¹⁴ We nonetheless identify the following cogent reasons for departing from this approach:
- (a) The proposed clause will only operate on a temporary basis.
 - (b) The current application is advanced in the context of the extraordinary circumstances visited upon the Fast Food Industry by the COVID-19 Pandemic and is in response to the current needs of both employers and some part-time employees for greater flexibility.
 - (c) The provision will assist in the retention of jobs and the maximisation of opportunities for employees to be allocated paid work.
 - (d) The clause provides additional rights for employees to refuse any 'additional hours' offered to them.
 - (e) The application is supported by evidence relating to its utility in the context of the McDonald's chains of restaurants, a chain that now applies the Award and is the largest employer in the Fast Food Industry.
70. The clause may be included in an award pursuant to s.36(1)(a) and s.139(1)(b).

Clause H.8 - Annual leave

71. The proposed clause H.8 enables an employer to request that an employee take annual leave.
72. The provision contains various safeguards and limitations that are intended to ensure that whilst the provision provides a mechanism through which employees may be requested to take annual leave, such a request can be made only in

¹⁴ [2019] FWCFB 272

certain circumstances and provided that various conditions are met. Importantly, the provision expressly contemplates that an employee may refuse an employer's request but must not unreasonably do so.

73. The other key elements of the clause are as follows:

- (a) An employer may make a request pursuant to clause H.8 subject to considering an employee's personal circumstances.
- (b) The request must be made in writing.
- (c) The request must be made at least 72 hours before the date on which the leave would commence.
- (d) The request may be made only if it is made for reasons attributable to the Pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.
- (e) An employee is not required to consider the request unless the request would leave the employee with a balance of two weeks of accrued annual leave.
- (f) A period of leave taken pursuant to this clause must commence within four weeks of the date of operation of Schedule H, however it may end after that date.

74. This proposed clause partially mirrors section 789GJ of Part 6-4C of the Fair Work Act. The protections outlined in clause H.8 are contained in section 789GJ, other than:

- the requirement to provide 72 hours' notice of the annual leave being taken (which derives from section 789GM of Part 6-4C of the Act); and
- the reference to any request being attributable to COVID-19 or COVID-19 Government initiatives (which is an additional safeguard included in the Award Schedule).

75. As was put by Ai Group and other employer parties in the context of comparable changes to the Vehicle Award, by adopting this regime the Commission can be satisfied that:

- (a) the leave provisions of the Schedule will not be utilised to exhaust an employee's annual leave. Rather requests must be attributable to operational concerns that have arisen as a result of COVID-19 or COVID-19 related Government initiatives. Furthermore, employees will still have an ability to take recreation periods subject to the Act's usual requirements;
- (b) a period of consultation is enshrined into the leave taking process, allowing employees to consider and take advice on any leave requests; and
- (c) on an overarching basis, if any circumstances arise that make the leave request unreasonable, employees are able to resist such a request. This prevents unjustifiable prejudice being caused in a particular case, if unique circumstances arise that make a leave request unreasonable. It ensures a level of protection for every individual and for scenarios that might not presently be envisaged.¹⁵

76. The proposed clause can be included in the Award pursuant to s.136(1)(a), s.139(1)(h), s.55(2) and s.93(3).

Clause H.9 – Close down

77. Clause H.9.1 enables an employer to require an employee to take annual leave as part of a close down of its operations, or part of its operations. Where an employee has not accrued sufficient annual leave to cover all or part of the close down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the close down.

¹⁵ [2020] FWCFB 2367 at 55

78. The merit of the provision as a mechanism for avoiding job losses is apparent. Absent such a provision, an employer may not be able to close down their operations because of matters attributable to COVID-19, unless they can stand down the relevant employees pursuant to s.524 of the Act or through a provision in the employees' contracts of employment. There is scope for significant complexity to arise in the context of the application of s.524 in specific and often fast changing factual scenarios currently being faced by employers. In contrast, the proposed award clause provides a simple and easy to understand mechanism for dealing with close downs that is tailored to the current context.
79. As a matter of logic, the Commission should accept that the provisions are unlikely to be used lightly or unnecessarily. It is trite to observe that it is not in an employer's interests to close down its operations unnecessarily.
80. This clause also contains various important safeguards and limitations:
- (a) Clause H.9.1 applies only if the employer has decided to close down for reasons attributable to the Pandemic or Government initiatives to slow the transmission of COVID-19.
 - (b) An employee must be provided with written notice of a requirement to take annual leave or unpaid leave in accordance with this clause.
 - (c) A period of at least 48 hours' notice must be provided, unless a shorter notice period is agreed.
 - (d) The clause permits an employer to require an employee to take unpaid leave only if it is in connection with a close down that commenced within the first four weeks of the operation of Schedule H and the leave does not extend beyond eight weeks from that same date.
 - (e) An employee is not required to take leave pursuant to the clause unless the employee is also advised in writing that the employer consents to any dispute arising from the requirement being settled by the Commission through consent arbitration in accordance with clause 9.5 of the Award and s.739(4) of the Act. The provision is not, however, intended to enable

parties to a dispute to access consent arbitration unless the parties have endeavored to resolve the dispute at the enterprise level in accordance with clauses 9.2 and 9.3 of the Award; nor is the provision intended to preclude parties to agreeing that the matter be dealt with by the Commission in some other way, in accordance with clause 9.5.

- (f) A period of unpaid leave counts as services for the purposes of any relevant award and NES entitlements.

- (g) If an employee required to take unpaid leave requests to engage in reasonable secondary employment, training and/or professional development during the period of leave, the employer must consider and not unreasonably refuse the request.

6. SECTION 134 CONSIDERATIONS

81. The variation to the Award is necessary to achieve the modern awards objective in the circumstances of the Pandemic, having regard to the matters listed at s.134(1) of the Act.
82. Schedule H strikes an appropriate balance between what is “fair” for employers and employees in the context of the Pandemic. The proposed variations must be considered in light of the acute need for additional flexibilities that are facing employers in the current context. It is important to note in this regard that the variations proposed are temporary. Subject to an application being made to extend the operation of Schedule H, they would cease to operate after three months.
83. The Award, in its current form, is not “relevant”. It does not reflect the operational realities in which employers and employees are endeavouring to currently operate. The insertion of the proposed schedule would address this deficiency.
84. Government restrictions relating to the COVID-19 crisis have prevented restaurants from allowing customers to dine-in. This has resulted in a large number of restaurants introducing take away food services or expanding previous take away food services, thereby increasing the level of competition with fast food businesses.
85. The Restaurant Award contains part-time provisions that are broadly similar to those here proposed by Ai Group. Further, the Restaurant Award was recently varied to introduce a schedule that includes annual leave and close down provisions that are also similar to those here proposed by Ai Group. To the extent that the Award does not contain flexibilities that enable employers covered by it to deal with similar trading conditions, the Award is out of step with other relevant modern awards and is not reflective of a relevant minimum safety net.
86. The increased competition between fast food businesses and employers covered by the Restaurant Award is unlikely to change in the near future. Under the first stage of restrictions endorsed by the National Cabinet on 8 May, restaurants will only be allowed to have 10 people at a time dining on their

premises. This is an insufficient number to make dining-in services viable for many restaurants. Also, the timing as to when these changes will be implemented is at the discretion of State and Territory Governments. As **Annexure A** demonstrates, not all states and territories have moved to ease restrictions in line with the National Cabinet decision at this stage.

87. Finally, the proposed variations deliver a level of parity between those employers in the sector that qualify for Jobkeeper and those that do not. This is appropriate in the context of a “fair and relevant” safety net.

88. To the extent that the Commission considers that employees covered by the Award are ‘low paid’ in the sense contemplated by s.134(1)(a), we refer to and rely upon the Commission’s observations in its recent decision concerning the Clerks Award:

[53] ... employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.¹⁶

89. Similar comments were made in a more recent decision of the Commission regarding variations to the Vehicle Award concerning the Pandemic:

[98] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But, as noted in the Hospitality decision, employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.¹⁷

90. It is also relevant that the clause seeks to mitigate the potential impact of the proposed variations in various ways, as outlined in this submission.

91. The proposed variations may encourage enterprise bargaining (s.134(1)(b)).

92. The measures proposed in Schedule H (particularly clause H.7) may increase workforce participation (s.134(1)(c)). To the extent that the proposed variations do not increase workforce participation relative to the level of workforce

¹⁶ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [53].

¹⁷ *Re Victorian Automobile Chamber of Commerce and Ors* [2020] FWCFB 2367 at [98].

participation prior to the Pandemic, it will in our submission enable the retention of “as many employees in employment as practicable in the current crisis”.¹⁸

93. This is, in our submission, a consideration weighing in favour of the grant of the proposed variation.
94. The proposed schedule will clearly promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).¹⁹
95. Section 134(1)(da) is a neutral consideration.
96. Section 134(1)(e) is a neutral consideration.
97. The proposed variation will have a positive impact on business (s.134(1)(f))²⁰. It will provide employers with essential flexibilities that are necessary to enable them to better ‘weather the storm’. Ensuring the ongoing viability of employers beyond the Pandemic is vital to ensuring that employees retain employment opportunities.
98. Section 134(1)(g) is a neutral consideration.
99. Though difficult to quantify in precise terms, we submit that the variation proposed will ultimately have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).
100. In our submission, the variation proposed is necessary to ensure that the Award achieves the modern awards objective, having regard to the considerations listed at s.134(1) of the Act and the context in which the application is made.

¹⁸ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [55] and *Re Victorian Automobile Chamber of Commerce and Ors* [2020] FWCFB 2367 at [101].

¹⁹ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [57].

²⁰ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [56].

Attachment A: Commonwealth, State and Territory Announcements concerning the Easing of Restrictions Concerning COVID-19

On 8 May 2020, the National Cabinet issued a framework for the easing of some of the restrictions on social and business activity put in place in response to the COVID-19 pandemic.

The implementation, timing and details of the easing of restrictions are to be determined by individual state and territory governments.

The National 3-Step Framework

The National Cabinet has released a [Roadmap](#) and a more detailed [Framework](#) to guide the easing of restrictions by the different states and territories. Both the Roadmap and the Framework are structured around a three-step approach.

The Framework covers various areas of social and commercial activity, including:

- Gatherings & Work
- Education & Childcare
- Retail & Sales
- Cafes & Restaurants
- Entertainment & Amusement Venues
- Sport & Recreation
- Accommodation
- Weddings, Funerals & Religious Services
- Hair & Beauty Services
- Domestic Travel

Table 1 below sets out the relevant aspects of three stages announced by the Commonwealth.

Table 1: Steps 1 – 3 for Areas of Activity most relevant to Ai Group Members

	Step 1	Step 2	Step 3
Work	Work from home if it works for you and your employer.		Return to workplace
	Workplaces develop a COVIDSafe plan. Avoid public transport in peak hour		
Education & Childcare	Childcare centres, primary and secondary schools open as per state and territory plans. Universities/technical colleges to increase face-to-face where possible and prioritise hands-on, skills-based learning		
			Consider reopening residential colleges and international student travel
Retail & Sales	Retail stores open Retail stores and shopping centre managers must develop COVIDSafe plans		
Cafes & Restaurants	May open and seat up to 10 patrons at one time	Cafes and restaurants can seat up to 20 patrons at one time	Cafes, restaurants and food courts can seat up to 100 people
	Need to maintain an average density of 4m ² per person Food courts are to remain closed to seated patrons		
Domestic Travel	Allow local and regional travel for recreation	Allow local and regional travel for recreation Consider allowing interstate recreational travel depending on the situation in each state and territory	Allow interstate travel
	Refer to state and territory governments for border restrictions and biosecurity conditions		

Table 2 summarises the implementation of the above phases in respect of cafes and restaurants by the various states and territories, as at the date of filing this submission:

Table 2: Businesses providing takeaway, home delivery and in-premises dining services

	Status
<u>Victoria</u>	While easing some restrictions effective from 13 May, Victoria has not moved to Step 1 in relation to cafes and restaurants which remain open only for takeaway or home delivery services
<u>New South Wales</u>	In addition to take away and home delivery services, NSW has announced that it will move to Step 1 from 15 May. From that date cafes and restaurants can open but only seat 10 patrons at any one time
<u>Queensland</u>	In addition to take away and home delivery services, from 15 May, Queensland will permit dining-in for customers subject to a limit of 10 people at any one time, in restaurants, cafes, pubs, RSLs, clubs, and hotels (food courts remain closed)
<u>South Australia</u>	In addition to take away services from restaurants, cafes, pubs, wineries and breweries, from 11 May, SA has permitted outdoor dining at cafes and restaurants. No alcohol is to be consumed and the 1 person per 4 square metres constraint applies
<u>Western Australia</u>	In addition to takeaway and home delivery services, from Monday 18 May, on-site dining is permitted at cafés, and restaurants can provide a meal service, including within pubs, bars, clubs, hotels and casino. A limit of 20 patrons is permitted and the 1 person per square metre rule applies.
<u>Tasmania</u>	In addition to takeaway and home delivery service, and subject to health advice, from 18 May, restaurants and cafes in all settings (including restaurants in pubs, clubs, hotels and RSLs) will open and seat patrons of up to 10 people at a time. Seated table service only and the 1 person per square metre rule applies.
<u>ACT</u>	While easing some restrictions effective from 8 May, the ACT has not moved to Step 1 in relation to cafes and restaurants which remain open only for takeaway or home delivery services.
<u>Northern Territory</u>	In addition to takeaway and home delivery services, from 15 May it will be permitted to serve and consume food or beverages in a shopping centre food court and to operate and attend restaurants and cafes. Social distancing rules apply and the NT is linking the removal of restrictions with detailed compliance with industry specific guidelines.

IN THE FAIR WORK COMMISSION

AM2020/20 Application to vary the Fast Food Industry Award 2010

WITNESS STATEMENT OF CAMERON NEWLANDS

I, Cameron Newlands of [REDACTED], do solemnly and sincerely declare and state the following:

1. I am employed by McDonald's Australia Limited (**McDonald's**) in the role of Market Director – NSW and ACT.
2. In my role, I undertake a very broad range of responsibilities associated with McDonalds' operations in NSW and ACT. These include:
 - (a) In relation to restaurants owned and operated by McDonald's (**McOpCo Restaurants**) in NSW:
 - (i) operation of the restaurants including direct supervision of the McOpCo team;
 - (ii) implementation of the business plan and allocation of resources to achieve results;
 - (iii) implementation, measurement and reporting on key compliance requirements including food safety, workplace safety and people practices;
 - (iv) responsibility for achieving sales and profitability budgets; and
 - (v) management of corporate and restaurant talent to ensure we have the right people in place to operate our restaurants.
 - (b) In relation to restaurants operated by McDonalds' franchisees (**Franchisee Restaurants**) in NSW and ACT:
 - (i) measuring operational standards and performance in Franchisee Restaurants and frequently engaging with them on opportunities for growth;

- (ii) franchisee engagement in the business plan and corporate support for change management in relation to initiatives within the business;
 - (iii) sharing of information through regular consultation and feedback with franchisees;
 - (iv) oversight of key compliance requirements including food safety, workplace safety and people practices;
 - (v) engagement to achieve sales and profitability budgets; and
 - (vi) measurement of franchisee performance.
3. In addition, during the month of April I have been participating in daily internal meetings with the McDonald's Senior Leadership team and my counterparts in other regions about emerging issues concerning COVID-19 and its impact on McDonalds' restaurants nationwide. This has included a particular focus on government and health regulations, employee and customer safety, sales impact, operational changes and employee relations queries.
4. Part of my role includes working with both franchisees and McOpCo Restaurants to facilitate or implement operational or staffing changes that must be made as a consequence of changes to relevant industrial instruments. For example, when McDonald's switched from applying an enterprise agreement to the *Fast Food Industry Award 2010 (Award)* earlier this year, I was involved in implementing and educating franchisees and other senior employees about operational measures and strategies to reflect this change.
5. I have been employed by McDonald's for approximately 20 years in a range of roles. I started my career at McDonald's as a crew member in a restaurant and I progressed through management training and various management roles to the level of a Restaurant Manager. I was then promoted into the corporate office as an Operations Consultant and progressed into various management roles in both the McOpCo and franchisee side of the operations team. I was promoted to my current role in May 2016.

McDonalds' Restaurants

6. McDonald's operates restaurants directly through company-owned restaurants (i.e. McOpCo Restaurants) and indirectly through Franchisee Restaurants.
7. As at 7 May 2020, there were 996 McDonald's restaurants in operation in Australia. Of those restaurants, 135 were McOpCo Restaurants and 861 were Franchisee Restaurants.
8. As at 7 May 2020, McDonalds' restaurants were located as follows:

State / Territory	Number of McOpCo Restaurants	Number of Franchisee Restaurants	Total
New South Wales	63	238	301
Victoria	25	240	265
South Australia	5	50	55
Western Australia	17	73	90
Northern Territory	0	9	9
Queensland	25	215	240
Australian Capital Territory	0	20	20
Tasmania	0	16	16
Total	135	861	996

9. McDonald's operates the following main categories of restaurants:
 - (a) Freestanding restaurants.

A freestanding restaurant is generally a restaurant that is located in a standalone building with its own car park. Freestanding restaurants also usually have a McCafe, McDelivery and a dining area.

Freestanding restaurants are located throughout Australia including in suburbs, regional areas and on interstate highways.

As at 7 May 2020, there were 760 freestanding restaurants. Of those, 113 were McOpCo Restaurants and 647 were Franchisee Restaurants.

(b) Food court restaurants.

A food court restaurant is a restaurant located in a retail environment, and which usually does not have its own restaurant dining area. Instead, it would share the dining space with other food outlets.

Food court restaurants are generally located in shopping centres.

As at 7 May 2020, there were 103 food court restaurants. Of those, 8 were McOpCo Restaurants and 95 were Franchisee Restaurants.

(c) Instore restaurants.

An instore restaurant might be attached to another building, for example, in a strip of buildings (and therefore differs to a freestander restaurant as it is not a standalone building). An instore restaurant typically does not have a drive-thru. Instore restaurants also typically do not have a car park but may have a shared customer parking space with other businesses. Instore restaurants are generally located in CBD, high-density suburban and high foot traffic locations.

As at 7 May 2020, there were 78 instore restaurants. Of those, 7 were McOpCo Restaurants and 71 were Franchisee Restaurants.

(d) Other.

There are some restaurants that do not fit into the above three categories. For example, there are restaurants that are located on the same site as a petrol station, some as part of a designated service centre.

As at 7 May 2020, there were 55 such restaurants. Of those, 7 were McOpCo Restaurants and 48 were Franchisee Restaurants.

McDonalds' Employees

10. As at 30 March 2020, there were 107,556 employees employed at McDonalds' restaurants. This includes:

	Number at McOpCo Restaurants	Number at Franchisee Restaurants	Total
Full-time employees	882	4,703	5,585
Part-time employees	2,908	13,735	16,643
Casual employees	13,610	71,718	85,328
Total	17,400	90,156	107,556

11. As at 2 March 2020, there were 9603 employees employed at McDonalds' restaurants under the age of 16, as follows:

Number at McOpCo Restaurants	Number at Franchisee Restaurants	Total
1,650	7,953	9,603

12. Franchisees are provided with training, guidance and recommendations by McDonald's relating to the practices that they should follow in relation to recruitment and rostering.

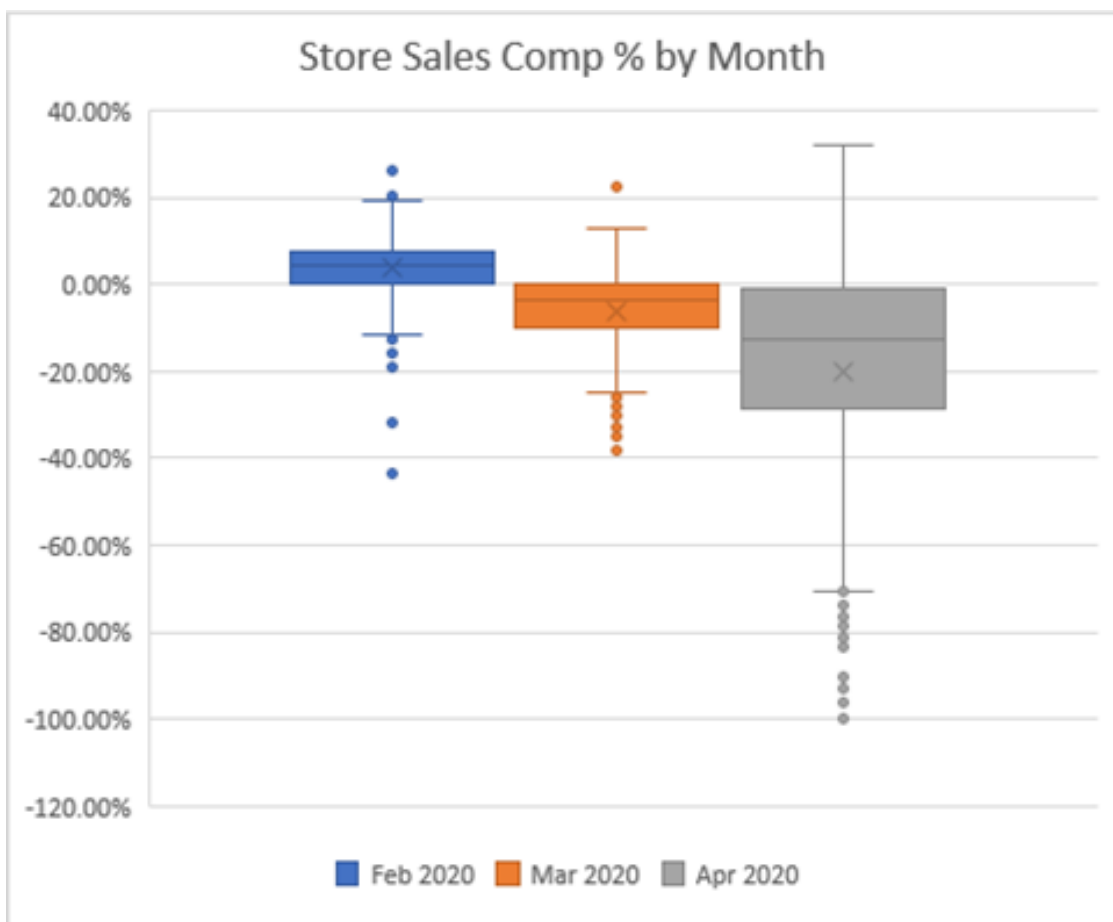
The Impact of COVID-19

13. As a result of Government restrictions implemented to stop the spread of COVID-19:
- (a) Dine-in areas in all freestanding and instore restaurants have been closed. These stores are offering only drive thru, takeaway and delivery.
 - (b) Customers of food court restaurants have not had access to a dine-in area. 68 restaurants were closed as at 30 April 2020. McDonald's is actively working to re-open restaurants where we can, but where this has occurred there are different trading hours, reduced service offerings (i.e. limited menus) and reduced staff levels. We have opened 28 of the previously closed restaurants but have not made a decision about when or how many of the additional stores will be reopened in the near future.

14. In the last 4 – 5 days, Commonwealth, State and Territory Governments have announced changes to the restrictions implemented to date. Some of these relate directly to the operations of restaurants and cafes.
15. It is my understanding that in NSW, up to 10 persons are permitted to be seated at a restaurant. In addition, other social distancing measures (such as maintaining a 1.5 metre distance between persons and there being only one person for every 4 square metres) are to be observed.
16. As at the time of signing this statement, McDonald's is reviewing what changes will be made to its operations in NSW and ACT as a consequence of those announcements.
17. A typical McDonald's restaurant would seat considerably more than 10 customers at one time. In some McDonalds' restaurants, 10 seats would constitute as little as 10% of its total seating capacity.
18. Though the dining areas of many McDonalds' restaurants may be partially reopened in light of the easing of restrictions, I do not anticipate that this will result in an increase in the need for employees beyond what is currently required. This is in part because the level of customer demand in light of the eased restrictions remains unpredictable. In any event, I do not expect that the eased restrictions will result in customer demand that matches pre-pandemic volumes or peaks in the foreseeable future.
19. In addition, the volume of work associated with, for instance, cleaning tables after customers leave, will not be sufficient to justify rostering any additional employees to those currently rostered to work. Existing employees would absorb these tasks.
20. There are various operational challenges that accompany reopening in a way that complies with the most recent government announcements. This includes monitoring the number of people that have entered and are seated in the restaurant. If these issues or difficulties outweigh the benefit of reopening a dining area (or are too difficult to manage appropriately) we may need to review any decision to reopen the area.

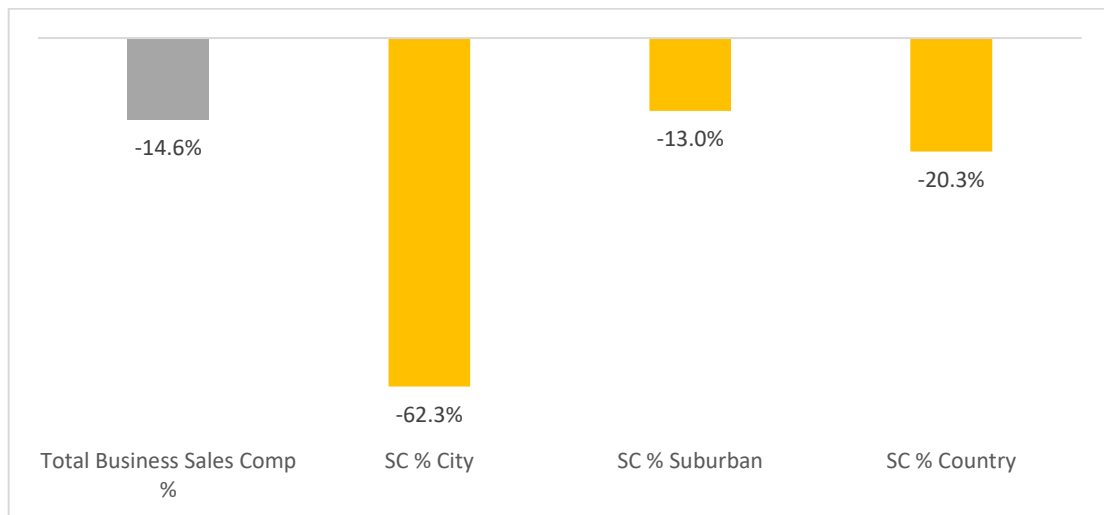
21. I have observed a significant variation in the extent to which McDonalds' restaurants have been impacted by COVID-19. Whilst not all restaurants have been impacted in the same way, some have been severely impacted. I have not previously observed greater disparity in the performance of McDonalds' restaurants.
22. Chart 1 reflects the standard deviation of performance of McOpCo and Franchisee Restaurants during February 2020, March 2020 and April 2020. It identifies that the standard deviation was greatest in April 2020.

Chart 1: Standard deviation of performance of restaurants (February – April 2020)



23. I have observed a correlation between the extent of the impact on McDonalds' restaurants and the location of the restaurant. I provide examples below. The charts identify sales comp data (i.e. a comparison of sales from restaurants that were open in April 2020 as compared to the same restaurants in April 2019).
24. *First*, restaurants located in CBDs have experienced a more significant downturn in sales than restaurants located in suburbs.
25. Chart 2 compares combined sales at McOpCo Restaurants and Franchisee Restaurants during April 2020 against the same set of restaurants during April 2019 by reference to the location of the restaurants. It identifies an overall reduction of 14.6% in sales and highlights a reduction of over 60% in city restaurants.

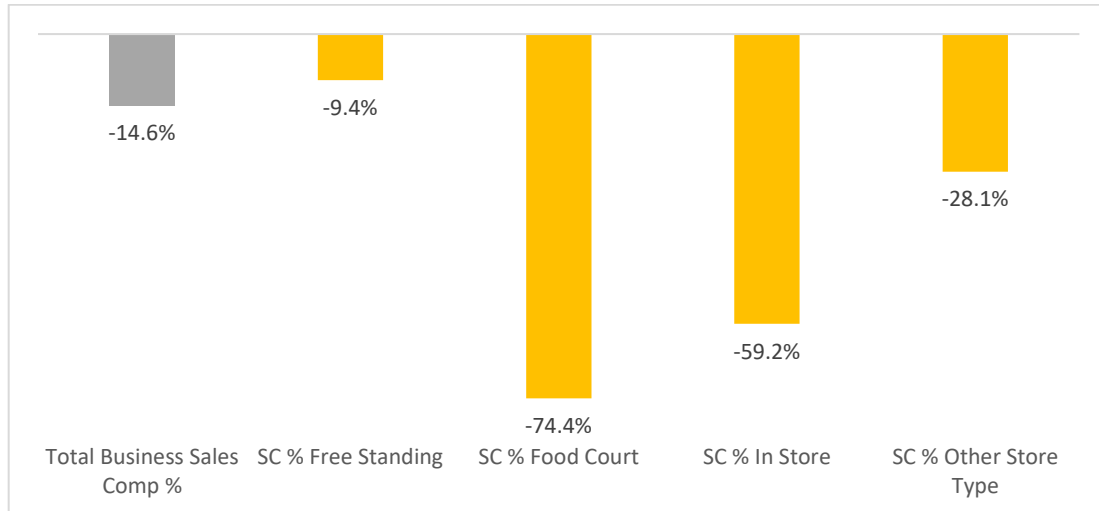
Chart 2: Reduction in sales, total and by location (April 2020)



26. *Second*, restaurants located in a food court have experienced a more significant downturn in sales than restaurants that have a drive-thru. Many of these were closed in April 2020 because they could not viably continue to trade.
27. Chart 3 compares combined sales at McOpCo Restaurants and Franchisee Restaurants during April 2020 against the same set of restaurants during April 2019 by reference to restaurant type. As can be seen, sales at restaurants in food courts were more than 74% lower than April 2019 and sales at instore

restaurants were almost 60% lower. By comparison, sales at free standing restaurants were 9.4% lower than they were in April 2019.

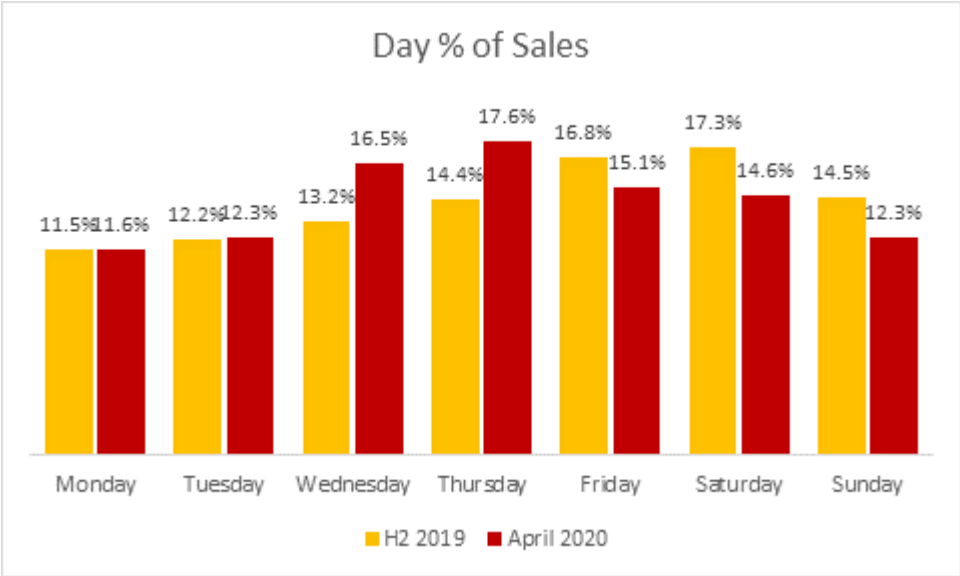
Chart 3: Reduction in sales, total and by restaurant type (April 2020)



28. *Third*, some restaurants located on highways between cities or major towns have experienced a very significant downturn. For instance, a McDonald's restaurant located on a highway between Sydney and Newcastle has experienced a reduction of 63.4% in sales during April 2020 as compared to April 2019.
29. *Fourth*, the four McDonalds' restaurants located within the domestic and international terminals at Sydney airport employ 403 employees. They are currently closed. Eighty-seven of those employees are full-time or part-time employees.
30. There have also been changes to patterns of consumer demand by reference to specific times of the day and days of the week:
 - (a) Lunch times are proportionally busier than they were previously whilst demand at dinner time has fallen.
 - (b) The demand at breakfast time has fallen. This includes a significant portion of our coffee sales. For instance, customers who used to regularly buy breakfast and coffee on their way to work are no longer doing so, because they are working from home.

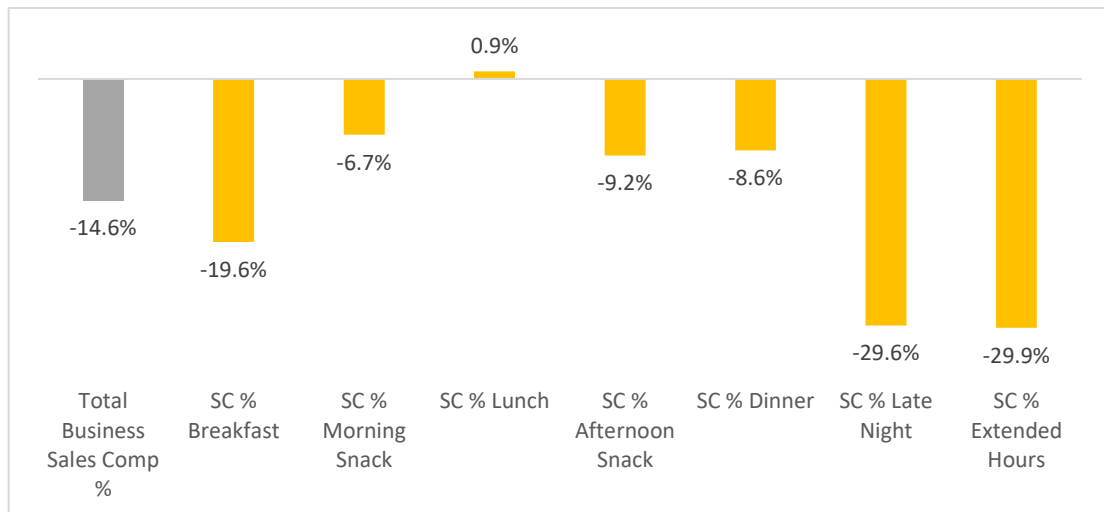
- (c) The late night / early morning demand has fallen. For instance, customers who would ordinarily visit a McDonald's restaurant after finishing a late night shift or after spending a night out with friends are not currently doing so.
- (d) Weekends have become quieter. In many stores where weekends are normally the busiest part of the week, they have become quieter than some weekdays. For instance, Saturdays are ordinarily a busy day at many restaurants due to customers who visit in the course of attending sporting activities. Many of those sporting activities have not been occurring recently due to COVID-19. This can be seen from Chart 4, which identifies the proportion of sales on each day of the week during July – December 2020 as compared to April 2020.

Chart 4: Percentage of sales by day of the week.



31. The evidence at paragraphs (a) – (c) above is demonstrated by Chart 5 below. It shows changes to sales in April 2020 as compared to April 2019 by references to times of the day:

Chart 5: Performance by daypart (April 2020)



32. In general, the level of demand for McDonalds' services and products is affected by the extent to which people are out of their homes undertaking other activities. It is common for customers to call into a McDonald's restaurant while they are on their way to or from undertaking other activities, rather than necessarily leaving their house specifically for the purpose of visiting one of our restaurants. Accordingly, the extent to which people are not travelling to or from work or other activities has an impact upon our sales.
33. As things currently stand:
- (a) McOpCo Restaurants and its employees are not eligible for assistance through the Jobkeeper scheme.
 - (b) McDonald's expects that only some Franchisees and their employees are eligible for assistance through the Jobkeeper scheme.
34. In some cases, a Franchisee is not eligible for Jobkeeper because they own multiple restaurants and while there may have been a significant decline in trade in one restaurant, sales have remained sufficient in the other restaurant or restaurants such that the revenue for the group has not fallen below 30%.

Measures taken to Address the Impact of COVID-19

35. To date the measures that have been implemented at McDonalds' restaurants in order to mitigate the impacts of COVID-19 include:
- (a) Some restaurants have been closed. As at 30 April 2020, 68 McDonalds' restaurants were temporarily closed for reasons associated with COVID-19. This includes 13 McOpCo Restaurants and 55 Franchisee Restaurants.
 - (b) Some restaurants have reduced their hours of operation. As at 30 April 2020, 83 McDonalds' restaurants had temporarily reduced their hours of operation for reasons associated with COVID-19. This includes 1 McOpCo Restaurant and 82 Franchisee Restaurants.
 - (c) A significant number of casual employees engaged at either McOpCo Restaurants or Franchisee Restaurants have not been rostered to work or have been rostered to work fewer hours than they are ordinarily rostered to work.

The Impact of COVID-19 on Labour Requirements

36. I make the following observations about the impact that the pandemic has or is having on the need for employees in both McOpCo Restaurants and Franchise Restaurants and associated issues:
- (a) In restaurants that have closed down there is generally little or no need for employees to undertake work at the restaurant.
 - (b) The number of employees that are needed to run a store will depend upon how busy it is. Where there is a reduction in sales volumes at a McDonald's restaurant, fewer employees will typically be needed to efficiently run the restaurant. As a consequence of the slowdown in trade associated with COVID-19, many stores that are still trading now need fewer employees to operate.

- (c) In many instances, in both McOpCo and Franchisee Restaurants, there has not been a need for some full-time and part-time employees to undertake the work that they would usually perform. This has either occurred because the restaurant is quiet but still trading or because all or part of the store has closed.
- (d) In some cases McOpCo has, to date, continued to provide work to full-time and part-time employees in circumstances where the work is not really necessary in order to maintain the efficient operation of the store but it has continued to do so in preference to terminating the employees.
- (e) It is not uncommon for permanent employees to work predominantly or exclusively in a certain part of a restaurant. For example, some employees mainly work in connection with the dining room area of a restaurant. This would include employees who are responsible for activities such as cleaning the dining room area, assisting customers to utilise in-store kiosks, hosting children's birthday parties or undertaking other service-related tasks. Much of this work is not currently required because of either government restrictions on the operation of restaurants or the decline in trade.
- (f) Employees who work in one part of a McDonald's restaurant will often not have the skills required to work in another part of the restaurant. For example, the performance of certain roles in the drive-thru operations require an employee to have undertaken specific training and have significant experience before they can be performed effectively. Similarly, an employee who works on one 'station' in the kitchen may not be able to undertake work in other parts of the kitchen without undertaking specific training. This has meant that full-time or part-time employees who are not currently required to perform their usual work cannot always be given work in other roles, even if it is available.
- (g) Many of the casual employees that were working at either McOpCo Restaurants or Franchisee Restaurants are either not currently being allocated work or are being allocated less work.

- (h) Currently part-time employees work at specific days and times that have been agreed in accordance with clause 12 of the Award. In the vast majority of circumstances, those agreements were reached before McDonalds' restaurants were impacted by the COVID-19 pandemic. In many instances the arrangements were based upon a combination of employee preferences and assumed staffing requirements of the relevant restaurant given typical trading patterns.

The changes to trading patterns described earlier in this statement have resulted in fundamental changes to when McDonald's restaurants need employees to work. The agreements previously reached with part-time employees do not reflect these changes. This has resulted in a misalignment between the agreed hours of work for part-time employees and the times that the restaurant needs them to work. In some cases, there is simply insufficient work for these employees to be usefully or efficiently employed during their typical hours of work.

37. To date, McOpCo Restaurants have not terminated any employees by reason of redundancy due to COVID-19. This is a result of various strategies that have been implemented in order to try and avoid needing to make employees redundant.
38. In some instances, McDonald's has attempted to provide alternate work for employees employed at McOpCo Restaurants that have closed down at another McOpCo Restaurant.
39. As explained above, not all employees employed in a restaurant possess the skills required to perform all roles within a restaurant. For instance, an employee employed to assist customers in the dine-in area of a restaurant may not know how to make coffee in a McCafe. Similarly, airport staff are not skilled to perform drive thru operations.
40. In some cases, McDonald's has requested employees at certain McOpCo Restaurants to consider volunteering to take annual leave in order to create capacity for employees from another McOpCo Restaurant that is more significantly impacted to perform some paid work in lieu of them. While some

employees subsequently requested and were granted some annual leave, not all relevant employees have done so.

41. At some restaurants where there is not a genuine need for permanent employees to perform work, they have been requested to consider taking annual leave.
42. The aforementioned measures are intended to avoid making permanent changes to the size of McDonalds' workforce in order to withstand the impact of COVID-19.
43. McDonalds' strategies for dealing with COVID-19 are directed towards retaining its employees to the greatest extent possible. McDonald's deeply values its workforce and there is a strong desire to support our employees during the pandemic. Many employees engaged at McOpCo Restaurants and Franchisee Restaurants go on to pursue long careers with the organisation and the organisation endeavours to provide various pathways for career advancement and avenues for training to facilitate and promote this.
44. Notwithstanding the importance of retaining current employees, the reality is that we currently have many part-time and full-time employees that we cannot genuinely usefully employ for all of the hours that they have specifically been employed to work.
45. If, in various store locations, levels of demand do not return to typical levels and to typical trading patterns, McDonald's is unlikely to sustain the employment of its current permanent workforce unless it has some capacity to either arrange for some to take annual leave, unpaid leave, to otherwise reduce their hours of work or to engage part-time employees with greater flexibility.
46. It has also become apparent that while many employees at McDonalds' restaurants were willing to volunteer to take annual leave during school holidays, there is less desire amongst such employees to take leave now that school has recommenced.
47. The approach of asking employees to volunteer to take annual leave, transferring employees to another store or just continuing to let permanent employees work

even if they are not genuinely needed will not be sufficient to avoid the need to terminate some permanent employees working at McOpCo Restaurants unless there is an imminent and significant improvement in the trading environment.

Changes to Employee Availability

48. The availability of many casual and permanent employees has changed during the pandemic.
49. Many employees are now temporarily available to work at times or on days that they would not have been in the past due to other activities that they are engaged in being cancelled (such as community or sporting activities).
50. Some employees are indicating that they are wanting to work additional hours because their partners have suffered a loss of income or work.
51. Conversely, some employees are not available to work their usual hours due to their changed circumstances such as varied childcare responsibilities arising from school closures.
52. Some employees have indicated, in effect, that they either do not want to or are not available to work hours that they would ordinarily be expected to work for reasons associated with COVID-19.

The Proposed Changes to the Award

53. It is my understanding that the Award applies to McDonald's employees employed in its restaurants.
54. It is my understanding that an application has been made to vary the Award to introduce temporary changes regarding part-time employment, annual leave and close down.
55. I have reviewed the amended draft determination proposing these changes to the Award, which was filed by the Australian Industry Group on 5 May 2020.
56. The changes proposed would assist us to avoid the need to reduce our workforce. They may also assist us to offer additional work to employees or even to employ additional employees covered by the Award.

Proposed Part-time Employment Clause

57. McDonald's engages part-time employees in accordance with the Award on arrangements that are very inflexible. For example, because of the Award, we engage part-time employees to work a set number of hours each day, to work on set days of the week and in accordance with set starting and finishing times. We have set arrangements for when meal breaks will be taken.
58. I have previously explained that changes to patterns of customer demand and trade has in some cases resulted in a misalignment between agreed hours of work of part-time employees and the restaurants' need for them to work. I have also previously explained that in some cases there is simply no need for part-time employees to work all of their previously agreed hours. For instance, part-time employees engaged to perform early-morning shifts to cover breakfast time in some restaurants are no longer genuinely needed at those times, because of significantly reduced demand. This issue impacts a significant number of restaurants that have a drive thru facility.
59. Without an ability to agree with a part-time employee that they will temporarily work different hours on a more flexible basis, I am concerned that there may not be a need for certain part-time positions to continue and that as a result, such positions will be redundant.
60. I understand that under the proposed new clause, McOpCo and Franchisee Restaurants would need to guarantee a specific number of hours per week (minimum of 8) and that we would need to roster such hours on days and at times that the employee is available, but would not need to agree on precise starting and finishing times as well as break times that would apply on an ongoing basis.
61. I understand that the proposed clause would only operate with the agreement of an employee.
62. I expect that in circumstances where part-time employees are working in restaurants where there is not currently a real need for them to work the precise hours that were previously agreed, the proposed provisions would enable restaurants to alter rostering practices so that the existing employees' hours of

work better match current levels of customer demand, if the employee agreed to the arrangement.

63. I expect that in some circumstances the provisions will also enable stores to offer potential new permanent part-time opportunities with some guarantee of hours of work even though the restaurant cannot be certain of the precise hours of work that will be undertaken each day or week. As things hopefully improve the restaurants will also be able to offer additional hours.
64. I expect that the provisions will result in both McOpCo Restaurants and Franchisee Restaurants being more prepared to offer additional hours to part-time employees beyond their 'guaranteed hours' rather than trying to struggle through busier period with less employees in order to avoid paying overtime rates. McDonald's restaurants generally endeavour to roster part-time employees in a way that avoids or at the very least minimises the additional cost of paying overtime rates.
65. If employees agree to temporarily work under the proposed part-time work arrangements, it will provide restaurants with a better capacity to adjust staffing levels to reflect changes in patterns in customer demand than is available under the current arrangements. This would assist greatly as it is very difficult to predict how patterns of customer demand and staffing requirements will change in the months ahead.

Proposed Annual Leave Clause

66. The taking of annual leave by permanent employees is an alternative to making employees redundant in circumstances where there is insufficient work for the employees to perform.
67. There are many employees at McOpCo Restaurants and Franchisee Restaurants that have more than 2 weeks of annual leave.
68. I expect that McDonalds' restaurants would utilise the proposed clause where they are unable to provide an employee with enough work due to the impact of

COVID-19 as an alternate to terminating the employee's employment by reason of redundancy.

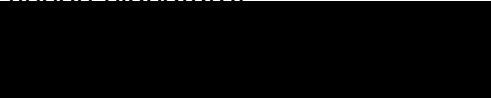
69. I expect that some restaurants may use the provisions to request employees to take accrued annual leave as a way of addressing the problem of having more permanent staff currently employed than is necessary or sustainable in the face of low levels of demand. Again, I expect that it would be used in such circumstances as a way of delaying making any decision to implement redundancies.

Proposed Close Down Clause

70. I expect that McDonalds' restaurants would utilise the proposed clause where it considers it necessary to close down a restaurant or part of a restaurant due to a substantial downturn in sales and where alternate work cannot be found for the employee.

71. The proposed clause would enable the restaurant to place full-time and part-time employees on annual leave or unpaid leave and maintain the employment relationship with them rather than terminating the employees' employment for reason of redundancy.

[insert signature]

A solid black rectangular box redacting the signature of Cameron Newlands.

Cameron Newlands

Date: 12 May 2020