DECISION

Fair Work Act 2009
s.157—Variation of a modern award to achieve the modern awards objective

Application by Australian Industry Group
(AM2020/20)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, 19 MAY 2020

Application to vary the Fast Food Industry Award 2010 to achieve the modern awards objective

1. Background

[1] This Decision concerns an application to vary the *Fast Food Industry Award 2010* (MA000003) (the Fast Food Award) filed by the Ai Group on Friday 1 May 2020 (the Application).

[2] Ai Group, the Shop, Distributive and Allied Employees' Association (the SDA) and the Australian Council of Trade Unions (the ACTU) have been in discussions directed at reaching a consent position on changes to the Fast Food Award to mitigate the impact of COVID-19 on employees and employers covered by the award. The Application was the product of those discussions.

[3] The Application seeks to insert a new Schedule – Schedule H – into the Fast Food Award. Schedule H provides for:

- a temporary and alternate scheme for part time employment;
- clause H.8 provides that, in certain circumstances an employer may request that an employee take paid annual leave. The employee is obliged to consider and not unreasonably refuse the request; and
- subject to a series of safeguards clause H.9 enables an employee to require an employee to take annual leave as part of a close down of its operations or part of its operations.

[4] On 3 May 2020, we issued a statement (the May Statement)[1] setting out the background to the application and expressed a *provisional* view that 'taking into account the relevant s 134 considerations … the variation of the Fast Food Award as proposed in the Application is necessary to achieve the modern awards objective'.[2]

[5] In the May Statement we invited any interested party to file a written submission supporting or opposing the Application and the *provisional* view set out at paragraph [19] by 12 noon on Tuesday 5 May 2020.

[6] On 5 May 2020, Ai Group lodged an amended draft variation, incorporating a minor drafting change to clause H.9.3.

[7] As the Application was opposed (by the Retail and Fast Food Workers Union (RAFFWU)) the matter was the subject of a hearing on Tuesday 5 May 2020. The transcript of the hearing is available here. At the end of the hearing we indicated that, on the material before us at that time, we were not persuaded to grant the variation sought by Ai Group.[3] We also said we were prepared to give Ai Group the opportunity to file evidentiary material directed at two matters:

- the impact of the measures that have been put in place in response to the COVID-19 pandemic on businesses that would be affected by the Application; and

- how the measures that are being proposed will assist in meeting what is said to be the parties' shared objective of retaining as many people in employment as possible, or in connection with their employment as possible during this period.[4]

[8] At around 4:30pm on Thursday, 7 May 2020 Ai Group advised it would be in a position to file evidentiary material in support of the Application by 5pm Tuesday, 12 May 2020.

[9] On 8 May 2020 we issued the following directions:[5]

> 1. The Applicants or any party supporting the application is to file submissions and evidentiary material including witness statements, by **5pm Tuesday, 12 May 2020**.
>
> 2. Any party opposing the application is to file submissions and evidentiary material by **5pm Wednesday, 13 May 2020.**
>
> 3.Parties wishing to cross-examine any witness are to advise chambers.ross.j@fwc.gov.au by **12pm Thursday, 14 May 2020**.

[1] [2020] FWCFB 2301.

[2] Ibid at [19].

[3] Transcript, 5 May 2020 at PN173.

[4] Transcript, 5 May 2020 at PN173.

[5] [2020] FWCFB 2428.

4. This matter will be listed for hearing at **9am Friday, 15 May 2020**.

5. Parties are to provide contact details for the hearing and those of any witnesses required for cross-examination to chambers.ross.j@fwc.gov.au by **4pm Thursday, 14 May 2020**.

6. All submissions and evidence are to be sent in word format to chambers.ross.j@fwc.gov.au.

[10] RAFFWU filed an objection to the directions on 8 May 2020, in the following terms:

'We note the applicant has been granted 7 days to file its materials in support of its application.

Those opposing have been granted 24 hours to reply to that material.

The applicant has been granted 40 hours prior to hearing after receipt of the materials of opposers.

The nature of the application makes it very difficult to identify the foundation of the case of the applicant. The Full Bench stated on transcript:

> We are prepared to give you an opportunity to file some evidentiary material going to two issues from the perspective of your clients, those that are award reliant, that is, the impact of the measures that have been put in place in response to the Covid-19 pandemic on their business and perhaps more importantly, how the measures that are being proposed will assist in meeting what is said to be the parties' shared objective of retaining as many people in employment as possible, or in connection with their employment as possible during this period.

Without this material it is difficult to comprehend how an opposer may respond to the proposed variation.

We submit 24 hours to respond to the material of the applicant is manifestly insufficient. We note the 7 days which the applicant has had not to mention the weeks before filing its original application. We submit the shortest period for opposers should be at least 7 days. We ask that this be brought to the attention of the Full Bench.'

[11] In response to RAFFWU's correspondence we issued the following revised directions:

1. The Applicants or any party supporting the application is to file submissions and evidentiary material including witness statements, by **5pm Tuesday, 12 May 2020**.

2. Any party opposing the application is to file submissions and evidentiary material by **5pm Thursday, 14 May 2020.**

3. Parties wishing to cross-examine any witness are to advise chambers.ross.j@fwc.gov.au by **10am Friday, 15 May 2020**.

4. This matter will be listed for hearing at **2pm Friday, 15 May 2020**.

5. Parties are to provide contact details for the hearing and those of any witnesses required for cross-examination to chambers.ross.j@fwc.gov.au by **4pm Thursday, 14 May 2020**.

6. All submissions and evidence are to be sent in word format to chambers.ross.j@fwc.gov.au.

[12] The revised directions provided those opposing the Application (i.e. RAFFWU) an additional 24 hours in which to file submissions and evidentiary material. The hearing was also moved, from 9am to 2pm on Friday 15 May 2020.

[13] There is no doubt that the Commission is bound to 'act judicially', which includes an obligation to afford parties procedural fairness. But the application and content of the doctrine of procedural fairness is determined by the context. As Mason J observed in *Kioa v West*:

> 'What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision - maker is acting.'[6]

[14] The following general observation of Buchanan J (with whom Marshall and Cowdrey JJ agreed) in *Coal Allied Mining Services Pty Ltd v Lawler and Others*, is also apposite:

> '...it is an important aspect of the work of [the Commission]...that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit...It is not inappropriate to say that the members of [the Commission] have a statutory mandate to get to the heart of matters as directly and effectively as possible.'[7]

[15] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:

- is fair and just; and
- is quick, informal, and avoids unnecessary technicalities.

[16] The key contextual considerations in the matter before us are:

- the statutory framework;
- the support of key interested parties (the SDA and ACTU); and
- the need for expedition in order to respond quickly to mitigate the adverse consequences of the COVID-19 pandemic on employers and employees covered by the Fast Food Award.

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[6] (1985) 159 CLR 550 at [32]; see [2015] FWCFB 210.

[7] [(2011) 192 FCR 78 at [25].

[17] A Statement in relation to the Application was published on the Commission's website and sent to all subscribers on 3 May 2020. Any interested party was provided with an opportunity to respond to the Application and to participate in the hearings on 5 and 15 May 2020. In these circumstances we are satisfied that we have met our obligation to afford procedural fairness to those affected by the Application. In particular, RAFFWU has been provided with a reasonable opportunity to respond to the Application and the evidence filed by Ai Group.

[18] Submissions have been filed by:

- Ai Group (Attachment B to the Application of 1 May 2020, 12 May 2020, 15 May 2020 and 15 May (Additional document));
- National Retail Association (NRA) (4 May 2020);
- RAFFWU (5 May 2020 and 14 May 2020);
- SDA (6 May 2020, 14 May 2020 and 15 May 2020); and
- The Hon Christian Porter MP, Commonwealth Minister for Industrial Relations (the Minister) (12 May 2020).

[19] A further hearing took place at 2pm on Friday, 15 May 2020. The transcript of that hearing is available here.

[20] Ai Group filed a witness statement by Mr Cameron Newlands.[8] Mr Newlands is employed by McDonald's Australia Limited (McDonald's) in the role of Market Director – NSW and ACT. Mr Newlands was not required for cross-examination and we deal with his evidence later.

[21] RAFFWU filed a witness statement[9] by Mr Joshua Cullinan, secretary of RAFFWU. Mr Cullinan was not required for cross-examination and we deal with his evidence later. It is convenient to note here that while Ai Group did not object to the admission of Mr Cullinan's statement it submitted that certain aspects of his evidence should be given little, if any, weight. Ai Group filed a table[10] in which it identified certain paragraphs and sentences of Mr Cullinan's statement which it characterised (variously) as hearsay, opinion or a submission, and on that basis submitted that the relevant sentence or paragraph 'should be attributed little if any weight'.[11]

[22] Counsel for RAFFWU did not advance any submissions in respect of the table filed by Ai Group or Ai Group's characterisation of various parts of Mr Cullinan's evidence. In these circumstances we accept Ai Group's characterisation as set out in the table filed and will accord little weight to the sentences and paragraphs identified.

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[8] Exhibit AIG1.

[9] Exhibit RAFFWU1.

[10] Ai Group submission – further – additional document, 15 May 2020.

[11] Transcript 15 May 2020 at PN44 – PN46.

2. COVID-19 Pandemic

[23] The Application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed here. The Information Note was most recently updated on 12 May 2020.

[24] Relevantly, for present purposes:

- Since midday on 23 March 2020, restrictions on operations were placed on, relevantly, restaurants and cafes.

- Further measures were announced on 24 March 2020 which applied from midnight on 25 March 2020. In particular, restrictions were placed on the opening of food courts (takeaway or home delivery remained operational).

- Since 29 March 2020, the Federal Government has advised people to stay at home unless partaking in a very limited range of activities:

    - Shopping for what is needed – food and other essential supplies;
    - Medical or health care needs, including compassionate requirements;
    - Exercise in compliance with the public gathering requirement; and
    - Work and study, if it cannot be done remotely.

- Since 29 March 2020 the Federal Government has also imposed a limitation on the number of persons that can gather together. The general requirement is not more than two persons, with the exception of people of the same household and family units. In recent days, some of these restrictions have been eased slightly in certain states. For example, in New South Wales, from 1 May 2020, two adults may visit another household.

[25] On 8 May 2020, the Commonwealth Government announced a 3-step plan, called the Roadmap to a COVIDSafe Australia for the easing of COVID-19 restrictions. The Minister's submission notes that under that framework, and in relation to cafés, restaurants and food courts, provides as follows:

> (a) **Step One** - cafes and restaurants will be able to seat up to 10 patrons at a time but will need to maintain an average density of 4m^2 per person. Food courts will remain closed, and restrictions on local and regional travel may be lifted.
>
> (b) **Step Two** - cafes and restaurants will be able to seat up to 20 patrons at a time but will need to maintain an average density of 4m^2 per person. Food courts will remain closed to seated patrons. Caravan parks or camping grounds will be able to open and restrictions on some interstate travel may be lifted.

(c) **Step Three** – cafes, restaurants and food courts will be able to seat up to 100 patrons at a time but may need to maintain an average density of $4m^2$ per person. Arrangements under step three will be the 'new normal' while the virus remains a threat. Restrictions on all interstate travel may be relaxed. International travel and mass gatherings over 100 people will remain restricted.

[26] Ai Group's submission of 12 May identifies the relevant announcements made to the date of its submission, as follows:

(a) Though some restrictions have been eased in Victoria, no changes concernin the operation of restaurants and cafes have 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.

[27] In relation to these changes Ai Group submits:

> '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.'[12]

[28] We accept Ai Group's characterisation of the changes announced so far, as 'incremental'. We also accept that they will not enable fast food outlets to return to business as usual.

[29] In his statement Mr Newlands deals with the recent easing of COVID-19 restrictions and notes that McDonald's is currently reviewing what changes will be made to its operations in NSW and ACT as a consequence of recent announcements regarding the lifting of some restrictions relating to the operation of restaurants and cafes. At [17] – [20] Mr Newlands' evidence is:

> '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.
>
> 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

[12] Ai Group submission 12 May at para [15].

> that the eased restrictions will result in customer demand that matches pre-pandemic volumes or peaks in the foreseeable future.
>
> 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.
>
> 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.[13]

[30] The Commission has made a number of decisions to insert short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[31] The Commission has granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010;*[14]
- *Clerks – Private Sector Award 2010;*[15]
- *Restaurant Industry Award 2010;*[16] *and*
- *Educational Services (Schools) General Staff Award 2010*.[17]

[32] In addition, we recently determined a contested application to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (Vehicle Award).[18]

[33] Further, on 8 April 2020 a Full Bench of the Commission issued a decision[19] (the April 2020 Decision) to vary 99 modern awards to insert a new Schedule – 'Schedule X: Additional measures during the COVID-19 pandemic'. Schedule X provides an entitlement to unpaid 'pandemic leave' and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission's decision:

- Information Note on modern awards and industries;
- Information Note on bargaining by business size;
- Information Note on Government responses to the COIVD-19 pandemic; and
- Expert report by Professor Borland.

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[13] Exhibit AIG1 at paras [17 – [20].

[14] [2020] FWCFB 1574

[15] [2020] FWCFB 1690

[16] [2020] FWCFB 1741

[17] [2020] FWCFB 2108

[18] [2020] FWCFB 2367

[19] [2020] FWCFB 1837

3. The Fast Food Industry and the impact of the COVID-19 pandemic

3.1 The Fast Food Industry - General

[34] The Fast Food industry can be broadly characterised as involving the production of non-preservable items in that the food produced is for immediate consumption, rather than stored for later use or sale.[20] The *Fast Food Award* defines the 'Fast Food industry' as:

> '… the industry of taking orders for and/or preparation and/or sale and/or delivery of:
>
> - Meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
> - Take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
> - Food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment.'[21]

[35] Further, in the Penalty Rates Decision,[22] the Full Bench made the following observation about the Fast Food sector:

> 'The industry is comprised of about 24,600 establishments[23] which operate in a number of industry sub-sectors (see [1350]). In terms of employee numbers the industry is dominated by the QSR (Quick Service Restaurants) 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.[24]

[36] As noted above, just under half of Fast Food industry employees are employed by McDonalds. In December 2019, the Commission terminated[25] the enterprise agreement that applied to all McDonald's outlets in Australia. McDonald's is the largest fast food chain in Australia and the Fast Food Award now applies to its employees.

[37] As we have mentioned, Ai Group filed a witness statement by Mr Cameron Newlands.

[38] RAFFWU advanced a detailed critique of Mr Newlands' evidence, noting that:

- the evidence fails to distinguish between the impact on McOpCo restaurants and the impact on franchise restaurants;[26]

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[20] (2017) 256 IR 1 at [1265].

[21] *Fast Food Industry Award 2010* Clause 3.1

[22] [2017] FWCFB 1001.

[23] Exhibit SDA 56.

[24] Exhibit Ai Group 3 at para 23.

[25] *Re McDonald's Australia Enterprise Agreement 2013* [2019] FWCA 8563.

[26] RAFFWU submission, 14 May 2020 at paras [31] – [33].

- the evidence does not disaggregate the data as between franchise operators who have experienced a 30% downturn in revenue (and hence are eligible for JobKeeper) and those who have not, and would therefore be eligible for the proposed flexibilities;[27] and
- the failure to disaggregate the data means that evidence of the measures taken to address the impact of COVID-1928 is of no assistance to the Commission, because it fails to identify whether these measures affect franchise operators who are eligible for JobKeeper, or franchise operators who are not (or both).[29]

[39] RAFFWU contends that Mr Newlands' evidence is cast at such a high level of generality that it does not assist the Commission in its statutory task and submits:

> 'In short, it is not possible to determine from the data the number of franchise operators affected, nor to the degree to which they have been affected. Nor is there any data from which the effects can be extrapolated. The failure to call evidence about the financial situation of franchisees is unexplained. It can be inferred from the generalised datasets that have been provided that McOpCo is able to present its data on a franchise basis. It has failed to do so and has provided no explanation for that failure. In the absence of any evidence from McDonald's that it is unable to disaggregate the data, it should be inferred that McDonald's made a conscious choice to aggregate the data such that the Commission cannot readily distinguish between the impact on McDonald's stores and franchise stores.'[30]

[40] We acknowledge that Mr Newlands' evidence lacks particularity and that this limits its probative value. This is one of the reasons we have decided *not* to vary the award to include the proposed close down provision. Despite its obvious limitations there is some value in Mr Newlands' evidence and we have accorded it some weight in our deliberations. We refer to those aspects of his evidence in our consideration of the proposed flexibilities.

[41] At [6] – [12] of his Statement Mr Newlands describes McDonalds' operations. This material is uncontroversial and is summarised below.

[42] McDonald's operates restaurants directly through company-owned restaurants (i.e. McOpCo Restaurants) and indirectly through Franchisee Restaurants.

[43] As at 7 May 2020, there were 996 McDonald's restaurants in operation in Australia, of which 135 were McOpCo Restaurants and 861 were Franchisee Restaurants. The McDonalds' restaurants were located as set out in Table 1 below.

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[27] Ibid at paras [34] – [35].

[28] Exhibit AIG1 at para [35].

[29] RAFFWU submission, 14 May 2020 at para [36].

[30] Ibid at para [37].

Table 1: McDonalds' restaurants by location

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**

[44] McDonald's operates the following main categories of restaurants:

- 760 Freestanding restaurants:[31] a restaurant that is located in a standalone building with its own car park. Freestanding restaurants are located throughout Australia including in suburbs, regional areas and on interstate highways.

- 103 Food court restaurants:[32] 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.

- 78 Instore restaurants:[33] 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 or 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.

- 55 Other restaurants:[34] 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.

3.2 Fast Food Industry Employees

[31] Of those, 113 were McOpCo Restaurants and 647 were Franchisee Restaurants.
[32] Of those, 8 were McOpCo Restaurants and 95 were Franchisee Restaurants.
[33] Of those, 7 were McOpCo Restaurants and 71 were Franchisee Restaurants.
[34] Of those, 7 were McOpCo Restaurants and 48 were Franchisee Restaurants.

[45] In a decision dealing with some substantive claims to vary the Fast Food Award[35] (the *February 2019 Decision*) we set out a 'profile' of a typical Fast Food Industry employee. The material set out below is drawn from the *February 2019 Decision*.

[46] The ABS data of direct relevance to the Fast Food Award are limited. A paper[36] by Commission staff provides a framework for 'mapping' modern award coverage to the Australia and New Zealand Standard Industrial Classification (ANZSIC). Under this framework, the Fast Food Award is 'mapped' to the Takeaway food services industry class, which is at the ANZSIC 4-digit level. The Census is the only data source that contains all of the employment characteristics for the Fast Food Award.

[47] The most recent data from the Census, for August 2016, show that there were around 170 000 employees in the Fast Food industry. The profile of employees in the Fast Food industry differs from the profile of employees across 'all industries' in six aspects:

- employees in the Fast Food industry are more likely to be female (55.1 per cent compared to 50.0 per cent of employees across all industries);
- almost 9 in 10 (85.6 per cent) employees in the Fast Food industry are employed on a part-time basis (i.e. work fewer than 35 hours per week) compared with only 34.2 per cent of employees across all industries;
- more than half (57.3 per cent) of employees in the Fast Food industry work 1–15 hours per week compared with only 11.6 per cent of employees across all industries;
- almost 8 in 10 (79.5 per cent) employees in the Fast Food industry are aged between 15 and 24 years compared with only 16.6 per cent of employees across all industries;
- more than 6 in 10 (63.9 per cent) employees in the Fast Food industry are students (59.6 per cent are full-time students and 4.3 per cent study part time) compared with 13.7 per cent of employees across all industries; and
- almost half (48.8 per cent) of employees in the Fast Food industry had Year 12 or equivalent as their highest year of school completed compared with 68.1 per cent of employees across all industries.

[48] As to the terms and conditions of employment in Fast Food Industry, the ABS defines casual employees as employees without paid leave entitlements.[37] Over half of all employed persons (56.4 per cent) in Accommodation and food services were without paid leave entitlements in February 2020, compared with 20.2 per cent of employees across 'all industries' (Table 3).

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[35] [2019] FWCFB 272.

[36] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.

[37] ABS, *Characteristics of Employment, Aug 2018*, Catalogue No. 6333.0, Explanatory notes.

Table 2: Employed persons by status of employment in main job, February 2020

	Accommodation and food services		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
Employee	**827.7**	**88.5**	**83.5**
With paid leave entitlements	**300.1**	**32.1**	**63.3**
Without paid leave entitlements	**527.6**	**56.4**	**20.2**
Owner manager of enterprise with employees	**75.0**	**8.0**	**5.9**
Owner manager of enterprise without employees	**29.8**	**3.2**	**10.3**
Contributing family worker	**2.3**	**0.2**	**0.2**
Total	934.8	100.0	100.0

Note: All data are expressed in original terms.

Source: ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2020,* Catalogue No. 6291.0.55.003.

[49] When considering only employees, more than 6 in 10 employees (63.7 per cent) in Accommodation and food services were without paid leave entitlements, higher than for employees across 'all industries' (around one quarter or 24.2 per cent). Full-time employees in Accommodation and food services were more likely to be employed with paid leave entitlements (71 per cent), however, this proportion was lower than for employees across 'all industries' (88.3 per cent). Part-time employees in Accommodation and food services were more likely to be without paid leave entitlements (81.1 per cent), compared to over half of part-time employees across 'all industries' (52.2 per cent).

Table 3: Employees with and without paid leave, February 2020

	Full-time		Part-time		All employees	
	With paid leave (%)	**Without paid leave (%)**	**With paid leave (%)**	**Without paid leave (%)**	**With paid leave (%)**	**Without paid leave (%)**
Accommodation and food services	71.0	29.0	18.9	81.1	36.3	63.7
All industries	88.3	11.7	47.8	52.2	75.8	24.2

Source: ABS, Labour Force, Australia, Detailed, Quarterly, Feb 2020, Catalogue No. 6291.0.55.003.

[50] The profile of McDonald's employees is addressed in Mr Newlands' evidence.

[51] As at 30 March 2020, there were 107,556 employees employed at McDonalds' restaurants. Table 4 sets out the breakdown of these employees by employment category.

Table 4: McDonalds' employees

	Number at McOpCo Restaurants	Number at Franchisee Restaurants	Total	%
Full-time employees	882	4,703	**5,585**	**5.2**
Part-time employees	2,908	13,735	**16,643**	**15.5**
Casual employees	13,610	71,718	**85,328**	**79.3**
Total	**17,400**	**90,156**	**107,556**	**100.0**

[52] As at 2 March 2020, there were 9603 employees employed at McDonalds' restaurants under the age of 16, some 1650 employed in McOpCo restaurants and the remaining 7953 in Franchisee Restaurants.

[53] Young people are over-represented in the Accommodation and Food Services industry. Over half of employees in the industry are aged 15 to 24 years (51.5%)[38] The Minister's submission notes that:

> 'Previous experience from the Global Financial Crisis shows that young people (due to a relative lack of skills and experience) and small businesses (less equipped to deal with soft demand and less diversified in product offerings) are particularly vulnerable during downturns, as demonstrated by a sharp increase in the youth unemployment rate and a significant increase in small business closures relative to large businesses.'[39]

Low paid employees – Fast Food Industry

[54] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',[40] within the meaning of s.134(1)(a).

[55] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. These are compared to the minimum weekly wages in the Fast Food Award as determined in the *Annual Wage Review 2018–19*, effective 1 July 2019.

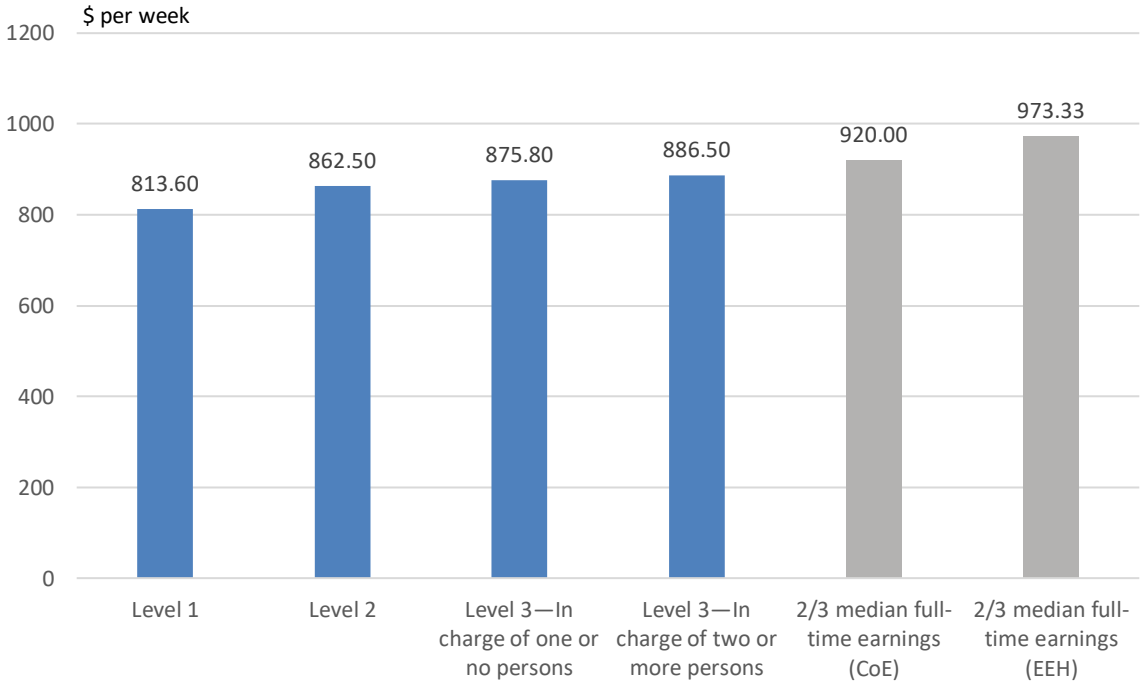
[56] Chart 1 shows that the full-time weekly wage for all classifications in the Fast Food Award was below both the CoE and EEH measures of two-thirds of median full-time earnings.

[38] ABS, Characteristics on Employment, cat. no. 6333.0, August 2019

[39] Minister's Submission at para [21].

[40] [2017] FWCFB 1001 at [166].

Chart 1: Comparison of minimum full-time weekly wages in the *Fast Food Industry Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000003; ABS, Characteristics of Employment, Australia, August 2019, Catalogue No. 6333.0; ABS, Employee Earnings and Hours, Australia, May 2018, Catalogue No. 6306.0.

3.3 The Impact of the COVID-19 Pandemic

[57] We note that in Professor Borland's report[41] (referred to at [33]) the fast food industry is identified as being one that "seem[s] most likely to experience decreases in employment as an immediate consequence of COVID-19".[42] The Fast Food 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".[43]

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

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

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

[58] Annexure B to the Application describes the impact of the COVID-19 pandemic on the Fast Food sector. Ai Group contends that:

> 'The operations of employers covered by the Award have been significantly impacted. In particular, fast food outlets have experienced a dramatic decline in demand from consumers. This appears to be attributable to:
>
> (a) 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.
>
> (b) A prohibition on people dining in food courts in shopping centres.
>
> (c) A prohibition on people dining in fast food restaurants.
>
> (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.
>
> The pressures on employers covered by the Award at this time 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.'[44]

[59] The Australian Bureau of Statistics (ABS) is releasing weekly administrative data from the Australian Taxation Office relating to changes in employee jobs and total wages paid as reported by businesses using single touch payroll systems. This covers a very large sample of employers, including around 99 per cent of employers with 20 or more employees and 71 per cent of employers with 19 or less employees.[45]

[60] Between the week ending 14 March 2020 (the week Australia recorded its 100th confirmed COVID-19 case) and 18 April 2020, the number of employee jobs in Accommodation and food services declined by 33.4 per cent (Chart 2), the largest decline across all industries. The decline in Accommodation and food services was more than 4 times larger than for all industries (–7.5 per cent) over the same period. Total wages similarly declined by 30.3 per cent in Accommodation and food service, compared with 8.2 per cent across all industries.

[61] The change in the number of employee jobs in Accommodation and food services has been relatively stable since the week ending 11 April 2020, while total wages have been stable since the week ending 4 April 2020. We return to this observation later.

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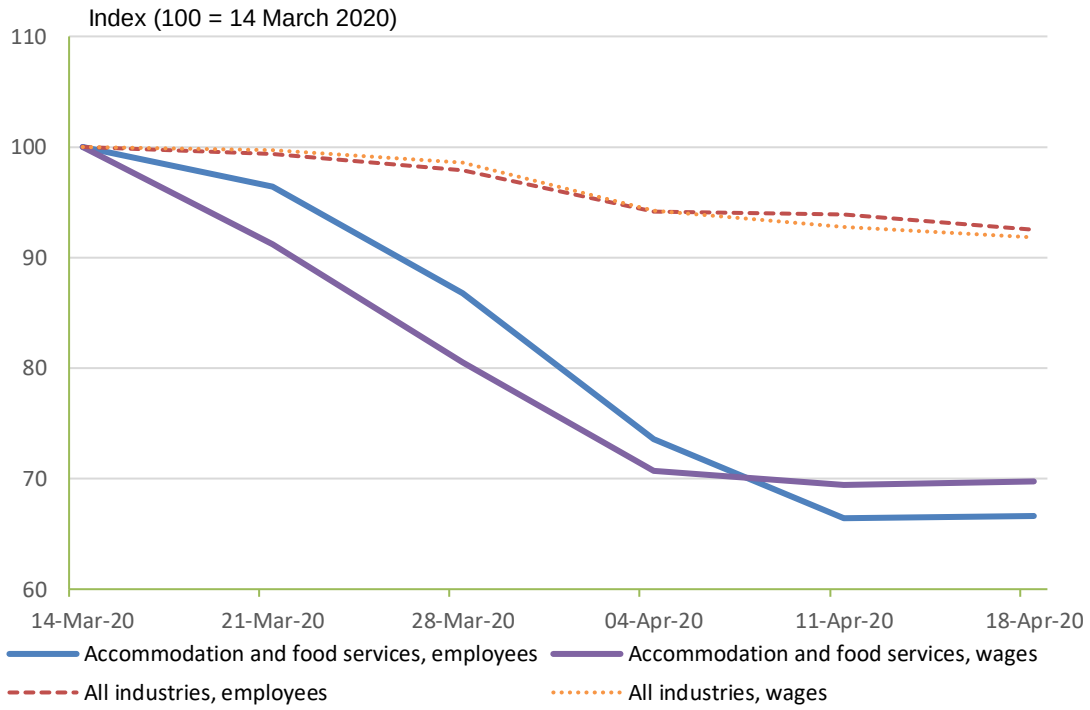
[44] Ai Group, Application at [7] – [8]..

[45] ABS, *Weekly Payroll Jobs and Wages in Australia, Week ending 18 April 2020*, Catalogue No. 6160.0.55.001.

Chart 2: Change in employee jobs and total wages, week ending



Note: Data are for the week ending.

Source: ABS, *Weekly Payroll Jobs and Wages in Australia, Week ending 18 April 2020*, Catalogue No. 6160.0.55.001.

[62] As identified in the Minister's submission, ABS data shows that:

(a) in April 2020, 88% of businesses in the Accommodation and Food Services industry anticipated reduced cash flow and 84% anticipated reduced demand for goods and services;[46]

(b) this industry contributes around $43 billion to the Australia economy per year,47 and employs over 827,000 employees, or 7.6 per cent of all employees;48

(c) more than two-thirds (68.8 per cent) of employees are remunerated based on modern awards or more generous individual arrangements (43.2 per cent and 25.7 per cent respectively).49

[63] Mr Newlands' evidence regarding the impact of the COVID-19 pandemic is set out at paragraph [13] of his statement where he states that as a result of Government restrictions implemented to stop the spread of COVID-19:

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[46] ABS, Business Indicators Business Impacts of COVID-19, cat. no. 5676.0.55.003, April 2020

[47] ABS, National Accounts, cat. no. 5206.0, December quarter 2019

[48] ABS, Labour Force Detailed Quarterly, cat. no. 6291.0.55.003, February 2020

[49] ABS, Employee Earnings and Hours, cat. no. 6306.0, May 2018

> '(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.'[50]

[64] Mr Newlands' evidence is that he has:

> '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.'[51]

[65] Chart 1[52] in Mr Newlands' statement shows 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.

[66] In his evidence Mr Newlands notes a correlation between the extent of the impact on McDonalds' restaurants and the location of the restaurant. The charts set out below show sales comparative data (i.e. a comparison of sales from restaurants that were open in April 2020 as compared to the same restaurants in April 2019). Mr Newlands sets out four examples to illustrate this point.

1. Restaurants located in CBDs have experienced a more significant downturn in sales than restaurants located in suburbs.

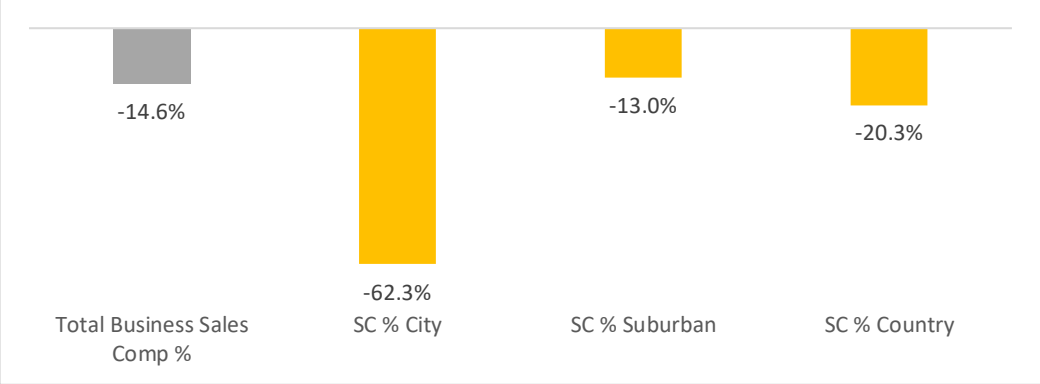
[67] Chart 3 below compares combined sales at McOpCo Restaurants and Franchisee Restaurants during April 2020 against the same set of restaurants during April 2019 by reference to the location of the restaurants. It identifies an overall reduction of 14.6% in sales and highlights a reduction of over 60% in city restaurants.

[50] Exhibit AIG1 at para [13].

[51] Exhibit AIG1 at para [21].

[52] Exhibit AIG1 at para [22].

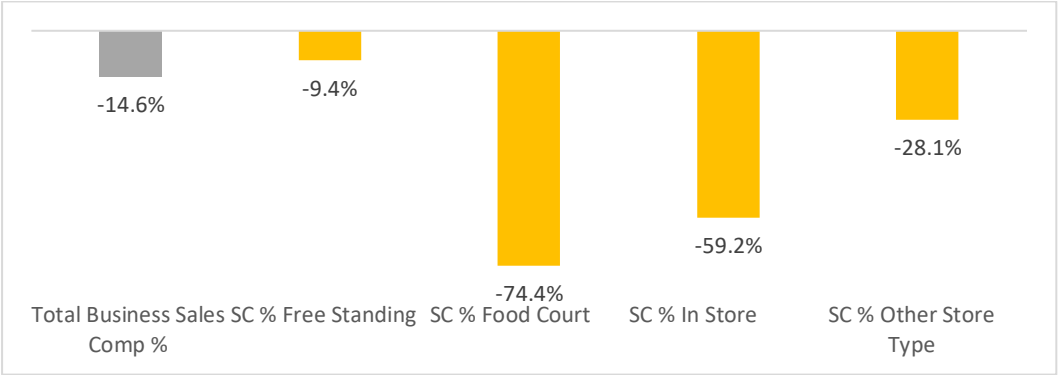
Chart 3: Reduction in sales, total and by location (April 2020)[53]



2. 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.

[68] Chart 4 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 4: Reduction in sales, total and by restaurant type (April 2020)[54]



3. 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.

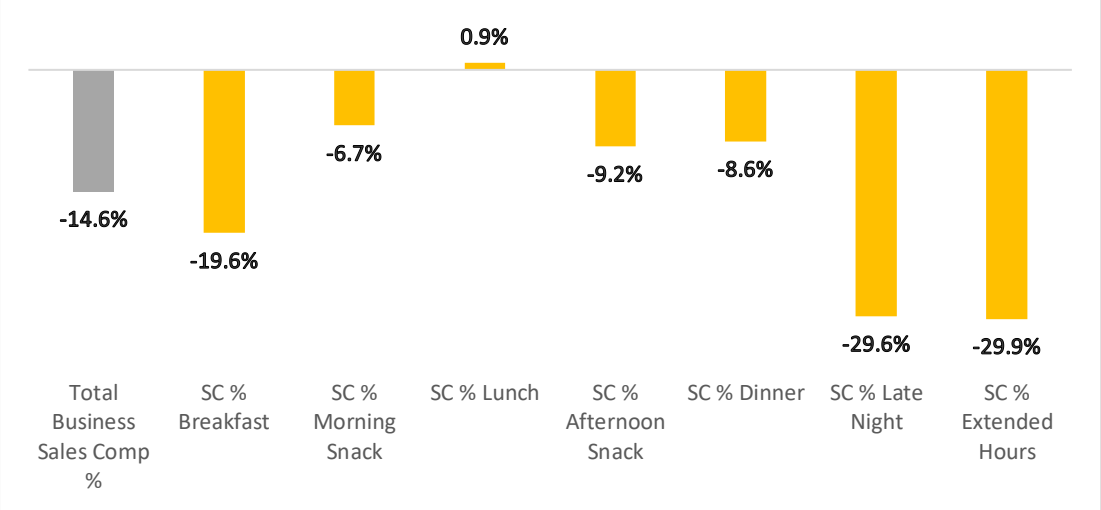
[53] Exhibit AIG1 at para [25].

[54] Exhibit AIG1 at para [27].

4. 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.

[69] These trends are evident in Chart 5, which shows changes to sales in April 2020 as compared to April 2019 by references to times of the day:

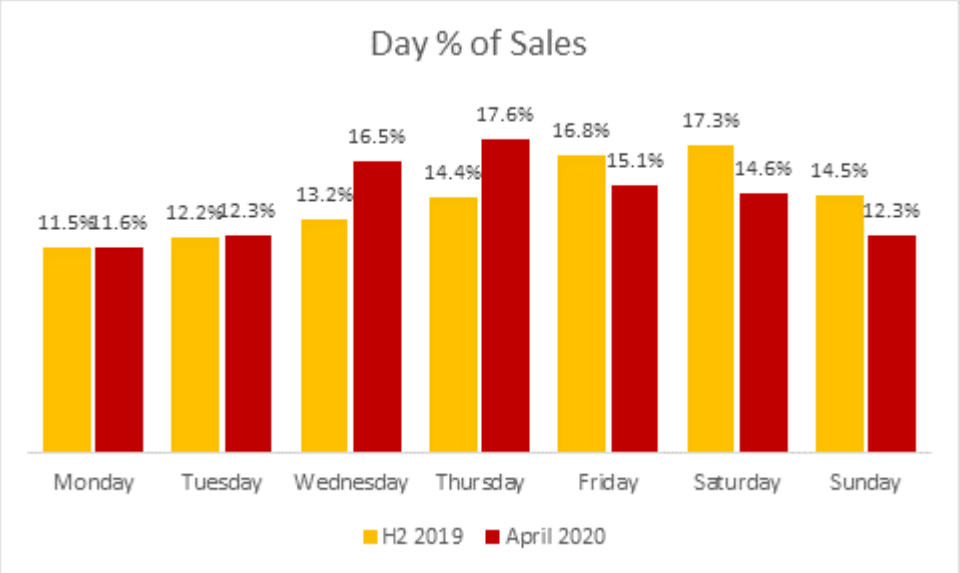
Chart 5: Performance by daypart (April 2020)[55]



[70] According to Mr Newlands, in respect of McDonalds operations, 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 is evident from Chart 6, which identifies the proportion of sales on each day of the week during July – December 2020 as compared to April 2020.

[55] Exhibit AIG1 at para [31].

Chart 6: Percentage of sales by day of the week[56]



[71] At [32] of his witness Statement Mr Newlands observes:

> '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'[57]

[72] The measures implemented at McDonald's restaurants to mitigate the impacts of COVID-19 include:

- closing some restaurants: as at 30 April 2020, 68 McDonalds restaurants were temporarily closed (13 McOpCo and 55 Franchise) (Note: 28 of the previously closed restaurants have been reopened albeit with different hours, reduced staff levels and limited menus)[58];
- reduced hours of operation: as at 30 April 2020, 83 McDonalds restaurants had reduced hours of operation (1 McOpCo and 82 Franchise); and
- a 'significant number' of casual employees have not been rostered for work or have been rostered to work fewer hours.

[56] Exhibit AIG1 at para [30].

[57] Exhibit AIG1 at para [32].

[58] Exhibit AIG1 at para [13](b).

[73] Mr Newlands deals with the impact of COVID-19 on labour requirements in both McOpCo restaurants and Franchise restaurants at [36] – [52] of his Statement. In particular Mr Newlands' evidence is that:

- many stores that are still trading now need fewer employees to operate;
- in many instances, there has not been a need for some full-time and part-time employees to undertake the work that they would usually perform, either because the restaurant is quiet but still trading or because all or part of the store has closed;
- 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;
- it is not uncommon for permanent employees to work predominantly or exclusively in a certain part of a restaurant and much of this work is not currently required because of either government restrictions on the operation of restaurants or the decline in trade;
- 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; and
- 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.

[74] As to the impact of the COVID-19 pandemic on Fast Food employers *other* than McDonald's, RAFFWU seek to draw the following findings from Mr Cullinan's evidence:

> 'Collins Foods, a major franchisee of brands including KFC and Taco Bell, reports that, excluding the net effect of food courts, the remainder of its KFC network (predominately drive-thru restaurants) traded positively through April, with **+4.0% same store sales growth** compared to 2019. It also reported increased drive-thru and home delivery sales more than offset any negative impact from the current Government restrictions banning dine-in transactions. After an initial decline in sales, Taco Bell has had a positive recovery with sales over the last few weeks of FY20 **returning to pre-COVID levels**. Dominos Australia Limited reported late in April that while there were significant changes in individual store performances, both positive and negative, **same store sales for Australia remained consistent post- COVID-19 at a national level**.'[59] (footnotes omitted)

[75] RAFFWU contends that Mr Cullinan's evidence 'puts beyond doubt that the conditions for making the variation do not exist'.[60]

[76] We note here that this aspect of Mr Cullinan's evidence (at [40] – [52] of his Statement) was not challenged by Ai Group. The evidence points to a diversity of experience across the

[59] RAFFWU Submissions 14 May 2020 at para [5].

[60] Ibid.

Fast Food sector in respect of the impact of the various COVID-19 related initiatives and impacts.

4. Submissions

[77] In this section we discuss the general submissions in relation to the Ai Group's proposed variation. In Section 5 we will summarise the submissions directed at specific elements of the amended draft variation determination and address the merits of the various elements of the amended draft variation determination.

[78] Ai Group submits that the variations it proposes are necessary to achieve the modern awards objective in the circumstances of the COVID-19 pandemic, in particular:

> '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.'

[79] Ai Group relies on the consent of the SDA (at least in respect of part of its proposed variation, a point to which we shall return to shortly), and submits:

> '…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.'[61]

[80] We note here that the SDA's position is relevant, but it is far from decisive.[62]

[81] Ai Group also relies on the recent Commission decisions which have varied modern awards in response to the COVID-19 pandemic (see [29] – [32] above).

[82] We note here that Ai Group's reliance on the Commission's earlier decisions in relation to the Hospitality, Restaurants and Private Sector Clerical Awards is misconceived. Contrary to Ai Group's contention that there are parallels between those decisions and the circumstances of the present matter, we think there are clear points of distinction. In particular:

- the variations in respect of each of these awards only operate until 30 June 2020 – Ai Group is proposing that the variations to the Fast food Award operate until mid-August 2020;
- at the time the earlier variations were made there was a high degree of uncertainty regarding the timeframe associated with the easing of COVID-19 related restrictions – there is now a road map for the easing of restrictions and some restrictions have already been eased;

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[61] Ai Group submission, 12 May 2020 at para [35].

[62] See [2020] FWCFB 272 at [112] – [114].

- the variation in respect of these awards were determined before the implementation of the JobKeeper Scheme and the flexibilities made available through Part 6-4C of the *Fair Work Act 2009* (Cth) the Act; and
- each of the previous matters were supported by *all* of the industrial parties – that is not the case in respect of the matter before us.

[83] Each of the COVID-19 related award variations made by the Commission turns on its own facts. While the general context may be the same; the impact of the pandemic has not been uniform in its severity, as is evident from Mr Newlands' evidence regarding the impact on McDonalds' operations.

[84] We would, however, reiterate our observation in the *Vehicle Manufacturing, Repair Services and Retail Award* decision:[63]

> '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).'

[85] The SDA supports two aspects of the revised draft determination but opposes the proposed close down clause (clause H.9).

[86] The SDA submits that in its negotiations with Ai Group over the past weeks it has been concerned to ensure that any clauses permitting variations to conditions are:

- time limited;
- reasonable in all the circumstances; and
- provide access to arbitration.

[87] The NRA supports the Application and agrees with the *provisional* view expressed in the May Statement. The NRA notes that:

> 'it has some concerns with clause H.9.3, which requires the employer (but not any other party) to pre-emptively consent to the arbitration of any dispute which may or may not arise under clause H.9.
>
> These concerns do not alter the NRA's support generally for the application, and the NRA does not press these concerns as a ground of opposition in this particular application.'

[63] [2020] FWCFB 2367 at [93]

[88] The Minister submits that the proposed variation is designed to fill the 'regulatory gap' for businesses who are unable to access the payment and flexibilities contained in section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. Ai Group advances a similar argument. The Minister supports the Application and submits that 'the proposal is a measured and proportionate one'. As to the modern awards objective, the Minister advances the following submission:

> 'The measures contained in the Commission's proposed variation represent a temporary but necessary response to a current extraordinary situation which is faced by Australian businesses and their employees.
>
> Section 134(1) of the FW Act requires the Fair Work Commission to ensure that modern awards (along with the NES) provide a 'fair and relevant minimum safety net of terms and conditions', taking into account the factors identified in the balance of the section.
>
> In this case, the extraordinary circumstances associated with COVID-19, and in particular the risk to security of employment identified in the Statement justify the measures proposed by the Application, and will contribute positively to the 'fairness' and 'relevance' of the Fast Food Award. It is appropriate that the amendments be introduced on a temporary basis as a specific and time-limited response to the current circumstances.
>
> The objective in section 134(h), which includes the sustainability, performance and competitiveness of the national economy remains relevant. The provisions will assist in maintaining employment and the viability of businesses.'[64]

[89] RAFFWU opposes the Application and contends that the 'proposed variation undermines the minimum terms and conditions of young, vulnerable and low-paid part-time and casual employees' and 'is inimical to the modern awards objective'.[65] RAFFWU submits that Ai Group has failed to demonstrate that the variation proposed is necessary to ensure that the Fast Food Award achieves the modern awards objective and that:

> 'The Commission cannot be satisfied of the need to vary the Award to achieve the modern awards objective, nor can it be satisfied that, even if such a variation were necessary, the proposed variation achieves that objective. The jurisdictional fact giving rise to the power to vary is not enlivened on the evidence and, consequently, the Commission has no power to grant the application. The Application must be dismissed'.[66]

[90] RAFFWU contends that:

- Ai Group has 'manifestly failed to demonstrate that the viability of any employer in the industry (not being eligible for JobKeeper) is threatened';67 and
- there is no material before the Commission sufficient to establish that the variation proposed is necessary within the meaning of s.138.

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[64] Commonwealth Minister for Industrial Relations submission 12 May 2020 at paras [22] – [25]

[65] Ibid at para [1].

[66] Ibid at para [6].

[67] Ibid at para [4].

[91] RAFFWU also submits that we should disregard the claims by Ai Group and the Minister that there is a 'regulatory gap', the closing of which is achieved by the proposed variation,:

> 'There is no 'regulatory gap'. There is only policy choice.
>
> The JobKeeper scheme aims to assist entities that have a significant decline in turnover due to the economic impacts of Coronavirus. The Commonwealth set the benchmark for eligibility for the benefits contained in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* at 30% for businesses with turnover of less than 1 billion and 50% for businesses with turnover of more than 1 billion.
>
> The requirement that larger businesses need to have a greater decline in turnover than smaller businesses to satisfy the basic decline in turnover test is said to recognise the 'greater capacity of larger businesses to withstand the economic impacts of the Coronavirus'. By implication then, the lower threshold was also set at a rate that the Commonwealth determined reflects the capacity of smaller business with a lower decline in turnover to withstand the economic effects of the Coronavirus.
>
> The thresholds reflect a deliberate, and presumably considered, policy choice by the Commonwealth. The thresholds do not create a 'gap'; instead, they carve out an area of regulatory choice. If the Commonwealth now considers that business with a downturn of less than 30% (or 50%, as the case may be) ought to be eligible for JobKeeper, the regulations can be amended accordingly. However, the Commonwealth does not presently propose to make such a change.
>
> The Commission should not, therefore, be drawn on this false equivalence. The Commonwealth determined that businesses with a downturn of less than 30% have a sufficient capacity to withstand the economic impacts of the Coronavirus. It cannot now suggest that this deliberate policy choice creates a 'gap' which should be filled by low-paid workers forgoing income in order to sustain employer profits.'[68] (footnotes omitted)

[92] We agree with RAFFWU's submission that there is 'no regulatory gap'. Rather the scope of the JobKeeper scheme is a deliberate policy choice by the Commonwealth.

[93] In the course of oral argument counsel for the Minister accepted that reference to a 'regulatory gap' was not the most felicitous term and that:

> 'The JobKeeper scheme operates in accordance with its terms, and there are some employers who qualify and some who don't. "Regulatory gap" is perhaps more often used where there's an inadvertent lacuna in legislation, and we don't suggest that's the case.
>
> However, the Minister's position, and his support for this application, proceeds on the basis that JobKeeper is one initiative, and others may also be required; and on the basis that the Minister is satisfied that the issue of job losses, which is the Minister's primary concern, can occur in different sectors of the economy, including those within the JobKeeper scheme and those who are not.

[68] RAFFWU Submission 14 May 2020 at para [4].

> And therefore consistent with the Minister's concern to maintain employment, this application, as has previous applications, does have the Minister's support.'[69]

[94] However the position is characterised it may be inferred from the material before us that there are likely to be Fast Food industry employers who do not qualify for the JobKeeper scheme but who have nevertheless been impacted by the COVID-19 pandemic and the associated measures to contain it.

[95] It also seems to us that the context in which the Application is being advanced and the character of the variations proposed are important contextual considerations. In particular, the variations proposed are:

- temporary in nature;
- advanced with the consent of the major union (at least in respect of two aspects of the claim); and
- have the stated aim of preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic.

5. The Variations Proposed

[96] In this section we describe the variations proposed by Ai Group and set out the submissions and evidence in respect of each element of the amended draft variation determination. We also make some observations regarding the merits of each element of the proposal advanced and identify the amendments we propose to make to Ai Group's proposal. In making these amendments we note that subject to the obligation to accord procedural fairness, we are not bound to vary the award in the terms proposed by Ai Group (see s.599).

[97] The prospect of the Commission inserting further safeguards in the proposed schedule was canvassed in the submissions and during the course of oral argument. In its submissions of 12 May 2020 Ai Group expressly alludes to such a prospect:

> '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.
>
> 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:

[69] Transcript, 15 May 2020 at PN155 – PN157.

> '[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).[70]
>
> 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.'[71]

[98] We return to the issue of safeguards and other amendments we propose, later.

[99] As mentioned earlier, the Application seeks to add a new schedule – Schedule H – to the Fast Food Award. Schedule H proposes flexibilities in relation to:

- a temporary and alternate scheme for 'Flexible part time employment' (the Flexible part time work term);
- a term which provides that, in certain circumstances an employer may request that an employee take paid annual leave. The employee is obliged to consider and not unreasonably refuse the request (the Annual leave term); and

[70] [2020] FWCFB 2356

[71] Ai Group submission, 12 May 2020 at paras [60] – [62].

- a term enabling an employee to require an employee to take annual leave, or if the employee has not accrued sufficient paid annual leave, unpaid leave, as part of a close down of its operations or part of its operations (the Close down term).

[100] The SDA proposed a series of amendments to the draft determination initially filed by Ai Group. These variations are set out at Annexure A to the SDA's submissions of 15 May 2020. The SDA submits:

> 'The SDA has engaged in discussions regarding variations to the Award with the sole aim of ensuring that workers and businesses impacted by COVID-19 are able to access reasonable and temporary measures which ensure as much ongoing paid employment for as many workers as possible, where JobKeeper support is not available to the workers and businesses in question.
>
> The SDA continues to strongly support fair protections for workers' rights in these circumstances, and further amendments to the determinations are proposed to address the matters raised by the Commission. Subject to these amendments, the SDA supports the proposed variations.'[72]

[101] In relation to the 'Flexible part-time work term' the SDA has proposed two additional safeguards:

- the employer and employee must have 'genuinely made the agreement … without coercion or duress'; and
- an agreement under the term is not valid unless the employee is also advised in writing that the employer consents to a dispute about whether the agreement was genuinely made being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

[102] In relation to the Annual leave term the SDA proposal adds the following safeguards:

- an employer may only make a request where it is reasonable in all the circumstances; and
- an employee is not required to take leave unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

[103] We note here that the changes proposed by the SDA strengthen the safeguards in respect of these two proposals and that absent such safeguards we would not have been satisfied that the proposed flexibilities were 'fair' within the meaning of s.134(1).

[104] The SDA has withdrawn its support for the Close down term.[73] We return to this issue shortly.

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[72] SDA submission, 15 May 2020 at paras [29] – [30].

[73] SDA submission, 15 May 2020.

[105] In its further submission of 15 May 2020, Ai Group adopted the SDA's draft determination, save in respect of the Close down term. Ai Group continues to press this aspect of its proposed variation.

[106] Before turning to its substantive terms there are two general aspects of the proposed schedule we wish to deal with.

[107] The first issue concerns the term, as set out in clause H.2:

> **H.2** Schedule H operates from [insert date] (Date of Operation) until [**3 months from Date of Operation**]. The period of operation can be extended on application to the Fair Work Commission.

[108] We are not persuaded that the 3 month period of operation proposed is warranted. As we have mentioned, the COVID-19 restrictions on cafes and restaurants are easing. Indeed since the hearing of this matter on 15 May 2020 the Victorian Premier has announced that on 1 June 2020 cafes, restaurants and the dining areas of pubs and clubs will reopen with up to 20 patrons indoors (3 weeks later, on 22 June that limit will go up to 50 patrons and in mid July it will increase to 100 patrons).[74]

[109] It is also relevant that in terms of employee numbers the Fast Food sector is dominated by the Quick Service Restaurant chains. These chains employ more than 85 per cent of Fast Food industry employees and, as we have mentioned, just under half of all Fast Food industry employees are employed in McDonald's outlets. The dominance of large employers in the Fast Food sector suggests that collective bargaining is a viable means of securing any flexibilities required to respond to the circumstances produced by the COVID-19 pandemic. In that regard we note that s.189 provides that the Commission may approve an enterprise agreement that does not pass the 'better off overall test' if it is satisfied that 'because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest'.

[110] The only evidence before us about the particular circumstance of a Fast Food industry employer relates to McDonald's. An enterprise agreement has applied to McDonald's in the past and we see no reason why McDonald's cannot engage in collective bargaining for an enterprise agreement that suits the needs of its business. Such a process would also provide an opportunity for the employees directly affected to have a say. We accept that such a process takes time, and that is one of the reasons in favour of varying the Award, but we are not persuaded that a period of 3 months is necessary. We propose that clause H.2 be amended as follows:

> **H.2** Schedule H operates from 19 May 2020 ~~(Date of Operation)~~ until 31 July 2020~~(3 months from Date of Operation). The period of operation can be extended on application to the Fair Work Commission~~.

[74] Statement from The Hon Daniel Andrews MP, Premier of Victoria, 17 May 2020.

[111] In limiting the period during which Schedule H will operate we are also conscious that s.138 provides that a modern award may only include terms 'to the extent necessary to achieve the modern awards objective. As noted by the Full Federal Court in *Anglo American*:

> 'The words "only to the extent necessary" in s.138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond the minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4'.[75]

[112] Any party seeking to extend the operation of the schedule (or any similar COVID-19 related variation) will be required to make a new application under s.158 supported by probative evidence.

[113] The second issue concerns Clause H.7 which states:

> '**H.7** Any requirement issued by an employer under Schedule H does not apply to the employee if the requirement is unreasonable.'

[114] For the reasons set out later, we have concluded that the Close down term lacks merit and we do not propose to grant that aspect of Ai Group's proposal. It follows that the reference in clause H.7 to any '*requirement* issued by an employer' is no longer apt. The remaining parts of the schedule deal with consent arrangements or with an employer *request* that an employee take paid annual leave. The capacity for an employer to request that an employee take annual leave can only be made where 'it is reasonable in all the circumstances'. Accordingly, we see no need for clause H.7 and will delete it.

[115] We have renumbered the clauses to reflect the deletion of what was H.7.

[116] We now turn to consider each of these proposed flexibilities in detail.

Clause H.7 – Part-time employment

[117] Proposed clause H.7 provides as follows:

> **H.7 Flexible part-time employment**
>
> While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.7.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until [insert date 3 months from the Date of Operation]:
>
> **H.7.1** A part time employee is an employee who:
>
> **(a)** Works at least 8 but less than 38 hours per week;
>
> **(b)** Has reasonably predictable hours of work; and

[75] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45].

(c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

H.7.2 The employer and the part-time employee will agree in writing upon:

(a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and

(b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours **(the employee's agreed availability).**

H.7.3 The employer and the employee must have genuinely made the agreement mentioned in clause H.7.2 without coercion or duress.

H.7.4 An agreement made under clause H.7.2 is not valid unless the employee is also advised in writing that the employer consents to a dispute about whether the agreement was genuinely made being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.7.5 The employee must not be rostered to work less than 3 consecutive hours in any shift.

H.7.6 The guaranteed minimum hours shall not be less than 8 hours per week.

H.7.7 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

H.7.8 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

(a) The additional hours are offered in accordance with clause 25 – Hours of work and clause 26 – Overtime;

(b) The employee may not be rostered for work outside of the employee's agreed availability;

(c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);

(d) An employee will accrue entitlements such as annual leave and personal/carer's leave on agreed additional hours worked;

(e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(f) The employee can refuse to work additional hours when offered on any occasion;

(g) Additional hours worked in accordance with this clause are not overtime; and

(h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

H.7.9 A part-time employee who immediately prior to the Date of Operation has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause H.7.2. If a part-time employee agrees to such a change, they shall, beyond Schedule H ceasing operation, revert to the previously agreed regular pattern of hours.

H.7.10 If an employee is first employed as a part-time employee during the operation of Schedule H, their employment beyond Schedule H ceasing operation will be on a casual basis unless:

(a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and

(b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

[118] Proposed clause H.7 operates as follows:

1. The provision 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 tha1. t an employer and employee may reach agreement in writing upon both of the following:

   (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).

2. An agreement under clause H.7.2 must have been 'genuinely made', without coercion or duress.

3. An agreement made under clause H.7.2 is not valid unless the employer consents to a dispute about whether the agreement was genuinely made being settled by the Commission through arbitration.

4. An employee's Guaranteed Minimum Hours may be changed by written agreement.

5. 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 8 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.

6. 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.

7. 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.7.8(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, absent 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 without being deterred by the impact of paying overtime rates.

   (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.

8. Clause 12, which regulates part-time employment, would not apply where an employer and employee have reached agreement pursuant to clause H.7.

9. At clause H.7.9 and clause H.7.10, 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.

[119] Proposed Clause H.7 provides a temporary and alternate scheme for part-time employment and in circumstances where clause H.7 applies, clause 12 of the Fast Food Award does not apply.

[120] Ai Group submits that:

> '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.

Clause [H.7] is, in our submission, 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.'[76]

[121] Mr Newlands' evidence as to the necessity for the proposed term is at [57] – [65] of his Statement, in short Mr Newlands says that the 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.

[122] At [59] Mr Newlands says:

'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.'[77]

[123] At [63] – [65] Mr Newlands also says:

'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.

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.

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.'[78]

[124] Mr Newlands also says that the availability of many casual and permanent employees has changed during the pandemic:

'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).

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[76] Annexure B to the Application at [24] – [25].

[77] Exhibit AIG1 at para [59].

[78] Exhibit AIG1 at paras [63] – [65].

> Some employees are indicating that they are wanting to work additional hours because their partners have suffered a loss of income or work.
>
> 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.
> 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.'[79]

[125] RAFFWU contends that in respect of part-time employees, the effect of the proposed variation is to:

> 'create a sub-class of part-time employees who are, in effect, minimum hour casual employees. This class of worker is entitled to a minimum of 8 hours per week (which may be significantly less than their existing entitlement) but is otherwise subject to the vagaries of casual employment. They do not know from week to week the number of hours they will be offered, the days on which they will be asked to work those hours or the start and finishing times of their shifts. They must offer wide 'availabilities' to maximise the prospects of securing work and plan to provide safe care for their children and loved ones throughout those windows in order to hold themselves ready to work hours that may never eventuate. These workers are not compensated for the disabilities attaching to casual employment by way of casual loading, but nor are they entitled to overtime for hours worked in excess of their minimum agreed hours of work.'[80]

[126] In short RAFFWU submits that:

> 'the clause permits the creation of a class of worker who has all of the uncertainty of casual employment, but without the offset of casual loading and with all the obligations of permanent employment, but without any entitlement to overtime.'[81]

[127] RAFFWU notes that the variation also has consequences for casual employees. The clause allows employers to (with consent, a concept addressed below) convert casual employees to part-time employees, relieving them of the burden of paying casual loading but without assuming the liability of paying overtime, while retaining the rostering flexibilities that attach to casual work.

[128] As to the requirement for 'consent' RAFFWU submits that 'consent' is 'illusory' in an industry where more than 50% of the affected workers are children and where the pressure to be 'flexible' in order to secure casual hours is 'well known', and submits:

> 'The vulnerabilities described by the Full Bench (in [2019] FWCFB 272) are only exacerbated by the uncertainty created by the present economic environment. Self-evidently, the pressure on employees to maximise their stated availability to obtain hours is greater the fewer hours that are available. And, it is to be observed that some classes of worker are more vulnerable than others. Workers who do not hold permanent residency are particularly vulnerable. It is highly

[79] Mr Newlands' Statement at paras [49] – [52]

[80] RAFFWU Submissions 14 May 2020 at [16].

[81] Ibid at [18].

> unlikely that workers on insecure visas would refuse a request by their employer to casualise their employment.
>
> As such, the 'consent' contained within the proposed variation is illusory. The clause lacks any meaningful protection for the majority of workers to whom it will apply. The illusion of consent should not be allowed to disguise the impact of the clause on vulnerable people.'[82]

[129] We accept that there have been changes to patterns of consumer demand by reference to specific times of the day and days of the week (see Chart 5 at [67] above). In particular it is Mr Newlands' evidence that:

(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.83

[130] We also accept that the proposed Part-time flexibility term will assist businesses to respond to the evident change in consumption patterns, thereby retaining part time employees in employment. However the current proposal is deficient in that it does not link the utilisation of a clause H.7 flexibility agreement with the stated purpose of the provision.

[131] We propose to vary Clause H.7.4 as follows:

> 'An agreement made under clause H.7.2 is not valid unless:
>
> **(i)** the employee is also advised in writing that the employer consents to a dispute about the operation of this clause H.7 being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act; and
>
> **(ii)** the agreement is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and is necessary to assist the employer to avoid or minimise the loss of employment.'

[132] We have extended the scope of disputes which may be the subject of arbitration to make it clear that it is not confined to a dispute about whether an agreement was 'genuinely made'

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[82] Ibid at [20] – [21].

[83] Exhibit AIG1 at para [30].

and would encompass a dispute about whether the agreement was made for reasons attributable to the COVID-19 pandemic and is necessary to assist the employer to avoid or minimise the loss of employment (as required by clause H.7.2(ii)).

[133] As to RAFFWU's submissions regarding the 'illusory' nature of the required consent in respect of clause H.7, there are statutory provisions directed at proscribing action taken to coerce an employee into exercising or not exercising a workplace right.

[134] We propose to give emphasis to those statutory protections by including notes in Schedule H, in the following terms:

> NOTE 1: An employee covered by this award who is entitled to the benefit of the safeguards in clauses H.7 and H.8 has a workplace right under section 341(1)(a) of the Act.
>
> NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.
>
> NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

[135] RAFFWU also references our comments in respect of an earlier claim by Ai Group to vary the Fast Food Award to introduce a flexible part time work term. We dismissed that claim for the reasons set out in our decision[84] of 20 February 2019. The earlier claim and the current proposed variation are different in a number of important respects. The current proposal requires a genuine agreement between the employer and employee; any dispute can be the subject of an arbitral determination; and an agreement under the proposed Flexible part-time work term is not valid unless it is made for reasons attributable to the COVID-19 pandemic and is necessary to assist the employer to avoid or minimise the loss of employment.

[136] As to new employees who may otherwise be engaged as casuals, we would observe that the proposed term provides a means whereby they can be employed as a part time employee with a guarantee of 8 hours work per week. No such guarantee applies to casual employees.

[84] [2019] FWCFB 272.

Clause H.8 - Annual leave

[137] Proposed clause H.8 enables an employer to request that an employee take annual leave. Such a request can be made only in certain circumstances and provided that various conditions are met. Proposed clause H.8 provides as follows:

> **H.8 Annual leave**
>
> **H.8.1** Subject to clause H.8.3 and H.8.7 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.
>
> **H.8.2** If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.
>
> **H.8.3** An employer may only make a request under clause H.8.1 where it is reasonable in all the circumstances.
>
> **H.8.4** An employee is not required to take leave under clause H.8 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.
>
> **H.8.5** A period of leave under clause H.8 must start before [insert date 4 weeks from the Date of Operation] but may end after that date.
>
> **H.8.6** Clause H.8.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.
>
> **H.8.7** An employer can only request that an employee take annual leave pursuant to this clause 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.

[138] The provision expressly contemplates that an employee may refuse an employer's request but must not *unreasonably* do so.

[139] RAFFWU contends that there is no evidence that the proposed annual leave variation is necessary, in particular:

> 'there is no evidence that employers in the industry have asked employees to take annual leave using the existing statutory framework and that such employees have refused to take leave. The

> Newlands Affidavit provides nothing more than generalised assertions unsupported by any empirical data.'[85]

[140] RAFFWU also submits the proposed variation is also not 'fair' in any event and contends that the proposed variation may lead to unfair outcomes for employees. For example, the proposed variation permits:

(a) an employer to press a vulnerable worker who is not entitled to Job Keeper, to reduce their annual leave accrual while replacing them with workers for whom an employer is funded with Job Keeper; and

(b) an employer to press any part-time worker, not entitled to Job Keeper, to reduce their annual leave accrual while replacing them with cheaper younger workers.

[141] Mr Newlands gives evidence in respect of this issue at [40] and [46] – [47] of his statement as follows:

> '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.
> …
> 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.
>
> 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.'

[142] Further, Mr Newlands' evidence as to the need for the proposed annual leave clause is at [66] – [69] of his Statement:

> 'There are many employees at McOpCo Restaurants and Franchisee Restaurants that have more than 2 weeks of annual leave.
>
> 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.
>
> 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

[85] Ibid at para [52].

that it would be used in such circumstances as a way of delaying making any decision to implement redundancies.'[86]

[143] We are satisfied of the necessity for a provision such as that in proposed clause H.8, however we propose to make one other change, to clause H.8.7, to bring the proposed term into line with clause H.7.4(ii), as follows:

'An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and is necessary to assist the employer to avoid or minimise the loss of employment'.

[144] Subsections 93(3) and (4) of the Act are relevant to this aspect of proposed Schedule H and provide as follows:

'*Terms about requirements to take paid annual leave*

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.' (emphasis added)

[145] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).[87]

- A modern award may include terms that:

  (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or

  (ii) terms that supplement the NES (s.55(4)).

[146] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type

[86] Ibid at paras [66] – [69].

[87] Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made.

contemplated by s.93(3) of the Act. The issue before us is whether the provisions we have mentioned are 'reasonable' within the meaning of s 93(3).

[147] The key elements of the clause are as follows:

- An employer may make a request pursuant to clause H.8 subject to considering an employee's personal circumstances.
- The request must be made in writing.
- The request must be made at least 72 hours before the date on which the leave would commence.
- 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.
- An employer may only make a request under clause H.8.1 if it is reasonable in all the circumstances.
- An employer must consent to the arbitration of a dispute about whether the request is reasonable in all the circumstances.
- 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.
- 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.

[148] In our view the term is a permitted term and is 'reasonable' within the meaning of s.93(3) and/or constitutes an ancillary or incidental term permitted by s.55(4).

Clause H.9 – Close down

[149] Clause H.9 – Close Down, provides as follows:

> **H.9 Close down**
>
> **H.9.1** Subject to clauses H.9.2, H.9.3 and H.9.4, an employer may:
>
> **(a)** Require an employee to take annual leave as part of a close down of its operation or part of its operation by giving at least 48 hours' notice or any shorter period of notice that may be agreed; and
>
> **(b)** Where an employee has not accrued sufficient leave to cover part or all 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 closedown.
>
> **H.9.2** Clause H.9.1 applies if the employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19.
>
> **H.9.3** An employer must provide an employee with written notice of any requirement to take annual leave or unpaid leave in accordance with this clause.

H.9.4 An employee is not required to take leave under clause H.9.1 unless:

(a) The employer has consulted with the employee about the requirement to take the leave; and

(b) The employee is advised in writing that the employer consents to a dispute arising from the requirement being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.9.5 Clause H.9.1 only permits an employer to require an employee to take unpaid leave if it is in connection with a close down that commenced prior to [insert date 4 weeks from the Date of Operation] and the unpaid leave does not extend beyond [insert date 8 weeks from the Date of Operation].

H.9.6 Where an employee is placed on unpaid leave pursuant to H.9.1(b), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

H.9.7 If an employee is required to take unpaid leave pursuant to clause H.9.1(b) and the employee makes a request to engage in:

(a) reasonable secondary employment;

(b) training;

(c) professional development;

during the period of unpaid leave, the employer must consider and not unreasonably refuse the request.

[150] Proposed 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 period 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.

[151] The clause contains a number of safeguards and limitations.

[152] In its submission of 15 May 2020 Ai Group responded to an SDA proposal to extend the notice period in clause H.9.1(a) from 48 hours' to one week. Ai Group submitted that a one week notice period was 'impracticable in the event that Government restrictions limiting the operation of restaurants and cafes are implemented with limited notice'. At [6] of its submission, Ai Group states:

> 'We are instructed in response to the SDA Draft Determination that the proposed close down clause may be sought to be relied upon in circumstances that require a rapid response, such as a confirmed diagnosis of a COVID-19 case requiring that the store/restaurant be closed for a 'deep clean' and/or an investigation int relevant operational issues.'

[153] In response to the statement set out above, the SDA withdrew its support for this aspect of the Application, submitting that:

> 'It is deeply concerning to the SDA to learn that the close-down provisions are also intended to respond to Workplace Health and Safety (WHS) incidents related to the COVID-19 pandemic, rather than solely downturns in trade resulting in a need to cease operations. The SDA has been campaigning alongside other unions for the introduction of a universal entitlement to paid pandemic leave for all workers, including casuals, to ensure that workers are not financially disadvantaged due to exposure to the virus. Utilisation of the close-down clause in the circumstances identified by the Ai Group would not be reasonable or appropriate.'[88]

[154] Mr Newlands' evidence as to the need for the close down clause is at [70] – [71] of his Statement:

> '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.
>
> 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.'[89] (emphasis added)

[155] Three things may be said about this aspect of Mr Newlands' evidence. The first is that Mr Newlands' opinion as to the circumstances in which McDonald's restaurants may utilise the clause is mere speculation and is unsupported by any evidence from a particular McDonald's outlet. The second point is that Mr Newlands refers to a close down being necessary 'due to a substantial downturn in sales'. No particularity is provided as to the likelihood of such an eventuality; indeed, the likelihood may be said to be diminishing as it is intended that the COVID-19 restrictions be progressively lifted. The final point to note is that if a close down proves necessary, and s.524 is not available, an employer may request that an employee take paid annual leave pursuant to clause H.8.

[156] RAFFWU submits that the proposed stand-down clause is 'entirely unnecessary' and advances three broad points in this regard:

1. The Act provides a scheme for stand downs that adequately covers the current situation, noting that:

   - Ai Group has advanced no evidence of the specific needs underpinning the proposed variation and no evidence of why s 524 falls short of meeting that need; and

   - Ai Group alleges 'significant complexity' in the operation of s.524 but fails to identify what that complexity is.

2. The 'true effect' of the proposed variation is to expand the circumstances in which an employer can close down their operations and force its employees to reduce their annual leave accruals during that period;

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[88] SDA submission 15 May 2020 at para. [4]

[89] Ibid at paras [70] – [71].

3. There is 'not a shred of evidence to suggest that the variation is necessary to achieve the modern awards objective':

> Moreover, the evidence before the Commission is that stores are reopening. There is no evidence at all that any employers are presently faced with a decision about whether to shut down or not.[90]

[157] In our view, the proposed 'Close-Down' clause lacks merit, for four reasons.

[158] First, as mentioned earlier, the change in the number of jobs in the Accommodation and food services sector has been relatively stable since the week ending 11 April and total wages have been stable since the week ending 4 April (see Chart 2 on page 17). This suggests that much of the initial impact of COVID-19 may have run its course in this sector.

[159] Second, Mr Newlands' evidence suggests that the trend in respect of McDonalds' operation is towards the *reopening* of restaurants rather than their *closure*. At [13](b) of his statement he says:

> '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.' (emphasis added)

[160] Third, as pointed out by Ms Kelly of counsel on behalf of RAFFWU, we know nothing of the circumstances of the 40 McDonalds restaurants that have closed. We do not know when they were closed; whether they are eligible for the JobKeeper Scheme; or whether they are part of a McOpCo or a larger Franchise cohort. In short, there is a lack of probative evidence about the enterprises which may utilise the provision – noting that the proposed term provides that the proposed clause would apply to close downs that commenced 4 weeks prior to the operation of the clause.

[161] Finally, Ai Group failed to mount a convincing case in support of its contention that s.524 was insufficient to meet the needs of employers covered by the Fast Food Award. Ai Group contended that s.524 was attended with 'significant complexity'; but failed to identify what that complexity was and how it impacted on the employers covered by the Fast Food Award.

[162] Further, Ai Group's submission of 15 May 2020 identifies one circumstance in which the proposed clause may be sought to be relied upon – 'a confirmed diagnosis of a COVID-19 case requiring that the store/restaurant be closed for a 'deep clean' and/or investigation into relevant operational issues'.[91] The example provided does not advance Ai Group's case, indeed

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[90] RAFFWU submission 14 May at para [58].

[91] Ai Group submission 15 May 2020 submission at para [6]

it sets it back. The example provided would clearly permit a stand down under s.524 which provides:

> **524 Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances …
>
> > (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

[163] As we have said, in our view the proposed Close down term lacks merit. If the Fast Food Award was varied in the manner proposed by Ai Group it would not provide a 'fair and relevant minimum safety net of terms and conditions'. In short, such a variation would not be fair to the employees covered by the Award. We accept that the variation proposed would benefit business and that the consideration in s.134(1)(f) may be said to weigh in favour of the proposal. But the other s.134(1) considerations are either neutral or, in the case of s.134(1)(a), weigh against the variation proposed. We reject this aspect of Ai Group's claim.

6. Consideration

[164] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the Act and provides as follows:

> '*What is the modern awards objective?*
>
> 134(1) 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:
>
> > (a) relative living standards and the needs of the low paid; and
> >
> > (b) the need to encourage collective bargaining; and
> >
> > (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***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[165] The modern awards objective is to '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 the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[166] The modern awards objective is very broadly expressed.[92] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[93] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[94]

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[92] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[93] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[94] [2018] FWCFB 3500 at [21]-[24]

[167] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[95] No particular primacy is attached to any of the s.134 considerations[96] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[168] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[97] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[98] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[169] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'Section 138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[170] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[99]

[171] For the reasons set out in Section 5 we have rejected Ai Group's proposed Close down term and we propose amending the balance of the proposed schedule H in the manner we have described (the amended Schedule H). We now turn to consider whether we should vary the Fast Food Award to insert the amended Schedule H.

[172] As we have mentioned, before varying a modern award the Commission must be satisfied that if the modern award is varied in the manner proposed then it would only include terms necessary to achieve the modern awards objective. The issue in contention is if the Fast Food Award was varied as proposed would it provide a 'fair and relevant minimum safety net'? Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. We now turn to the s.134 considerations.

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[95] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[96] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[97] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[98] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[99] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[173] In our view the considerations in s 134(e) and (g) were not relevant. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[174] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',[100] within the meaning of s.134(1)(a).

[175] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.

[176] Using the two-thirds of median full-time wages as the benchmark, award reliant Fast Food employees are 'low paid' within the meaning of s.134(1)(a) (see Chart 1 at [56] above).

[177] RAFFWU submits[101] that the proposed variation:

> 'has a material detriment for already low paid workers. For part-time workers, it reduces their minimum hours of work. It creates substantial insecurity of income. It has the potential to greatly increase childcare costs, because part-time workers will be forced to make such arrangements to cover a vast window of 'availability' for hours that might never eventuate. It will reduce their income by removing their rights to overtime. The proposed variation will also operate to reduce the income of casual employees by depriving them of the right to casual loading'.

[178] Ai Group relies on the Commission's observations in its recent decision concerning the *Clerks—Private Sector Award 2010*:

> [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.[102]

[179] Ai Group submits[103] that:

> 'It is also relevant that the clause seeks to mitigate the potential impact of the proposed variations in various ways.'

[180] We accept that the proposed variation may result in low paid employees receiving less pay than they would for the same hours under the current terms of the award. It is axiomatic

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[100] [2017] FWCFB 1001 at [166].

[101] RAFFWU submission at para [59]

[102] [2020] FWCFB 1690.

[103] Ai Group submission 13 May 2020 at [90].

that such a reduction in pay will mean that they are less able to meet their needs. But, the retention of as many employees as possible in employment, albeit receiving less pay for the hours they work than they would under the current terms of the award, is an important countervailing consideration. It is also important to note that the flexibilities in the proposed variation are subject to a number of safeguards, as discussed earlier in our decision.

[181] We accept that this consideration weighs against the proposed variation.

s.134(1)(b) the need to encourage collective bargaining

[182] Ai Group contends that the proposed variation 'may encourage enterprise bargaining'. The submission advanced in support of this contention was entirely speculative.

[183] Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that varying the Fast Food Award in the manner proposed would necessarily *encourage* enterprise bargaining generally; but the shorter duration of the schedule's operation may encourage McDonald's at least to engage in collective bargaining (at discussed earlier at [109] – [110] above). On balance we think this consideration is neutral.

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

[184] Ai Group submits that:

> '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 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".[104] This is, in our submission, a consideration weighing in favour of the grant of the proposed variation.'[105]

[185] RAFFWU submits that the proposed variation:

> 'does nothing to promote social inclusion. The proposed variation will not increase workforce participation. It will only increase insecurity and fear in existing workforce participation. In that sense, the clause is destructive of social inclusion. It is inimical to the promotion of it.'[106]

[186] This consideration is directed at obtaining employment. The variation proposed will facilitate the objective of retaining employees in employment in the current circumstances. The flexibilities in schedule H are only accessible if, among other things, they are 'necessary to assist the employer to avoid or minimise the loss of employment'. This consideration weighs in favour of the variation.

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[104] *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [55].

[105] Ai Group submission 13 May 2020 at [92] – [93].

[106] RAFFWU submission 15 May 2020 at [61]

s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

[187] RAFFWU contends the proposed variation does not promote flexible work practices and that this is 'evident from the findings of the Commission' in earlier proceedings involving the Fast Food Award (see [2019] FWCFB 272). Those earlier proceedings involved a claim by Ai Group to insert a 'Flexible Part time clause' into the Award. As we have mentioned earlier, the two claims are different, in a number of important respects. Further, in our earlier decision we accepted that:

> '…if the claim was granted, it would have a positive impact on business and that this is a consideration which weighs in favour of varying the award in the manner proposed.'[107]

[188] We make the same finding in the present matter. The proposed variation will promote flexibility. This is a factor which weighs in favour of making the variation sought.

s.134(1)(da) the need to provide additional remuneration for employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts

[189] Section 134(1)(da) was given detailed consideration in the *Penalty Rates Case*.[108] We generally adopt those observations and only propose to highlight two matters.

- s.134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv). The expression 'additional remuneration' in this context means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of hours worked at particular times.

- the expression 'the *need* for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances. Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv); rather, s.134(1)(da) is a consideration which we are required to take into account.

[190] Ai Group contends that s.134(1)(da) is a neutral consideration.

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[107] [2019] FWCFB 272 at [133].

[108] [2017] FWCFB 1001 at [184]-[203].

[191] RAFFWU submits that the proposed variation 'actively undermines these considerations. It strips both part-time and casual employees of the penalties that attach to overtime and unsocial, irregular and unpredictable hours'.[109]

[192] We accept that this consideration weighs against the variation proposed.

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

[193] Ai Group submits that the proposed variation will:

> '…have a 'positive impact on business (s.134(1)(f)).[110] 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'.[111]

[194] We are satisfied that this consideration weighs in favour of the variation proposed.

s.134(1)(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.

[195] Ai Group submits that 'the variation proposed will ultimately have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'.[112] The Minister advances a similar submission.

[196] We are not persuaded that s.134(1)(h) is relevant in the current context. The consideration deals with the impact of a variation on the national economy and there is insufficient evidence to establish that the proposed variation would advance this consideration.

7. Conclusion

[197] We note that the terms in Schedule H may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (b), (c), (h) and (j) of the Act.

[198] We are satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157) and in so deciding we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant. Further, once varied the Fast Food Award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

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[109] RAFFWU submission 15 May 2020 at [63]

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

[111] Ai Group submission 15 May 2020 at [97]

[112] Ai Group submission 15 May 2020 at [99]

[199] For the reasons set out above we propose to vary the Fast Food Award in the manner set out at **Attachment A**. The determination will come into operation on 19 May 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

PRESIDENT

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Appearances:

Ms R. Bhatt and Mr B. Ferguson for Ai Group

Mr D. Williams of Counsel with Ms J. Kuzma for the Commonwealth Minister for Industrial Relations

Mr Warren Friend of Counsel, with Mr D. Macken, Mr G. van Rensburg and Ms S. Burnley for SDA

Ms S. Kelly of Counsel, with Mr J. Cullinan with and Mr M. Cornthwaite for RAFFWU

Ms S. Ismail for Australian Council of Trade Unions

Hearing details:

Melbourne
2020
15 May

DETERMINATION

Fair Work Act 2009
s.157 – Application to vary modern awards if necessary to achieve modern awards objective

The Australian Industry Group
(AM2020/20)

FAST FOOD INDUSTRY AWARD 2010
[MA000003]

Fast food industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, 19 MAY 2020

Application to vary the Fast Food Industry Award 2010.

A. Further to the decision [[2020] FWCFB 2316] issued by the Full Bench on 19 May 2020, the above award is varied as follows:

1. By inserting the following definition in clause 3.1 in alphabetical order:

> **Jobkeeper payment** means a jobkeeper payment payable to an entity under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

2. By inserting Schedule H as follows:

Schedule H—Award flexibility during the COVID-19 Pandemic

H.1 The provisions of Schedule H are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

H.2 Schedule H operates from 19 May 2020 until 31 July 2020.

H.3 Schedule H applies to:

H.3.1 employers who do not qualify for Jobkeeper payments and their employees; and

H.3.2 employees who do not qualify for Jobkeeper payments and their employers in relation to those employees.

H.4 If an employer or employee becomes entitled to Jobkeeper payments for an employee, the terms of Schedule H will not apply in relation to that employer and that employee.

H.5 Schedule H is intended to assist in the continuing employment of employees.

H.6 During the operation of Schedule H, the following provisions apply.

H.7 Flexible part-time employment

While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.7.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until 31 July 2020:

H.7.1 A part time employee is an employee who:

(a) Works at least 8 but less than 38 hours per week;

(b) Has reasonably predictable hours of work; and

(c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

H.7.2 The employer and the part-time employee will agree in writing upon:

(a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and

(b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

H.7.3 The employer and the employee must have genuinely made the agreement mentioned in clause H.7.2 without coercion or duress.

H.7.4 An agreement made under clause H.7.2 is not valid unless:

(a) the employee is also advised in writing that the employer consents to a dispute about the operation of this clause H.7 being settled by the Fair Work Commission through arbitration in accordance with clause 9.5—Dispute Resolution and section 739(4) of the Act; and

(b) the agreement is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and is necessary to assist the employer to avoid or minimise the loss of employment.

H.7.5 The employee must not be rostered to work less than 3 consecutive hours in any shift.

H.7.6 The guaranteed minimum hours shall not be less than 8 hours per week.

H.7.7 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

H.7.8 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

(a) The additional hours are offered in accordance with clause 25—Hours of work and clause 26—Overtime;

(b) The employee may not be rostered for work outside of the employee's agreed availability;

(c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);

(d) An employee will accrue entitlements such as annual leave and personal/carer's leave on agreed additional hours worked;

(e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(f) The employee can refuse to work additional hours when offered on any occasion;

(g) Additional hours worked in accordance with this clause are not overtime; and

(h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

H.7.9 A part-time employee who immediately prior to the 19 May 2020 has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause H.7.2.

If a part-time employee agrees to such a change, they shall, when Schedule H ceases operation, revert to the previously agreed regular pattern of hours.

H.7.10 If an employee is first employed as a part-time employee during the operation of Schedule H, their employment will be on a casual basis when Schedule H ceases operation unless:

(a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and

(b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

H.8 Annual leave

H.8.1 Subject to clause H.8.3 and H.8.7 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

H.8.2 If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

H.8.3 An employer may only make a request under clause H.8.1 where it is reasonable in all the circumstances.

H.8.4 An employee is not required to take leave under clause H.8 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 9.5—Dispute Resolution and section 739(4) of the Act.

H.8.5 A period of leave under clause H.8 must start before 16 June 2020 but may end after that date.

H.8.6 Clause H.8.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.

H.8.7 An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and is necessary to assist the employer to avoid or minimise the loss of employment.

H.9 Dispute resolution

Any dispute regarding the operation of Schedule H may be referred to the Fair Work Commission in accordance with clause 9—Dispute resolution.

NOTE 1: An employee covered by this award who is entitled to the benefit of the safeguards in clauses H.7 and H.8 has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on 19 May 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after 19 May 2020.

PRESIDENT

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