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Fair Work Commission
Terrace Tower
80 William Street
EAST SYDNEY NSW 2000

By email: amod@fwc.gov.au

Dear Award Modernisation Team

**2014 4-YEARLY REVIEW OF MODERN AWARDS
FWC Matter No. AM2014/305 – PENALTY RATES (“Proceedings”)**

On 20 April 2015 Ai Group Workplace Lawyers filed, on behalf of the Australian Industry Group (**Ai Group**), an Outline of Submission regarding the common evidence it proposed to file in the proceedings (**20 April Outline**).

Pursuant to Item 7 of the Revised Directions issued by the Full Bench in the Proceedings on 7 August 2015 ([2015] FWCFB 5357), we now **attach** for filing on behalf of Ai Group, in the Proceedings, an Amended Outline of Submission on Common Evidence. The amendments made to the original 20 April Outline in accordance with the Revised Direction appear at paragraphs 10, 18 and 19 of the attached document.

Further, in the 20 April Outline Ai Group reserved its position to update the proposed findings contained therein if updated statistical and related data was released by the Australian Bureau of Statistics or similar entities. Updates of this nature have also been made at paragraph 16 of the attached document. One correction has also been made due to an error in the original 20 April Outline.

Paragraphs 14 and 15 have been updated to reflect that common evidence was filed on behalf of Ai Group on 29 June 2015.

Yours faithfully

A handwritten signature in black ink that reads 'L Cruden'.

Leanne Cruden
Senior Lawyer

FAIR WORK COMMISSION

AM 305 of 2014

FOUR YEARLY REVIEW OF MODERN AWARDS PENALTY RATES

AMENDED OUTLINE OF SUBMISSION ON COMMON EVIDENCE OF AUSTRALIAN INDUSTRY GROUP

1. The Australian Industry Group (“**Ai Group**”) is representing employer parties covered by the *Fast Food Industry Award 2010* (“**Fast Food Award**”) in the four yearly review of modern awards being conducted by the Fair Work Commission (“**Commission**”) pursuant to section 156 of the *Fair Work Act 2009* (Cth) (the “**FW Act**”).
2. The Commission has decided to refer common issues concerning penalty rates in a number of modern awards to a specially convened Full Bench (the “**Penalty Rate Proceedings**”).
3. The President of the Commission has assigned the Fast Food Award to the “Retail Group” as part of the consideration of the Penalty Rates Proceedings.
4. This outline summarises the position of Ai Group on:
 - (a) the reasons for the changes sought in its draft determination dated 13 February 2015 (the “**Ai Group Penalty Rates Draft Determination**”) filed in the Penalty Rates Proceedings; and
 - (b) the findings sought in relation to the common evidence to be filed by the Ai Group in the Penalty Rates Proceedings.

The Changes Sought

5. Ai Group seeks three changes to the Fast Food Award:
 - (a) First, to change the starting time for an evening work penalty from 9.00pm to 10pm (see clause 25.5(a)(i) of the Fast Food Award).
 - (b) Secondly, to reduce the level of the Sunday work penalty from 50 per cent to 25 per cent for full time and part-time employees (see clause 25.5(c)(i) of the Fast Food Award).
 - (c) Thirdly, to reduce the level of the Sunday work penalty from 75 per cent to 50 per cent for casual employees, inclusive of the casual loading (see clause 25.5(c)(ii) of the Fast Food Award).
6. Ai Group is not seeking to abolish the Sunday work penalty completely.

7. If the Commission was to make the changes sought by the Ai Group, the Fast Food Award would continue to contain clauses providing for significant additional remuneration in the form of Sunday work penalties.

The Reasons for the Changes Sought

8. A modern award must meet the “*modern awards objective*” – to provide a “*fair and relevant minimum safety net of terms and conditions*” (see section 134(1) of the FW Act).
9. A modern award must contain terms “*only to the extent necessary to achieve the modern awards objective*” (see section 138 of the FW Act).
10. The clauses in the Fast Food Award the subject of the changes sought are not meeting the modern awards objective in section 134 of the FW Act:
 - (a) First, the clauses provide for levels of penalties which are no longer “*relevant*” for the purposes of section 134(1) of the FW Act.
 - (b) Secondly, the clauses provide for levels of penalties which are beyond a “*fair and relevant minimum safety net*”.
 - (c) Thirdly, the clauses provide for levels of penalties which are higher than the level of penalties in the *Restaurant Industry Award 2010*.
 - (d) Fourthly, the clauses provide for levels of penalties which do not “*promote social inclusion through increased workforce participation*” for the purposes of section 134(1)(c) of the FW Act.
 - (e) Fifthly, the clauses provide for levels of penalties which go well beyond the provision of “*additional remuneration*” for “*working on weekends*” for the purposes of section 134(1)(da)(iii) of the FW Act.
 - (f) Sixthly, the clause concerning evening work penalty commences at a time that is not “*unsocial*” for the purposes of section 134(1)(da)(ii) of the FW Act.
11. Given that the clauses in the Fast Food Award, the subject of the changes sought, provide for levels of penalties beyond a fair and relevant minimum safety net, the clauses are not meeting the requirement in section 138 of the FW Act.
12. The clauses in the Fast Food Award, the subject of the changes sought, should be varied as set out in the Ai Group Penalty Rates Draft Determination.

Proposed Common Evidence

13. At present, Ai Group does not propose to call an expert witness in the common evidence and expert hearing. Ai Group wishes to reserve its right to call an expert witness to respond to expert evidence filed by the unions (such as the ACTU or the SDA).
14. On 29 June 2015 Ai Group filed, by way of common evidence, a tender bundle of statistical and related data, including data compiled by the Australian Bureau of Statistics (“**ABS**”).
15. Some of the ABS data upon which Ai Group intends to rely is only available electronically and, were it to be printed, would comprise hundreds of pages and likely be

incomprehensible and unmanageable. Accordingly, at the same time as filing its tender bundle Ai Group filed an Affidavit of Julie Christina Toth affirmed on 29 June 2015, that annexed relevant extracts of the ABS data and explained how the extracts were obtained and compiled.

Proposed Findings in relation to Proposed Common Evidence

16. The proposed findings are:

Australian Employees Generally

- (a) In May 2015, the estimated proportion of Australian employees who were female was 45.88 per cent, as at 24 June 2015.
- (b) In May 2015, the estimated proportion of Australian employees who worked part time (that is, work less than 35 hours per week) was 30.8 per cent.
- (c) In May 2014, the estimated proportion of Australian employees who worked as casual employees (that is, who did not receive paid leave entitlements) ("**Casuals**") was 21.6 per cent.
- (d) In November 2013, the estimated proportion of Australian employees who worked as a casual and worked less than 35 hours per week was 70.0 per cent.
- (e) From 1950 to 2007, the proportion of the Australian population that attended church frequently (that is, at least monthly) declined from 44.0 per cent to 17.0 per cent.

Australian Employees Aged 15 to 24 Years

- (f) In February 2015, the estimated proportion of Australian employees who were aged 15 to 24 years was 15.6 per cent.
- (g) In May 2015, the estimated proportion of Australian employees aged 15 to 24 years who worked part time was estimated to be approximately 54.1 per cent.
- (h) In November 2013, the estimated proportion of Australian employees aged 15 to 19 years and who worked as a Casual in their main job was 70.3 per cent.
- (i) In November 2013, the estimated proportion of Australian employees aged 20 to 24 years and who worked as a Casual in their main job was 38.3 per cent.
- (j) In 2009, Australian employees aged 15 to 19 years averaged 10 hours per week in paid work and 21 hours per week in education.
- (k) In 2009, Australian employees aged 20 to 24 years averaged 27 hours per week in paid work and 8 hours in education-related activities.
- (l) In 2012-2013, the estimated proportion of all Australians aged 15 to 24 years who lived at home with two parents was approximately 53.0 per cent.

- (m) In 2012-2013, the estimated proportion of all Australians aged 15 to 24 years who lived at home with one parent was a further approximate 17.0 per cent.
- (n) In 2006, the most time consuming leisure activity engaged in by Australians aged 15 to 24 years was watching TV and other passive media such as computer games.
- (o) In 2012-2013, the estimated number of full-time dependent students aged 15 to 24 years was 1.29 million.
- (p) In May 2015, the estimated number of Australians aged 15 to 24 years who were unemployed but seeking part-time work was 117,000.
- (q) In May 2015, the estimated number of Australians aged 15 to 24 years who were unemployed but seeking full time work was 152,700.

Accommodation and Food Services Industry

- (r) In February 2015, the estimated number of Australian employees working in the Accommodation and Food Services industry was 842,300.
- (s) In February 2015, the estimated number of Australian employees aged 15 to 19 years working in the Accommodation and Food Services industry was 215,800.
- (t) In February 2015, the estimated number of Australian employees aged 20 to 24 years working in the Accommodation and Food Services industry was 158,600.
- (u) In February 2015, the estimated proportion of all Australian employees aged 15 to 24 years working in the Accommodation and Food Services industry was 32.5 per cent.
- (v) In 2009, the estimated proportion of Australian employees in the Accommodation and Food Services industry typically working on a weekend was 72 per cent.

Food and Beverage Services Industry

- (w) In February 2015, the estimated number of Australian employees working in the food and beverage services industry was 727,200.
- (x) In February 2015, the estimated number of Australian employees working in the food and beverage services industry on a part-time basis was 439,600 (60.4 per cent).

Fast Food Industry

- (y) In 2014, the estimated number of Australian employees working in the fast food industry was 214,265.

- 17. Ai Group may update its proposed findings if updated statistical and related data is released by ABS or similar entities.
- 18. Ai Group intends to rely upon the proposed findings in support of the following broad submissions:
 - (a) In 1919, when penalty rates for work on a Sunday were introduced into industrial awards, the typical Australian employee was male, worked 44 hours per week on a

full time permanent basis on Monday to Saturday, was married, had children and attended church regularly on a Sunday.

- (b) In current times, fifty per cent of Australian employees are female, a significant proportion (in the order of 30 per cent) of Australian employees work on a part time basis, a significant proportion (in the order of 20 per cent) of Australian employees work on a casual basis and attendance at church (or other religious ceremonies) has declined significantly such that only a proportion (in the order of 17 per cent) of Australian employees attend church on a monthly basis.
 - (c) In current times, a proportion (in the order of 15 per cent) of Australian employees are aged 15 to 24 years and, of that proportion, a significant proportion (in the order of 30 per cent) work in the Accommodation and Food Services industries, a significant proportion (particularly those aged 15 to 19 years) work on average 10 hours per week on a casual basis and a significant proportion (in the order of 70 per cent) live at home.
 - (d) In current times, a significant proportion (in the order of 60 per cent) of Australian employees working in the food and beverage services industry do so on a part time basis.
 - (e) In current times, there is a significant number of Australians aged 15 to 24 years unemployed but seeking work.
 - (f) In current times, the level of penalties in clause 25.5(c) of the Fast Food Award are no longer "*relevant*" for the purposes of section 134(1) of the FW Act.
 - (g) In current times, the level of penalties in clause 25.5(c) of the Fast Food Award are beyond a "*fair and relevant minimum safety net*" for the purposes of section 134(1) of the FW Act.
 - (h) In current times, the level of penalties in clause 25.5(c) of the Fast Food Award do not "*promote*" "*increased workforce participation*" for the purposes of section 134(1)(c) of the FW Act.
 - (i) In current times, the level of penalties in clause 25.5(c) of the Fast Food Award go well beyond the provision of "*additional remuneration*" for "*working for weekends*" for the purposes of section 134(1)(da)(iii) of the FW Act.
19. Ai Group also intends to rely upon the proposed finding concerning the number of Australian employees in the fast food industry (see paragraph 16(y) of this outline) in support of specific submissions concerning employment circumstances in the fast food industry.
20. Ai Group will propose findings (additional to those outlined in paragraph [16]) based on the non-common evidence it intends to file.

11 August 2015