

OUTLINE OF SUBMISSION OF AUSTRALIAN INDUSTRY GROUP

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A. Introduction

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 (the “**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, including the Fast Food Award, 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. On 13 February 2015, Ai Group filed its draft determination dated 13 February 2015 (the “**Ai Group Penalty Rates Draft Determination**”) in the Penalty Rates Proceedings (see Schedule A to this outline).

B. Changes Sought

5. By the Ai Group Penalty Rates Draft Determination, Ai Group seeks three changes to the Fast Food Award:
 - (a) First, to change the starting time for an evening work penalty from 9pm 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 evening work penalty or the Sunday work penalty completely.
7. Ai Group is seeking to delay the commencement of the evening work penalty by one hour so that it aligns with the evening work penalty start time in the *Restaurant Industry Award 2010* (the “**Restaurant Award**”).
8. Ai Group is seeking to equate the level of the Sunday work penalty to the level of the Saturday work penalty.
9. 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 evening work penalties and Sunday work penalties.

C. Reasons for the Changes Sought

10. A modern award, including the Fast Food 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).
11. A modern award, including the Fast Food Award, must contain terms “*only to the extent necessary to achieve the modern awards objective*” (see section 138 of the FW Act).
12. The clauses in the Fast Food Award the subject of the changes sought in the Ai Group Penalty Rates Draft Determination are not meeting the modern awards objective in section 134 of the FW Act:
 - (a) First, the clauses which provide for the commencement of evening work penalties, and the levels of Sunday work penalties, are no longer “*relevant*” for the purposes of section 134(1) of the FW Act (particularly given the limited disability associated with work between 9pm and 10pm or on a Sunday and the absence of a greater disability for work on a Sunday in comparison to work on a Saturday).
 - (b) Secondly, the clauses which provide for the commencement of evening work penalties, and the levels of Sunday work penalties, are beyond a “*fair and relevant minimum safety net*” (particularly given the limited disability associated with work between 9pm and 10pm or on a Sunday and the absence of a greater disability for work on a Sunday in comparison to work on a Saturday).
 - (c) Thirdly, the clauses which provide for the commencement of evening work penalties, and the levels of Sunday work penalties, are higher than the level of penalties in the Restaurant Award in circumstances where there are no material differences in the working arrangements in the two industries.

- (d) Fourthly, the clauses which provide for the levels of Sunday work penalties do not “*promote social inclusion through increased workforce participation*” for the purposes of section 134(c) of the FW Act.
 - (e) Fifthly, the clause concerning the evening work penalty commences at a time that is not “*unsocial*” for the purposes of section 134(da)(ii) of the FW Act.
 - (f) Sixthly, the clauses provide for levels of Sunday work penalties which go well beyond the provision of “*additional remuneration*” for “*working on weekends*” for the purposes of section 134(da)(iii) of the FW Act (and constitute “*overcompensation*”).
13. Given that the clauses in the Fast Food Award the subject of the changes sought in the Ai Group Penalty Rates Draft Determination 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.
14. 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.
15. Ai Group submits that, as outlined in greater detail below, the characteristics of the fast food industry, as well as the characteristics of employees in the fast food industry, are distinct from the characteristics of other industries (and employees in those other industries) that are involved in the Penalty Rates Proceedings (see also Quiggin Cross Examination, 1 October 2015, PN11445). The difference in these characteristics may mean that the Commission is more readily able to make the variations sought in the Ai Group Penalty Rates Draft Determination than the changes sought by other parties in the Penalty Rates Proceedings.

D. Nature of Four Yearly Review

D1. Absence of Need for Cogent Reasons or Significant Change

16. The provisions in the FW Act relating to the four yearly review prescribe the factors to be taken into account by the Commission in conducting the review (see section 156 of the FW Act).
17. Significantly, the provisions do not limit a variation to a modern award to:
- (a) circumstances where there are “*cogent*” reasons for doing so (compare *Re Modern Awards Review 2012* [2012] FWA FB 5600; (2012) 223 IR 49 at [89], [99] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [318] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Public Holidays Case* [2013] FWCFB 2168; (2013) 232 IR 119 at [65] per Ross J, Smith DP, Hampton C; *Re Award Flexibility Case* [2013] FWCFB 2170; (2013) 232 IR 159 at [10], [11] per Ross J, Watson SDP, Gregory C; *Re Legal Services*

Award 2010 [2012] FWA 9551; (2012) 227 IR 171 at [16], [17], [19], [41], [42], [46] per Kaufman SDP; *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2013] FWC 4141; (2013) 233 IR 310 at [11] per Watson VP); or

- (b) circumstances of a “*significant change*” since the making of the Fast Food Award in order to vary the Fast Food Award (compare *Re Modern Awards Review 2012* [2012] FWA 5600; (2012) 223 IR 49 at [89], [99] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [318] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Public Holidays Case* [2013] FWCFB 2168; (2013) 232 IR 119 at [65] per Ross J, Smith DP, Hampton C; *Re Award Flexibility Case* [2013] FWCFB 2170; (2013) 232 IR 159 at [10], [11], [181], [207] per Ross J, Watson SDP, Gregory C; *Re Legal Services Award 2010* [2012] FWA 9551; (2012) 227 IR 171 at [16] per Kaufman SDP; *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2013] FWC 4141; (2013) 233 IR 310 at [11] per Watson VP).
18. Whilst the factors prescribed are not exhaustive, the other relevant factors to be taken into account by the Commission in performing its functions and exercising its powers relating to a four yearly review are determined from the subject matter, scope and purpose of the provisions relating to the four yearly review (see, for example, *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505 per Dixon J; *Wotton v Queensland* [2012] HCA 2; (2009) 246 CLR 1 at [9] per French CJ, Gummow, Hayne, Crennan and Bell JJ; *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [23] per French CJ; *NBMZ v Minister for Immigration* [2014] FCAFC 38; (2014) 220 FCR 1 at [6] per Allsop CJ and Katzmann J, at [149] per Buchanan J).
19. There is nothing in the subject matter, scope or purpose of the provisions relating to the four yearly review that limits a variation to a modern award to circumstances:
- (a) where there are “*cogent*” reasons for doing so (at least to the extent that “*cogent*” is intended to signify “*strong*”, “*compelling*” or “*forceful*” reasons (see, for example, *Australian Oxford Dictionary*, Second Edition, (2004), p247; *Macquarie Dictionary*, Third Edition, (1997), p249)); or
- (b) of a “*significant change*” since the making of the Fast Food Award in order to vary the Fast Food Award.
20. The Commission should not fetter its approach to the four yearly review by constraints that are not contained in the provisions relating to the four yearly review and which do not arise from the subject matter, scope or purpose of the four yearly review (see also the approach in *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [91], [138], [139] per Hatcher VP, Boulton J and McKenna C).
21. The Commission has previously varied the level of penalty rates in a modern award without identifying “*cogent*” reasons or “*significant change*” (see *Re Restaurant and Catering*

Association of Victoria [2014] FWCFB 1996; (2014) 243 IR 132 at [138], [139] per Hatcher VP, Boulton J and McKenna C).

D2. Absence of Need for Detailed Evidence

22. Additionally, the responsibility for conducting the four yearly review has been assigned to the Commission – a tribunal that is required to perform its functions and exercise its powers in a manner that is “*fair and just*” and is “*quick, informal and avoids unnecessary technicalities*” (see section 577 of the FW Act; see also *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [10]-[11], [60](2) per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C), that may inform itself of an issue relating to any matter in such manner as it considers appropriate (see section 590(1) of the FW Act; see also *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [13] per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [15] per Ross J, Harrison SDP, Hampton C) and that is not bound by the rules of evidence (see section 591 of the FW Act; see also *Re SDA* [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C).
23. Furthermore, the Commission should recognise, as it has done previously, that it is inherently difficult to demonstrate by direct evidence the employment effects of a proposed award variation, let alone quantify those effects (see *Re SDA* [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C).
24. Accordingly, the Commission should not insist upon, or confine its attention to matters only the subject of, detailed evidence (through, say, the preparation and filing of numerous witness statements) before varying a modern award as part of a four yearly review. Equally, the Commission should not require the identification of a precise impact (in dollar terms or in increased employment) of a proposed variation as a condition of varying a modern award as part of a four yearly review. (In any event, Ai Group has tendered detailed evidence in support of the Ai Group Penalty Rates Draft Determination.)

D3. Breadth of Four Yearly Review

25. The four yearly review is broader in scope than the transitional review conducted under item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (see *Re Modern Awards Review 2012* [2012] FWAFB 5600; (2012) 223 IR 49 at [91], [99] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [7], [119], [236] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Re Public Holidays Case* [2013] FWCFB 2168; (2013) 232 IR 119 at [66] per Ross J, Smith DP, Hampton C; *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [19], [60](3) per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [3] per Hatcher VP, Boulton J and McKenna C; *Re Textile, Clothing, Footwear and Associated Industries Award 2010* [2015] FWCFB 2831 at [12] per Watson SDP, O’Callaghan SDP, Cribb C; *Re Four Yearly Review - Annual Leave Decision*

[2015] FWCFB 3406 at [22] per Ross J, Harrison SDP, Hampton C; *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [76], [78] per Watson VP (diss); see also Fair Work Commission, *Four Yearly Review of Modern Awards – Issues Paper*, 24 January 2014 at [8]). Accordingly, there should be no general reticence – to make broad changes to a modern award, given that the modern award system was in transition and a four yearly review would soon be undertaken – of the kind identified in the transitional review (see *Re Modern Awards Review 2012* [2012] FWA FB 5600; (2012) 223 IR 49 at [91] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [119], [221], [335] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC) when the Commission is conducting the four yearly review.

26. The four yearly review does not expressly or impliedly favour the retention of the status quo (see *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [77] per Watson VP (diss)) and does not permit historical inertia to be a determinative consideration (see *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [71] per Watson VP (diss)).

E. Modern Awards Objective

27. A modern award, including the Fast Food 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).
28. In the context of the modern awards objective, the word “*fair*” means “*just, unbiased and equitable*” (see *Australian Modern Oxford Dictionary*, Second Edition, (2004), p448, first meaning; see also *Macquarie Dictionary*, Third Edition, (1997), p756, first meaning) and should be considered from the perspective of both employers and employees.
29. In the context of the modern awards objective, the word “*relevant*” means pertinent (see *Macquarie Dictionary*, Third Edition, (1997), p1798), appropriate, contemporary and not obsolete (see also section 164(a) of the FW Act) and should be contrasted with historical.
30. In the context of the modern awards objective, the word “*modern*” means “*current*” and “*not antiquated*” (see *Australian Modern Oxford Dictionary*, Second Edition, (2004), p448, first meaning) or “*ancient*” (see *Macquarie Dictionary*, Third Edition, (1997), p1382, first and second meanings).
31. It is implicit from the modern awards objective that the “*fair*” and “*relevant*” safety net should be considered from both the perspective of the employer and the perspective of the employee and to balance the interests of the two groups (see, for example, *SDA v \$2 and Under* (2003) 135 IR 1 at [11] per Giudice J, at [124] per Watson SDP, Rafaelli C).

32. As a matter of logic, a modern award may cease to be “*fair and relevant*” even though there has been no change (let alone significant change) in the industry since the making of the modern award – by way of example:
- (a) the Commission may, at the time of making a modern award, have adopted a level of penalty rates from an industrial instrument operating within part of Australia without examining, at the time of making the modern award, the ongoing “*fairness*” or “*relevance*” of the level; or
 - (b) the Commission may, at the time of making a modern award, have adopted a level of penalty rate which was different to (higher than) the level of penalty rate in another (but related) modern award without examining, at the time of making both modern awards, the “*fairness*” or “*relevance*” of the different levels; or
 - (c) the Commission may, at the time of making a modern award, have adopted a level of penalty rate from a related modern award but may, later in time, have reduced the level of penalty rate in the related modern award; or
 - (d) the Commission may, at the time of making a modern award, have adopted a level of penalty rates from an industrial instrument within part of Australia without examining, at the time of the making of the modern award, the features and characteristics of all employees, or differing group of employees, in the industry,

(see also the approach in *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [90], [138] per Hatcher VP, Boulton J and McKenna C).

F. “Necessary” to Meet Modern Awards Objective

33. In many statutory contexts, the word “*necessary*” is construed to mean “*expedient*” (see, for example, *McGrath v Liquidators of HIH Insurance Limited* [2009] NSWSC 1244 at [22] per Barrett J; *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] NSWCA 85; (2015) 105 ACSR 581 at [124] per Bathurst CJ (with whom Beazley P, Macfarlan, Meagher and Barrett JJA agreed)).
34. In the context of the modern award objective, the word “*necessary*” in section 138 of the FW Act should be construed as “*required*”, “*essential*”, “*imperative*” or “*indispensable*” to meet the modern award objective (see *SDA v NRA (No 2)* [2012] FCA 480; (2012) 205 FCR 227 at [46] per Tracey J; *Re Modern Awards Review 2012* [2012] FWA 5600; (2012) 223 IR 49 at [33] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; see also *Australian Modern Oxford Dictionary*, Second Edition, (2004), p857, first meaning).
35. Applied to a modern awards review under section 156 of the FW Act, the Commission is required, as part of the four yearly review, to form a view on whether (or be satisfied that) a provision (or term) of a modern award is essential, imperative or indispensable to meeting the modern awards objective and to vary a modern award if it forms the view (or is satisfied)

that the provision (or term) of the modern award is not essential, imperative or indispensable to meeting the modern awards objective (that is, a fair and relevant minimum safety net).

G. Penalty Rates

36. A penalty is a premium or loading paid, in addition to a base rate of pay, by an employer for the performance of work by an employee (see, for example, *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; see also *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [155] per Hampton and Bartel DPP, Dangerfield C; *Macquarie Dictionary*, Third Edition, (1997), p1588; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p379). The Fast Food Award describes the penalty as a “loading” (see clause 25.5 of the Fast Food Award).
37. The traditional justification for requiring an employer to pay a penalty has been the performance of work by an employee outside a “prescribed limit” or “prescribed condition” (see *Re Saturdays and Sundays Rates of Pay* (1947) 58 CAR 610 at 616 per Drake-Brockman ACJ and Sugerman J; see also *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [197] per Hampton and Bartel DPP, Dangerfield C). The prescribed limit or condition typically has involved one of two aspects – outside the standard hours of work (whether at a particular time or on a particular day) or in excess of normal hours (see Dawkins, Rungie, Sloan, “Penalty Rates and Labour Supply: Employee Attitudes to Non-Standard Hours of Work”, (1986) 28 *Journal of Industrial Relations* 564 at 565; see also Pezzullo First Affidavit annexing report entitled “*The Modern Face of Weekend Work*” (“**Pezzullo First Affidavit**”) (Exhibit PG 34), p29; Synergies Economic Consulting Report (Exhibit SDA 52), p3, first paragraph).
38. In terms of a particular day of the week being the prescribed limit or condition, the standard hours were regarded as occurring (initially) on Monday to Saturday (see *Federated Gas Employees’ Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 469 per Higgins J; see also *Tramways & Gas Employees Case* (1949) 62 CAR 558 at 564 per Blackburn C) and (later) as Monday to Friday (see *Re Bank Officials (Federal) Award 1955* (1957) 88 CAR 598 at 599 per Portus C).
39. One purpose of a penalty has been to compensate an employee for working at a particular time or on a particular day (see *Re Saturdays and Sundays Rates of Pay* (1947) 58 CAR 610 at 615 per Drake-Brockman ACJ and Sugerman J; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [196], [197] per Hampton and Bartel DPP, Dangerfield C; *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; see also *Macquarie Dictionary*, Third Edition, (1997), p1588; Pezzullo First Affidavit (Exhibit PG 34), p29; Sands Statement (Exhibit Retail 2), exhibit SS2 (ACSR Report), p13; Synergies Economic Consulting Report (Exhibit SDA 52), p3, first paragraph; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p414). A second purpose of a penalty has been to deter an employer from rostering

employees to work a particular time or on a particular day (see *Re Saturdays and Sundays Rates of Pay* (1947) 58 CAR 610 at 615 per Drake-Brockman ACJ and Sugerman J; see also *Federated Gas Employees' Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 469, 470 per Higgins J; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [196], [197] per Hampton and Bartel DPP, Dangerfield C; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p414). A third purpose of a penalty has been to provide an incentive for an employee to work at a particular time or on a particular day (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).

40. Other traditional considerations relating to the requirement to pay a penalty have included:
- (a) a lack of public transport being available at the times covered by the penalties;
 - (b) the impact of work outside the “*prescribed limit*” on health (see also *Federated Gas Employees' Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 470 per Higgins J); and
 - (c) the impact of work outside the “*prescribed limit*” on family and social life (see also *Federated Gas Employees' Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 469 per Higgins J; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [197], [203] per Hampton and Bartel DPP, Dangerfield C).
41. Traditionally, a penalty on a Sunday was justified on the basis that Sunday was treated as the day for family, social and religious reunion, the day when friends were free and the day most valuable for rest and amenity under social habits (see *Federated Gas Employees' Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 469 per Higgins J; *Tramways & Gas Employees Case* (1949) 62 CAR 558 at 564 per Blackburn C; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [197] per Hampton and Bartel DPP, Dangerfield C; see also Sands Statement (Exhibit Retail 2), exhibit SS2, p13; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p414).
42. Although not stated expressly, the requirement to pay a penalty reflected the typical employee of the time – a married male with a family working (initially) 48 hours per week, (later) 44 hours per week and (later still) 40 hours a week Monday to Friday (noting the reduction in hours effected by the orders in *Re Amalgamated Engineering Union* (1927) 24 CAR 755 per Dethridge CJ and Beeby JJ (to 44 hours) and *Re Standard Hours Inquiry* (1947) 59 CAR 581 at 610 per Drake-Brockman CJ, Foster and Sugerman JJ (to 40 hours)). (It is significant that the number of employees working the typical hours of Monday to Friday has reduced in Australia – from 79 per cent in 1971 to 59 per cent in 2003 (see Muurlink Wellbeing Report (Exhibit UV 26), p40, par 64; see also Workplace and Economic Research Section of Fair Work Commission, *Changing Work Patterns*, (December 2015), table 3.1, table 3.2).)

H. Employees in Australia in Current Times

H1. Employees Generally

43. As at May 2015, the ABS estimated that 46 per cent of all Australian employed persons were female (see Toth Affidavit, p34 (AiG Tender Bundle, Document 1, Part 1 of 2, p34); see also ABS Employee Earnings and Hours May 2014, p2 (AiG Tender Bundle, Document 2, p162 (50 per cent of employees in May 2014)); Australian Jobs 2015 (Exhibit UV 34), p3 (46 per cent of employees in November 2014)).
44. As at May 2015, the ABS estimated that 30.8 per cent of all Australian employed persons worked on a part-time basis (that is, they worked less than 35 hours per week) (see Toth Affidavit, par 9 (AiG Tender Bundle, Document 1, Part 1 of 2, p6); Australian Jobs 2015 (Exhibit UV 34), p3 (30 per cent in November 2014); Yu Cross Examination, 6 November 2015, PN22749 (30 per cent in January 2013)).
45. As at May 2014 (and noting that there is no updated data available after that time – see Toth Second Affidavit (Exhibit AIG 25), par 6), the ABS estimated that 21.6 per cent of all Australian employees worked on a casual basis (that is, they did not receive paid leave entitlements) (see ABS Employee Earnings and Hours May 2014 (AiG Tender Bundle, Document 2, p163); see also Pezzullo First Affidavit (Exhibit PG 34), p33 (19 per cent in November 2013); Workplace and Economic Research Section of Fair Work Commission, *Changing Work Patterns*, p6, second bullet point; Muurlink Wellbeing Report (Exhibit UV 26), p51, par 96 (doubling of casual workforce in Australia)).

H2. Employees Aged 15 to 24 Years

46. As at May 2015, the ABS estimated that 18.2 per cent of all Australian employees were aged 15 to 24 years (see Toth First Affidavit (Exhibit AIG 24), p149 (AiG Tender Bundle, Document 1, Part 2 of 2, p149); see also ABS Employee Earnings and Hours May 2014, p3 (AiG Tender Bundle, Document 2, p163); Australian Jobs 2015 (Exhibit UV 34), p3 (15 per cent in November 2014); Accommodation and Food Services Industry Outlook (Exhibit RCI 13), p4 (15.9 per cent in 2013)).
47. As at May 2015, the ABS estimated that 75.8 per cent of all Australian employed persons aged 15 to 19 years worked on a part-time basis (that is, they worked less than 35 hours per week) (see Toth First Affidavit (Exhibit AIG 24), par 12(c) (AiG Tender Bundle, Document 1, Part 1 of 2, p7)), in comparison to 30.8 per cent of all Australian employed persons (see paragraph [44] of this outline).
48. As at May 2015, the ABS estimated that 41.3 per cent of all Australian employed persons aged 15 to 24 years worked on a part-time basis (that is, they worked less than 35 hours per week) (see Toth First Affidavit (Exhibit AIG 24), par 12(d) (AiG Tender Bundle, Document 1, Part 1 of 2, p7); see also State of Australia's Young People Report, p44 (AiG Tender Bundle,

Document 3, Part 1 of 3, p236)), in comparison to 30.8 per cent of all Australian employed persons (see paragraph [44] of this outline).

49. As at November 2013 (and noting that there is no updated data available after this time – see Toth First Affidavit (Exhibit AIG 24), par 26(c) (AiG Tender Bundle, Document 1, Part 1 of 2, p13)), the ABS estimated that 71.4 per cent of all Australian employees aged 15 to 19 years worked on a casual basis (that is, they did not receive paid leave entitlements) (see Toth First Affidavit (Exhibit AIG 24), par 31(a) (AiG Tender Bundle, Document 1, Part 1 of 2, p15)), in comparison to 21.6 per cent of all Australian employees (see paragraph [45] of this outline).
50. As at November 2013 (and noting that there is no updated data available after this time – see Toth First Affidavit (Exhibit AIG 24), par 26(c) (AiG Tender Bundle, Document 1, Part 1 of 2, p13)), the ABS estimated that 49.6 per cent of all Australian employees aged 15 to 24 years worked on a casual basis (that is, they did not receive paid leave entitlements) (see Toth First Affidavit (Exhibit AIG 24), par 31(b) (AiG Tender Bundle, Document 1, Part 1 of 2, p15)), in comparison to 21.6 per cent of all Australian employees (see paragraph [45] of this outline).
51. In 2006 (and noting that there is no updated data available after this time – see Toth Second Affidavit (Exhibit AIG 25), par 7), the ABS estimated that Australian employed persons aged 15 to 19 years worked on average 10 hours per week and on average studied 21 hours per week (see State of Australia’s Young People Report, p43 (AiG Tender Bundle, Document 3, Part 1 of 3, p235)).
52. In 2006, the ABS estimated that Australian employees aged 20 to 24 years worked on average 27 hours per week and on average studied 8 hours per week (see State of Australia’s Young People Report, p43 (AiG Tender Bundle, Document 3, Part 1 of 3, p235)).
53. In 2006, the ABS estimated that the most time-consuming leisure activity for Australians aged 15 to 24 years was watching TV and other passive leisure activities (see State of Australia’s Young People Report, p73 (AiG Tender Bundle, Document 3, Part 2 of 3, p265)).
54. As at June 2013, the ABS estimated that 70 per cent of all Australian persons aged 15 to 24 years lived in a couple or single parent family (see Toth First Affidavit, par 21 (AiG Tender Bundle, Document 1, Part 1 of 2, p11); see also State of Australia’s Young People Report, p26, p27 (AiG Tender Bundle, Document 3, Part 1 of 3, p218, p219)).
55. In the period from 2004 to 2012, the data from the Household, Income and Labour Dynamics in Australia (“HILDA”) survey estimated that the number of Australian weekend workers who were dependent students, rather than self-supporting students, increased from approximately 15 per cent to approximately 25 per cent (see Pezzullo First Affidavit (Exhibit PG 34), p19, first paragraph; p45, Chart 4.3).

H3. Employees in the Accommodation and Food Services Industries

56. In 2009, the ABS estimated that 72 per cent of Australian employed persons working in the accommodation and food services industries (of which the fast food industry is part) usually worked on weekends (see ABS Australian Social Trends (Exhibit AIG 15), p25; see also table, "Accommodation and food services" entry; see further Muurlink Wellbeing Report (Exhibit UV 26), p45, par 80; Markey Report (Exhibit ACTU 2), p2, par 5; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p428, figure 11.3; Workplace and Economic Research Section of Fair Work Commission, *Changing Work Patterns*, (December 2015), p19, p20).
57. In 2013, the ABS estimated that 43.4 per cent of Australian employed persons working in the accommodation and food services industries were aged 15 to 24 years (see Accommodation and Food Services Industry Outlook (Exhibit RCI 13), p4).
58. In May 2015, the ABS estimated that 716,900 people worked in the food and beverage services section of the accommodation and food services industries (see Toth Affidavit, par 33(a)(i) (AiG Tender Bundle, Document 1, Part 1 of 2, p16); see also Quiggin Report (Exhibit UV 24), Appendix A, par 5 (727,200 in February 2015)).
59. In May 2015, the ABS estimated that 436,200 employed persons (or 60.8 per cent) worked in the food and beverage services section of the accommodation and food services industries on a part-time basis (see Toth Affidavit, par 33(b) (AiG Tender Bundle, Document 1, Part 1 of 2, p16); see also Australian Jobs 2015 (Exhibit 34), p15; Quiggin Report (Exhibit UV 24), Appendix A, par 8 (439,800 in February 2015); Watson Report (Exhibit SDA 35), p5, lines 25-26 (68 per cent in 2011)), in comparison to 30.8 per cent of all Australian employed persons (see paragraph [44] of this outline).

I. Employees in the Fast Food Industry

60. In 2014, it was estimated that 214,265 employees worked in the fast food industry (see SDA/AIG Amended Aide Memoire (Exhibit TBA); Pezzullo First Affidavit (Exhibit PG 34), p27; see also O'Brien Report (Exhibit ACTU 3), p6, par 3 (203,333 employees worked in the fast food industry in 2011); O'Brien Cross Examination, 15 December 2015, PN23332).
61. In July 2015, approximately 101,000 employees in the fast food industry worked for McDonald's in a store (see Kopias First Affidavit (Exhibit AIG 21), pars 7, 8, 9, 10).
62. In July 2015, approximately 13,000 employees in the fast food industry worked for Hungry Jack's in a store (see Feast First Affidavit (Exhibit AIG 23), par 9, 11, 12, 14, 16).
63. In July 2015, approximately 53 per cent (approximately 114,000 (see paragraphs [61] and [62] of this outline) of approximately 215,000 (see paragraph [60] of this outline)) of employees in the fast food industry worked for McDonald's or Hungry Jack's.

64. In August 2015, approximately 51 per cent of employees working in stores for McDonald's were female (see Limbrey First Affidavit (Exhibit AIG 3), pars 28, 29; see also Dunn Amended Affidavit (Exhibit AIG 1), par 12; Haydar Affidavit (Exhibit AIG 5), par 22; Dando Amended Affidavit (Exhibit AIG 6), par 9; Agostino First Affidavit (Exhibit AIG 7), par 14; Eagles First Affidavit (Exhibit AIG 9), par 9), in comparison to 46 per cent of all Australian employed persons being female (see paragraph **[43]** of this outline).
65. In July 2015, approximately 66 per cent of employees working in stores for McDonald's and Hungry Jack's were aged 14 to 17 years (see Deasy Amended First Affidavit (Exhibit AIG 11), p25, Table 1; see also Limbrey First Affidavit (Exhibit AIG 3), pars 33, 34, 35, 36, 186; Dunn Amended Affidavit (Exhibit AIG 1), par 15).
66. In July 2015, approximately 90 per cent of employees working in stores for McDonald's and Hungry Jack's were aged 14 to 24 years (see Deasy Amended First Affidavit (Exhibit AIG 11), p25, Table 1; see also Limbrey First Affidavit (Exhibit AIG 3), pars 33, 35; Dunn Amended Affidavit (Exhibit AIG 1), par 15; Haydar Affidavit (Exhibit AIG 5), par 14; Dando Amended Affidavit (Exhibit AIG 6), par 12; Agostino First Affidavit (Exhibit AIG 7), par 17; Eagles First Affidavit (Exhibit AIG 9), par 13), in comparison to 18.2 per cent of all Australian employed persons being aged 15 to 24 years (see paragraph **[46]** of this outline).
67. In July 2015, approximately 85 per cent of employees working in stores for McDonald's and Hungry Jack's worked on a part time or casual basis (see Deasy Amended First Affidavit (Exhibit AIG 11), p29, Table 10; see also Limbrey First Affidavit (Exhibit AIG 3), pars 30, 31; Dunn Amended Affidavit (Exhibit AIG 1), par 13; Haydar Affidavit (Exhibit AIG 5), par 12; Dando Amended Affidavit (Exhibit AIG 6), par 10; Agostino First Affidavit (Exhibit AIG 7), par 15; Eagles First Affidavit (Exhibit AIG 9), pars 10, 11; see also Workplace and Economic Research Section of Fair Work Commission, *Industry Profile – Accommodation and Food Services*, (December 2015), p25).
68. In mid-2015, less than 10 per cent of employees working in stores for McDonald's who worked on a part time or casual basis and were aged 14 to 16 years made themselves available to work before 4pm on a weekday (see Limbrey First Affidavit (Exhibit AIG 3), pars 73, 78, 83, 87, 92, 96).
69. In mid-2015, employees working in stores for McDonald's who worked on a part time or casual basis and were aged 14 to 17 years made themselves available to work for double the number of hours on a weekend than a week day (see Limbrey First Affidavit (Exhibit AIG 3), pars 164, 166; see also Dunn Cross Examination, 26 October 2015, PN18476, PN18488).
70. In July 2015, approximately 50 per cent of employees working for McDonald's and Hungry Jack's worked 1 to 10 hours per week (and a further approximate 20 per cent of employees working for McDonald's and Hungry Jack's worked 11 to 15 hours per week) (see Deasy Amended First Affidavit (Exhibit AIG 11), p29, Table 11; see also Limbrey First Affidavit (Exhibit AIG 3), par 43; see further State of Australia's Young People Report, p43 (AIG Tender Bundle, Document 3, Part 1 of 3, p235); O'Brien Report (Exhibit ACTU 3), p10; Workplace

and Economic Research Section of Fair Work Commission, *Industry Profile – Accommodation and Food Services*, (December 2015), p28).

71. In July 2015, approximately 80 per cent of employees working for McDonald's and Hungry Jack's worked the same or similar hours each week (see Deasy Amended First Affidavit (Exhibit AIG 11), p32, Table 12).
72. In July 2015, approximately 74 per cent of employees working for McDonald's and Hungry Jack's were not married and were not in long term relationships (see Deasy Amended First Affidavit (Exhibit AIG 11), p26, Table 3).
73. In July 2015, approximately 75 per cent of employees working for McDonald's and Hungry Jack's lived at home with one or both of their parents (see Deasy Amended First Affidavit (Exhibit AIG 11), p26, Table 4), with approximately 90 per cent of employees working for McDonald's and Hungry Jack's aged 14 to 18 years living at home with one or both parents (see Deasy Amended First Affidavit (Exhibit AIG 11), p27, Table 4B; see also State of Australia's Young People Report, p26, p32 (AIG Tender Bundle, Document 3, Part 1 of 3, p218, p224)) (noting too that according to the 2011 Census approximately 35.8 per cent of employees across all age groups in the take away food services industry were dependent students (see O'Brien Report (Exhibit ACTU 3), p29, table 3.2)).
74. In July 2015, approximately 93 per cent of employees working for McDonald's and Hungry Jack's were not the parent or legal guardian of a person aged under 18 years (see Deasy Amended First Affidavit (Exhibit AIG 11), p27, Table 5).
75. In July 2015, approximately 77 per cent of employees working for McDonald's and Hungry Jack's were full time or part time students (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, Table 6; see also Dunn Amended Affidavit (Exhibit AIG 1), par 16; Haydar Affidavit (Exhibit AIG 5), par 44; Agostino First Affidavit (Exhibit AIG 7), par 19; Eagles First Affidavit (Exhibit AIG 9), pars 14, 15).
76. In July 2015, approximately 72 per cent of employees working for McDonald's and Hungry Jack's who were full time students worked on Saturdays and approximately 72 per cent of employees working for McDonald's and Hungry Jack's who were full time students worked on Sundays (see Deasy Amended First Affidavit (Exhibit AIG 11), p34, Table 13C; see also Eagles First Affidavit (Exhibit AIG 9), pars 23, 33; Markey Report (Exhibit ACTU 2), p2, par 5).
77. In July 2015, approximately 63 per cent of employees working for McDonald's and Hungry Jack's preferred to work both week days and weekends (see Deasy Amended First Affidavit (Exhibit AIG 11), p35, Table 14).
78. In July 2015, younger employees working for McDonald's and Hungry Jack's preferred not to work only on weekdays whereas older employees working for McDonald's and Hungry Jack's preferred to work only on weekdays (see Deasy Amended First Affidavit (Exhibit AIG 11), p36, Table 14A).

79. In July 2015, approximately 70 per cent of employees working for McDonald's and Hungry Jack's would work more hours on a Saturday or a Sunday if offered more hours (see Deasy Amended First Affidavit (Exhibit AIG 11), p38, Table 16; Deasy Amended First Affidavit, p40, Table 16C; Deasy Amended First Affidavit, p41, Table 17; Deasy Amended First Affidavit, p43, Table 17C; see also Dunn Amended Affidavit (Exhibit AIG 1), pars 36, 38, 54, 55; Agostino First Affidavit (Exhibit AIG 7), par 57).
80. In July 2015, approximately 78 per cent of employees working for McDonald's and Hungry Jack's worked six hours or less on a Saturday (see Deasy Amended First Affidavit (Exhibit AIG 11), p44, Table 19; see also Dunn Amended Affidavit (Exhibit AIG 1), par 29; Haydar Affidavit (Exhibit AIG 5), par 30; Dando Amended Affidavit (Exhibit AIG 6), par 24; Agostino First Affidavit (Exhibit AIG 7), par 32; Eagles First Affidavit (Exhibit AiG 9), par 26).
81. In July 2015, approximately 80 per cent of employees working for McDonald's and Hungry Jack's worked six hours or less on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p53, Table 23; see also Dunn Amended Affidavit (Exhibit AIG 1), par 48; Dando Amended Affidavit (Exhibit AIG 6), par 32; Agostino First Affidavit (Exhibit AIG 7), par 42; Eagles First Affidavit (Exhibit AIG 9), par 38).
82. In July 2015, approximately 55 per cent of employees working for McDonald's or Hungry Jack's reported no adverse impact of their working on a Saturday or Sunday on spending time with family or friends (see Deasy Amended First Affidavit (Exhibit AIG 11), p45, Table 20; p53, Table 24), with no material difference existing on the impact of working on a Saturday in comparison to the impact of working on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p45, Table 20; p53, Table 24).
83. In July 2015, approximately 60 per cent of employees working for McDonald's or Hungry Jack's spend in excess of six hours per week watching TV, playing computer games or undertaking online and social media activities (see Deasy Amended First Affidavit (Exhibit AIG 11), p70, Table 33).
84. In July 2015, the majority of employees working for McDonald's or Hungry Jack's on a Saturday or a Sunday commonly commenced a shift at either 6am, 7am, 8am, 10am, 11am, 12pm, 4pm or 5pm (see Deasy Amended First Affidavit (Exhibit AIG 11), p51, Table 22).
85. In July 2015, approximately 75 per cent of employees working for McDonald's or Hungry Jack's did not experience any greater difficulties travelling to and from work on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p58, Table 25).
86. Based on the data relating to McDonald's and Hungry Jack's, and consistent with the data relating to Australian employees aged 15 to 24 years and Australian employees working in the accommodation and food services industries, the typical employee in the fast food industry is:
- (a) aged between 14 to 24 years (see paragraph [65] and [66] of this outline);

- (b) single (see paragraph [72] of this outline);
 - (c) studying (see paragraph [75] of this outline; see also paragraphs [51] and [55] of this outline);
 - (d) working part-time (see paragraph [67] of this outline; see also paragraphs [47], [48], [49], [50], [51], [52] and [59] of this outline);
 - (e) living with one or both of their parents (see paragraph [73] of this outline; see also paragraph [54] of this outline);
 - (f) not supporting a dependent family (see paragraph [74] of this outline);
 - (g) working 1 to 15 hours a week (see paragraph [70] of this outline; see also paragraph [51] of this outline);
 - (h) working regularly one day of a weekend (see paragraph [76] of this outline; see also paragraph [56] of this outline); and
 - (i) preferring to work some time on weekends (see paragraph [77] of this outline).
87. Additionally, based on the data relating to McDonald's and Hungry Jack's:
- (a) 78 per cent of employees working for McDonald's and Hungry Jack's on a Saturday work between 1 and 6 hours (see paragraph [80] of this outline), with the typical crew member of McDonald's in a corporate store working on average 5.38 hours on a Saturday (see Limbrey First Affidavit (Exhibit AIG 3), par 171); and
 - (b) 80 per cent of employees working on a Sunday work between 1 to 6 hours (see paragraph [81] of this outline), with the typical crew member of McDonald's in a corporate store working on average 5.28 hours on a Sunday (see Limbrey First Affidavit (Exhibit AIG 3), par 173).
88. Some of the characteristics of a typical employee in the fast food industry are not dissimilar to the characteristics of a typical employee in the restaurant industry, with approximately 50 per cent of restaurant employees being female, approximately 50 per cent of restaurant employees being casuals and over 40 per cent of restaurant employees working between 1 and 24 hours per week (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [95] per Hatcher VP, Boulton J and McKenna C).
89. In July 2015, there is a clear distinction between career and non-career employees working in the fast food industry (with a smaller number of career employees intending to make a career in the industry through the acquisition of skills and experience (often through their employer) and through promotion and being available to work throughout a day, and a greater number of non-career employees working in the industry whilst studying, intending

to work in other industries in due course and only being available late afternoon and on weekends) (see Limbrey First Affidavit (Exhibit AIG 3), pars 180, 181, 182, 184, 185; Dunn Amended Affidavit (Exhibit AIG 1), pars 65 to 68; Dunn Cross Examination, 26 October 2015, PN18476, PN18488; Haydar Affidavit (Exhibit AIG 5), pars 43 to 45; Dando Amended Affidavit (Exhibit AIG 6), pars 41, 42; Agostino First Affidavit (Exhibit AIG 7), pars 53 to 55; Eagles First Affidavit (Exhibit AIG 9), pars 48 to 52).

90. In July 2015, approximately 38 per cent of employees at McDonald's and Hungry Jack's did not intend to become career employees in the fast food industry (see Deasy Amended First Affidavit (Exhibit AIG 11), p74, Table 35) whereas approximately 45 per cent of such employees were undecided on becoming career employees in the fast food industry (see Deasy Amended First Affidavit (Exhibit AIG 11), p74, Table 35).
91. In mid-2015, approximately 50 per cent of casual employees at McDonald's have worked for McDonald's less than one year (see Limbrey First Affidavit (Exhibit AIG 3), par 42; see also Dunn Amended Affidavit (Exhibit AIG 1), par 17; Dando Amended Affidavit (Exhibit AIG 6), par 15; Agostino First Affidavit (Exhibit AIG 7), par 22; Eagles First Affidavit (Exhibit AIG 9), par 17).

J. Fast Food Industry

J1. Number of Establishments

92. The fast food industry is estimated to comprise 24,600 fast food establishments (see SDA/AIG Amended Aide Memoire (Exhibit TBA); see also Pezzullo First Affidavit (Exhibit PG 34), p27; Workplace and Economic Research Section of Fair Work Commission, *Industry Profile – Accommodation and Food Services*, (December 2015), p20 (24,035 establishments)).

J2. Production of Non-Preservable Items

93. At a general level, the fast food industry involves the production of non-preservable items – the food is produced for immediate consumption by the customer and is not stored for later use or sale (see Krishnamurthy Affidavit (Exhibit AIG 20), pars 6, 19; see also Dunn Amended Affidavit (Exhibit AIG 1), par 18; Agostino First Affidavit (Exhibit AIG 7), par 23; Dando Amended Affidavit (Exhibit AIG 6), par 16; Eagles First Affidavit (Exhibit AIG 9), par 18; see also Productivity Commission, *Workplace Relations Framework*, Final Report, (December 2015), p427).

J3. Responsive to Consumer Demand

94. In the fast food industry, the standard hours of operations of stores include Saturdays and Sundays as that reflects the demand of customers for purchase and consumption of fast food (see Limbrey First Affidavit (Exhibit AIG 3), par 11(c); see also ABS Australian Social Trends (Exhibit AIG 15), p25; Pezzullo First Affidavit (Exhibit PG 34), p57, third and fourth

paragraphs; p62, fourth bullet point; see further Dunn Cross Examination, 26 October 2015, PN18460; Haydar Cross Examination, 26 October 2015, PN18667; Dando Cross Examination, 26 October 2015, PN18734; Fantis Statement (Exhibit RCI 1), par 5; Fantis Cross Examination, 26 October 2015, PN18877).

95. At a general level, the success of the fast food industry depends upon the appropriate response of the industry to customer demand (see also Fantis Cross Examination, 26 October 2015, PN18877).

J4. No Opportunity to Avoid Penalties

96. Given the demand of customers for the purchase and consumption of fast food and the production of non-preservable items, employers in the fast food Industry have little opportunity to avoid the costs associated with penalties (see also *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [81] per Watson VP (diss)).

J5. Significant Weekend Sales

97. In 2015, most McDonald's stores operate 24 hours per day seven days per week (see Limbrey First Affidavit (Exhibit AIG 3), pars 4, 8, 9 (601 of 943 stores operate 24/7; other stores operates 24/7 some but not all days); see also Dunn Amended Affidavit (Exhibit AIG 1), pars 21, 56; Dando Amended Affidavit (Exhibit AIG 6), pars 3, 17, 35; Haydar Affidavit (Exhibit AIG 5), par 24, 37; Agostino Second Affidavit, par 2; Eagles Second Affidavit, par 2; see further Fantis Statement (Exhibit RCI 1), par 5), a practice consistent with other establishments in the accommodation and food services industries (see Workplace and Economic Research Section of Fair Work Commission, *Industry Profile – Accommodation and Food Services*, (December 2015), p44).
98. In 2015, in McDonald's stores, 17 per cent of the weekly revenue is earned on a Saturday (see Limbrey First Affidavit (Exhibit AIG 3), par 11 and Confidential Exhibit KTL-2; see also par 170 and Confidential Exhibit KTL-3) and 14 per cent of weekly revenue is generated on a Sunday (see Limbrey First Affidavit (Exhibit AIG 3), par 12 and Confidential Exhibit KTL-2; see also Limbrey First Affidavit (Exhibit AIG 3), par 172 and Confidential Exhibit KTL-3).
99. In mid-2015, in some McDonald's stores, the peak period of sales was regarded as Friday to Sunday (see Dando Amended Affidavit (Exhibit AIG 6), par 34; Dando Cross Examination, 26 October 2015, PN18734; Haydar Cross Examination, 26 October 2015, PN18667).
100. In mid-2015, in some McDonald's stores, Sunday sales were 25 to 30 per cent greater than on the average weekday (see Eagles First Affidavit, par 41; see also Agostino First Affidavit (Exhibit AIG 7), par 45).
101. In mid-2015, approximately 30 per cent of weekly sales in the fast food industry were achieved on a Saturday (the highest amount of daily sales) and 18 per cent of weekly sales in the fast food industry were achieved on a Sunday (the third highest amount of daily sales)

(see Foodservice Suppliers Association of Australia, *Dining Out Data*, May 2015 (Exhibit TBA), p15; see also Agostino First Affidavit (Exhibit AIG 7), pars 35, 45; Dando Amended Affidavit (Exhibit AIG 6), par 34; Productivity Commission, *Workplace Relations Framework, Final Report*, (2015), p424-425).

J6. Predictable Weekend Work

102. In mid-2015, 75 per cent of the employees working for McDonald's and Hungry Jacks on a Saturday work a similar shift each Saturday regularly (that is, do not change their shifts regularly) (see Deasy Amended First Affidavit (Exhibit AIG 11), p50, Table 21).
103. In mid-2015, 70 per cent of the employees working for McDonald's and Hungry Jack's on a Sunday work a similar shift each Sunday regularly (see Deasy First Affidavit, p59, Table 26).

J7. Employee Choice to Work Weekends in the Fast Food Industry

104. The majority of employees working in the fast food industry on weekends choose to do so. Over three quarters of employees in the industry are students (see paragraph [75] of this outline) who are unable to (or do not) work significant hours during the week (see also Pezzullo First Affidavit (Exhibit PG 34), p15, first paragraph). Employees working for McDonald's in stores on a part-time or casual basis and aged 14 to 17 years make themselves available double the number of hours on a weekend than on a week day (see paragraph [69] of this outline). At the commencement of employment with McDonald's, employees complete roster availabilities that indicate availabilities to work on weekends (see Limbrey First Affidavit (Exhibit AIG 3), pars 54 to 59; Haydar Affidavit (Exhibit AIG 5), par 39(a); Eagles First Affidavit (Exhibit AIG 9), par 44), with the availabilities being significantly greater on weekends than weekdays (see Limbrey First Affidavit (Exhibit AIG 3), par 164, 166; Dunn Cross Examination, 26 October 2015, PN18476, PN18488). (In this sense, employees in the fast food industry are able to exercise control over their hours by determining the availability of their work hours (on both a permanent and temporary basis).)
105. The majority of employees working in the fast food industry on weekends are content to do so. Employees in McDonald's stores do not complain over working on weekends (see Limbrey First Affidavit (Exhibit AIG 3), par 192; Haydar Affidavit (Exhibit AIG 5), par 48; Dando Amended Affidavit (Exhibit AIG 6), par 43; Agostino First Affidavit (Exhibit AIG 7), pars 57; Agostino Second Affidavit (Exhibit AIG 8), pars 3 to 7; Eagles First Affidavit (Exhibit AIG 9), par 54). There is no evidence to suggest that employees in McDonald's stores or the fast food industry generally feel "forced", "compelled" or "coerced" to work on weekends.
106. In the Australian community generally, of the 37 per cent of employees who usually work on a weekend, 65 per cent were following their preference to work some or all of their hours on a weekend (see ABS Australian Social Trends (Exhibit AIG 15), p26; see also Productivity Commission, *Workplace Relations Framework, Final Report*, August 2015, p924; Pezzullo First Affidavit (Exhibit PG 34), p14, last paragraph). Additionally, in the Australian

community generally, the ABS expects that weekend work is popular for students who need to attend an educational institution during weekday daytime hours (see ABS Australian Social Trends, p26 (AIG Tender Bundle, Document 5, Part 2 of 2, p364, right hand column); see also ABS Australian Social Trends (Exhibit AIG 15), p23; Deloitte Access Economics Scoping Study (Exhibit SDA 54), p4, section 2.3, third paragraph; Synergies Economic Consulting Report (Exhibit SDA 52), p3, first paragraph; p19, second last paragraph; Macdonald Cross Examination, 15 December 2015, PN24459).

107. There is no evidence of adverse impact on social interaction by employees working in the fast food industry on weekends (see also paragraph [82] of this outline). (There is, in fact, no greater social interaction on Sundays than Saturdays (see Productivity Commission, *Workplace Relations Framework*, Draft Report, Appendix F, pp930-932).)
108. At a general level, given these factors (see paragraphs [104] to [107] of this outline), there is less need for employers in the fast food industry to offer an incentive (in the form of penalty rates) for employees wishing to work on weekends.

J8. No Difficulties in Recruiting Sunday Workers

109. There is no evidence to suggest that employers in the fast food industry need to offer incentives to recruit employees to work on Sundays.
110. In mid-2015, McDonald's and its franchisees do not pay its employees an incentive to work in stores on Sundays, bearing in mind that they pay their employees a flat (loaded) rate each day of the week (see clause 19 of the *McDonald's Australia Enterprise Agreement 2013* [2013] FWAA 5001). Equally, other major participants in the fast food industry have enterprise agreements with a flat (loaded) rate each day of the week (see, for example, clause 8 of the *Hungry Jack's Western Australia Employee Collective Agreement 2009*; clause 7(c) of the *SDA Hungry Jack's New South Wales / ACT Agreement 2004*; clause 7 of and Schedule B to the *SDA – Domino's Pizza Agreement 2009* [2009] FWAA 3943; clause 6 of the *KFC National Employment Agreement 2010* [2010] FWAA 8127; clause 20 of the *KFC Employees WA SDA Enterprise Agreement 2009* [2009] FWAA 1708; clause 18 of the *Grill'd Wollongong Enterprise Agreement 2015* [2015] FWCA 7715; clause 18 of the *Grill'd Enterprise Agreement 2015* [2015] FWCA 8788; clause 3.2 of the *Oporto Franchising Pty Limited Enterprise Agreement 2013-2017* [2013] FWCA 4534).
111. In mid-2015, some McDonald's stores have a greater number of employees available to work on weekends than positions available (see Dunn Cross Examination, 26 October 2015, PN18493 – PN18495; PN18507).
112. (In mid-2015, the hardest time periods to recruit employees in McDonald's stores were week days (see Dunn Cross Examination, 26 October 2015, PN18746).)

J9. Similarity with Restaurant Industry

113. The practices for choosing menu items, preparing food and serving customers in the fast food industry and the restaurant industry are, or are becoming, similar (see Krishnamurthy Affidavit (Exhibit AIG 20), pars 11, 15 to 18, 23).

K. Adverse Employment Opportunities

114. For employers in the retail industry generally, Sunday penalty rates are a consideration in rostering employment shifts on a Sunday (see, for example, Fantis Statement (Exhibit RCI 20), par 8; Fantis Cross Examination, 26 October 2015, PN18877, PN18883; see also D'Oreli Cross Examination (a retail witness), 26 October 2015, PN17212); Pezzullo First Affidavit (Exhibit PG 34), p34).
115. Employers in the retail industry will offer more or longer shifts on weekend if penalties are reduced (see, for example, Daggett Statement (Exhibit R7), par 21; D'Oreli Cross Examination (a retail witness), 26 October 2015, PN17212).

L. No Adverse Health Consequences

116. In mid-2015, the typical employee in the fast food industry working on the weekend works a shift of between one and six hours (see paragraph [87] of this outline).
117. As a matter of logic, an employee in the fast food industry who works a six hour shift commencing at 6am on a Sunday will finish work at 12pm and will have the remainder of the day to rest and relax. Equally, as a matter of logic, an employee in the fast food industry who works a six hour shift from 12pm will finish at 6pm and will have both the morning and the evening to rest and relax. (The number of logical examples involving work on Sundays can be readily multiplied.) There is no logical reason for increased adverse health consequences from working such shift lengths in the fast food industry.
118. There is no evidence of adverse health consequences of working on the weekends in the fast food industry. In 2014 and 2015, operators of McDonald's stores in the fast food industry have not observed greater injuries on Saturdays or Sundays in comparison to weekdays (see Limbrey First Affidavit (Exhibit AIG 3), par 178; Dunn Amended Affidavit (Exhibit AIG 1), par 63; Agostino First Affidavit, pars 51, 52; Dando Amended Affidavit (Exhibit AIG 6), par 40; Haydar Affidavit (Exhibit AIG 5), par 40; Eagles First Affidavit, par 47).
119. In some States, there are restrictions on the number of hours, and the number of weekday shifts, that employees aged 16 and under may work (see Dunn Cross Examination, 26 October 2015, PN18488; Dunn Re Examination, 26 October 2015, PN18549 – PN18551; see also Limbrey First Affidavit (Exhibit AIG 3), pars 38, 40).

M. No Distinction between Saturdays and Sundays

120. In the Australian community in general (as in Canada), the activities (including work) that are undertaken on a Saturday and Sunday have or are becoming merged (see Muurlink Cross Examination, 4 November 2015, PN20884) and the distinction between a Saturday and Sunday is being erased or becoming blurred (see Muurlink Cross Examination, 4 November 2015, PN20887; PN20894 – PN20896; Pezzullo First Affidavit (Exhibit PG 34), p18, second and third paragraphs; p49, first four paragraphs; p61, last bullet point) such that there is a general trend towards the same emotional attractiveness (or same negative impact) of working on either day of a weekend (see Muurlink Report (Exhibit UV 26), p40, par 65; Muurlink Cross Examination, 4 November 2015, PN20886 – PN20887; PN20897 – PN20906; PN20909; see also Zuzanek, “Sunday Blues: Have Sunday Time Use and Its Emotional Connotations Changed over the Past Two Decades”, (2014) 23 *Time & Society* 6 (Exhibit AIG 14)).

N. No Adverse Social Impact

121. In the Australian community in general, but particularly in the age group of 14 to 24 years, there is an increased use of social and electronic media, as opposed to social interaction (see also paragraphs [53] and [83] of this outline).
122. In July 2015, 30 per cent of employees working for McDonald’s and Hungry Jack’s spent on average 6 to 10 hours per week using electronics (such as TVs and social media) (see Deasy Amended First Affidavit (Exhibit AIG 11), p70, Table 33) and an additional 35 per cent of employees working for McDonald’s and Hungry Jack’s spent on average more than 10 hours per week socialising using electronics (see Deasy Amended First Affidavit (Exhibit AIG 11), p70, Table 33).
123. In 2006, Australians aged 15 to 24 years on average spent 20 hours per week with friends (see State of Australia’s Young People Report, p72 (AiG Tender Bundle, Document 3, Part 2 of 3, p264) and 18 hours per week on TV and other passive leisure (see State of Australia’s Young People Report, p73, p74 (AiG Tender Bundle, Document 3, Part 2 of 3, p265, p266).
124. There is no reason to suggest that working on a Sunday decreases use of electronics or social media and there is no evidence of such decreased use.
125. Additionally, as a matter of logic, an employee in the fast food industry who works a six hour shift commencing at 6am on a Sunday will finish work at 12pm and will have the remainder of the day to socialise or use electronics. Equally, as a matter of logic, an employee in the fast food industry who works a six hour shift from 12pm will finish at 6pm and will have both the morning and the evening to socialise and use electronics. (The number of logical examples of freedom to socialise and use electronics can be readily multiplied.) There is no logical reason for adverse social consequences from working such shift lengths in the fast food industry, especially if both days of the weekend are not worked.

126. From 1950 to 2007, the proportion of the Australian population that attended church at least monthly declined from 44 per cent to 17 per cent (see National Church Life Survey, p1, p2 (AiG Tender Bundle, Document 4, p331, p332)). In 2007, Australians aged 15 to 24 years were more likely than any other age group to give low importance to religion (see State of Australia's Young People Report, p89 (AiG Tender Bundle, Document 3, Part 2 of 3, p281)). In 2011, 22 per cent of the Australian community identified themselves as having no religion (see Losing My Religion Report (Exhibit TBA), p3; see also State of Australia's Young People Report, p88 (AiG Tender Bundle, Document 3, Part 2 of 3, p280); National Church Life Survey, p2 (AiG Tender Bundle, Document 4, p331)). In 2014, it was estimated that over 49 per cent of Australians never attended a religious service (see Workplace and Economic Research Section of Fair Work Commission, *Changing Work Patterns*, (December 2015), p23) and less than 12 per cent of Australians attended a religious service on a weekly or more regular basis (see Workplace and Economic Research Section of Fair Work Commission, *Changing Work Patterns*, (December 2015), p23). In July 2015, seven per cent of McDonald's and Hungry Jack's employees indicated that they liked to spend their spare time on Sundays attending church (see Deasy Amended First Affidavit (Exhibit AIG 11), p69, Table 32).

O. Background to the Fast Food Award

127. On 12 September 2008, as part of the award modernisation process, a Full Bench of the former Australian Industrial Relations Commission proposed to make a single retail industry modern award that would apply to (among other industries) the fast food industry (see, for example, *Re Award Modernisation* [2008] AIRCFB 717 at [4], [84]-[92] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C).
128. On 12 September 2008, the Full Bench of the former Commission released an exposure draft of the single retail industry award.
129. However, on 19 December 2008, the Full Bench of the former Commission, in response to submissions from employer parties, decided to make a specific award for the fast food industry and to make three other awards for general retailing, hair and beauty and community pharmacies (see *Re Award Modernisation* [2008] AIRCFB 1000 at [284] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C).
130. In addressing the content of the Fast Food Award (and the three other awards), the Full Bench stated (see *Re Award Modernisation* [2008] AIRCFB 1000 at [286]-[287] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C):

"[286] The contents of the four awards we publish with this decision are derived from the existing awards and [Notional Agreements Preserving State Awards (NAPSAs)] applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments.

In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.

[287] Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another."

(It will be immediately noted that the Full Bench took into account, in determining the level of penalty rates, the predominant federal industrial instrument, as well as awards and NAPSAs, but did not consider or assess the appropriateness of the level of penalty rates generally, including in relation to the characteristics of the fast food industry or employees working in the fast food industry.)

131. On 19 December 2008, the Full Bench of the former Commission made the Fast Food Award (see PR985113). At that time, the Fast Food Award contained an evening penalty rate as a loading of 10 percent commencing at 6pm (see clause 26.2(a)) and a single penalty rate for work on a Sunday as a loading of 75 per cent (see clause 26.2(c)).
132. On 29 January 2010, the Full Bench (now of Fair Work Australia) varied the Fast Food Award to alter the commencing time for the evening penalty rate from 6pm to 9pm and to introduce separate penalty rates for full time and part time employees (in one group, at a level of 50 per cent) and casual employees (in another group, at a level of 75 per cent) (see *Re Fast Food Industry Award 2010* [2010] FWA FB 379 at [23], [26] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C).
133. In addressing the variations, the Full Bench stated (see *Re Fast Food Industry Award 2010* [2010] FWA FB 379 at [23], [26] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C):

"[23] Since making this award the Commission has reviewed the penalty payments applying in the restaurant industry. Those penalty payments are found in the Restaurant Industry Award 2010. For fast food operations that open into the evening there is logic in adopting a similar approach to penalty payments. ...

...

[26] We have reconsidered the level of this loading having regard to the Sunday penalty rates in relevant pre-reform awards and NAPSAs and in particular the penalties now applicable in the restaurant industry. In all the circumstances we consider that a loading of 50% for full-time and part-time employees and 75% for casuals is fair and appropriate."

(At the time (29 January 2010), the Restaurant Award had a commencement time for evening penalty rates at 10pm. At the time, the Restaurant Award had a 50 per cent loading for Sunday work (see also *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [131] per Hatcher VP, Boulton J and McKenna C.)

134. On 18 March 2013, a differently constituted Full Bench refused an application by employer parties to vary the Fast Food Award so as to remove entirely penalty rates for weekend work (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [175], [205] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).
135. The Full Bench was particularly persuaded, in refusing to remove penalty rates for weekend work in the Fast Food Award, by a suggested requirement to undertake “*a substantial re-balancing of the considerations adopted by the AIRC in the award modernisation process*” (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [207] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC). However, it is not clear that, as part of the award modernisation process, the former Commission took into account the level of penalty rates as part of a balancing process with other considerations (see, for example, the passages emphasised in *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [47] and [48] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).
136. The Full Bench was also influenced, in refusing to remove penalty rates for weekend work in the Fast Food Award, by the transitional nature of the operation of the Fast Food Award, including the clauses relating to penalty rates (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [221], [224] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).
137. Finally, whilst the Full Bench stated that it took into account the level of the Sunday penalty rate in comparison to the level of the Saturday penalty rate (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [219] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC), it is not clear how or the extent to which the Full Bench in fact did so.
138. On 1 October 2013, clause 26.2 of the Fast Food Award was re-numbered as clause 25.2 (see PR539921).
139. Overall, one Full Bench has considered the commencement time of the evening penalty rates in the Fast Food Award on one previous occasion since the making of the Fast Food Award (see the decision on 29 January 2010 set out in paragraph [132] of this outline) and was heavily persuaded by the evening penalty rate provision in the Restaurant Award (see paragraph [133] of this outline). However, the Full Bench, for reasons not identified, did not make the Fast Food Award and the Restaurant Award identical in their operation concerning the commencement time of the evening penalty rate.
140. Additionally, two Full Benches have considered the level of Sunday penalty rates in the Fast Food Award on two occasions (see the decisions on 29 January 2010 and 18 March 2013 set out in paragraphs [132] and [134] of this outline), were influenced by the nature of the

claims (including the asserted removal of Sunday penalty rates altogether) and were shaped by the content of the predominant federal industrial instrument, as well as awards and NAPSAs.

141. In the prior considerations of penalty rates in the Fast Food Award, there is no suggestion that the Full Benches have considered, or given weight to:
- (a) the particular characteristics of the typical employee in the fast food industry;
 - (b) the increasing prevalence of 24/7 trading and Sunday trading in the fast food industry in the past six years (with the number of McDonald's restaurants operating 24/7 virtually doubling from December 2009 to May 2015 (see Limbrey First Affidavit (Exhibit AIG 3), par 48(a));
 - (c) the absence of a need for an incentive to attract employees in the fast food industry to work on a Sunday;
 - (d) the lack of disability associated with work on a Sunday for the typical employee in the fast food industry;
 - (e) the absence of a greater disability for work on a Sunday in comparison to work on a Saturday;
 - (f) the overall relevance of the level of Sunday penalty rates; and
 - (g) the overall fairness of the level of Sunday penalty rates

(as opposed to merely considering the level of Sunday penalty rates in the predominant industrial instrument, as well as other awards and NAPSAs, and the Restaurant Award).

P. Background to the Restaurant Award

142. On 14 May 2014, as part of the transitional review of the Restaurant Award, a Full Bench of the Commission concluded that the Restaurant Award "*overcompensated*" non-career casual employees, and thus ceased to be "*fair and relevant*", by providing for a combined casual loading and Sunday penalty rate of 75 per cent (see *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [138] per Hatcher VP, Boulton J and McKenna C).
143. The Full Bench varied the Restaurant Award so as to provide that the casual loading, together with the Sunday penalty rate, should not exceed 50 per cent in total for non-career employees (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [140] per Hatcher VP, Boulton J and McKenna C).

144. Ai Group notes that the third of its changes sought in the Ai Group Penalty Rates Draft Determination is of the same kind as the change made by the Full Bench to the Restaurant Award.
145. Ai Group submits that the changes sought in the Ai Group Penalty Rates Draft Determination are consistent with the changes made by the Full Bench to the Restaurant Award.

Q. Productivity Commission Reports

146. In November 2015, the Productivity Commission issued a recommendation that the level of Sunday work penalties for cafes, hospitality, entertainment, restaurants and retailing be aligned with the Saturday work penalties (see Productivity Commission, *Workplace Relations Framework*, Final Report, (November 2015), pp405-408; p497) and noted that the social costs of performing Sunday work during the daytime were less than performing evening work but that Sunday work attracted higher levels of penalty rates than night work (see Productivity Commission, *Workplace Relations Framework*, Final Report, (November 2015), p404).

R. Other Factors

147. The Commission has previously recognised that a reassessment of the Sunday penalty rate in light of the level of the Saturday penalty rate is “*not without merit*” (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [235] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC; see also *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [129] per Hatcher VP, Boulton J and McKenna C).
148. The Commission has previously considered the operation of related modern awards in deciding whether to vary a modern award (see *Re Fast Food Industry Award 2010* [2010] FWA 379 at [23] per Giudice J, Lawler and Watson VPP, Watson, Harrison and Acton SDPP, Smith C; *Re Fast Food Industry Award* [2011] FWA 6865 at [15] per Watson VP; *Re Social Services Industry Award 2010* [2013] FWC 4141; (2013) 233 IR 310 at [33] per Watson VP).
149. The Commission has previously considered that penalty rates must recognise the disabilities of working at unsociable times, be sufficient to induce people with appropriate skills to work voluntarily the relevant hours and be set having regard to whether employers in the particular industry normally trade at such times (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).
150. The Commission has previously recognised that, given the diversity in the characteristics of employers and employees covered by different modern awards the application of the modern awards objective may result in different outcomes for different awards (see *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [33], [60](7) per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Four Yearly Review of Modern Awards – Transitional Provisions* [2015] FWCFB 3523 at [16], [146] per Boulton J, Kovacic DP, Bull C).

151. The Commission has previously recognised that it is appropriate to consider the historical context of the modern award and previous decisions relevant to a contested issue (see *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [33], [60](3) per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Four Yearly Review of Modern Awards – Transitional Provisions* [2015] FWCFB 3523 at [16], [146] per Boulton J, Kovacic DP, Bull C).
152. The South Australian Commission has recognised that the traditional justifications for penalty rates have little relevance to contemporary circumstances and modern industrial standards (at least with respect to the retail industry) (see *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [200] per Hampton and Bartel DPP, Dangerfield C) and that the level of penalty rates needs to be considered in the current social context (see *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [201] per Hampton and Bartel DPP, Dangerfield C).
153. The South Australian Commission has previously recognised that the substantial deterioration of the amenity of social life is associated with night shift work and work extending well outside the day time hours (see *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [203] per Hampton and Bartel DPP, Dangerfield C).

S. Changes in Characteristics of Employment

154. In 1919, when penalty rates for work on a Sunday were introduced into industrial awards, the typical Australian employee was male, worked 48 hours per week on a full time permanent basis on Monday to Saturday, was married, had children and attended church regularly on a Sunday (see paragraph [42] of this outline).
155. In current times, approximately fifty percent of Australian employees are female, a significant proportion (in the order of 30 percent) of Australian employees work on a part time basis, a significant proportion (in the order of 20 percent) 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 (see paragraphs [43], [44], [45] and [126] of this outline).
156. In current times, a proportion (in the order of 18 per cent) of Australian employees are aged 15 to 24 years and, of that proportion, in the order of 40 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 in the order of 70 per cent live at home (see paragraphs [46], [49], [50], [54] and [57] of this outline).
157. 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 (see paragraph [59] of this outline).

T. Fulfilment of Purposes of Penalty Rates

158. Given that the typical fast food employee chooses to work on a weekend (see paragraphs [104], [105] and [106] of this outline) even in the absence of penalty rates (see paragraph [110] of this outline), there is no need to “*compensate*” the employee for working on a weekend (compare the first purpose of a penalty (see paragraph [39] of this outline)).
159. However, even after the implementation of the change sought in the Ai Group Penalty Rates Draft Determination, the penalty rates on a weekend will continue to compensate an employee for working on a Saturday or Sunday (and thus meet the requirement of section 134(da) of the FW Act).
160. Given the nature of the fast food industry, including its operations on Saturdays and Sundays, and given the preference of employees in the fast food industry to work on a weekend, there is no need to deter an employer from rostering employees on a weekend (compare the second purpose of a penalty (see paragraph [39] of this outline); see also Productivity Commission, *Workplace Relations Framework, Final Report*, (December 2015), p416-417)).
161. Given the high preference of employees in the fast food industry to work on Saturdays and Sundays, there is no need to offer an incentive (or, alternatively, an excessive incentive) to work on a weekend (compare the third purpose of a penalty (see paragraph [39] of this outline)).

U. Other Penalty Rate Considerations

162. There is no evidence that, in 2015, there are real difficulties in travelling to and from work on a Sunday in comparison to a Saturday (see also paragraph [85] of this outline).
163. There is no evidence that, in 2015, there is a difference between the public transport available between 9pm and 10pm (compare paragraph [40](a) of this outline).
164. There are no adverse health consequences of working on a Sunday (see paragraphs [116] to [119] of this outline).
165. There are no adverse social consequences of working on a Sunday (see paragraphs [121] to [126] of this outline).

V. Modern Awards Objective

V1. Relative Living Standards and the Needs of the Low Paid (Section 134(1)(a))

166. In assessing relative living standards and the needs of the low paid, the Full Bench ought to bear in mind the nature of employment in the fast food industry, particularly the age of

employees, the limited number of hours worked each week and the living arrangements of employees (see paragraphs [65], [66], [67], [70] and [73] of this outline).

167. There is no evidence that employees in the fast food industry suffer poor or low living standards, either generally or in comparison to other groups of employees. There is no evidence of the living standards of employees (such as financial stress or material deprivation) in the fast food industry at all (see also, for example, *Annual Wage Review 2015* [2015] FWCFB 3500 at [49], [396], [398], [399] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb.).
168. It is true that there is some data relating to living standards for employees in the food and beverage services industries (the two digit subdivision level) (of which the fast food industry is part) (see O'Brien Report (Exhibit ACTU 3, section 3) but the data focuses on the (two digit) level of food and beverage services (see O'Brien Report (Exhibit ACTU 3), table 3.3; table 3.4; table 3.5) rather than the (four digit) class of takeaway food) and thus includes persons in cafes, restaurants and hospitality (see O'Brien Report (Exhibit ACTU 3), p5, par 3).
169. Ai Group submits that the factor of relative living standards is neutral and the Commission should attach no weight to the factor.
170. Whilst it is accepted that employees in the fast food industry that are paid in accordance with the Fast Food Award and are engaged in the lower classifications are often low paid, the level of hourly pay reflects the age of the employees, the lack of formal qualifications required prior to (and during) employment and the nature of skills required to perform common duties in the industry.
171. Additionally, the level of weekly pay for such employees reflects the part-time nature of employment, including the limited number of hours worked each week (typically between 1 and 15 hours) (see paragraph [70] of this outline).
172. However, not all employees in the fast food industry should be treated as low paid. In 2015, employees in the fast food industry employed by the major employers are covered by enterprise agreements rather than the Fast Food Award (see, for example, Dunn Amended Affidavit (Exhibit AIG 1), par 9; Haydar Affidavit (Exhibit AIG 5), par 9; Agostino First Affidavit (Exhibit AIG 7), par 11; Eagles Second Affidavit (Exhibit AIG 10), par 3; see also paragraph [110] of this outline) with higher hourly rates of pay than under the Fast Food Award. (According to the ACTU, only 30 per cent of employees in the accommodation and food services industry (the one digit level) were low paid and only 10 per cent of employees in the same industry were very low paid (see O'Brien Report (Exhibit ACTU 3), p34).
173. Additionally, in assessing the needs of the low paid, it is important to note that there is no evidence that the typical fast food employee is unable to purchase essentials for a decent standard of living or engage in community life (see, for example, *Annual Wage Review 2015* [2015] FWCFB 3500 at [36], [311] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb.).

174. In assessing the needs of the low paid, it is important for the Commission to bear in mind that the purpose of penalty rates (including evening penalty rates and weekend penalty rates) is not to address the needs of the low paid – the purpose is to act as compensation for the performance of non-standard hours, a disincentive to engaging employees to work non-standard hours or an incentive to work non-standard hours (see paragraph [39] of this outline). As is the current practice of the Commission (see, for example, *Annual Wage Review 2015* [2015] FWCFB 3500 at [42], [43] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb), the needs of the low paid should be addressed by setting an appropriate minimum hourly rate of pay (independent of penalty rates). (To this end, it is relevant to note that relative living standards in Australia have improved in recent years (see, for example, *Annual Wage Review 2015* [2015] FWCFB 3500 at [50], [410], [412], [417] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb)
175. Ai Group submits that the weight to be attached to the needs of the low paid, in setting the level of additional remuneration in the form of penalty rates, ought to be given no greater weight than other factors (including the impact on business).
176. In any event, it is axiomatic that if the changes sought in the Ai Group Penalty Rates Draft Determination were made, the costs of employers would reduce (given the smaller period of operation of the evening penalty rate and the lower level of penalty rate on a Sunday) (see also Borland Report (Exhibit UV25), par 33) and it is likely, based on economic theory and practice, that additional employment opportunities (in the form of longer hours or further shifts) will be provided to (low paid) employees in the fast food industry (see Altman Cross Examination, 27 October 2015, PN19654; see also Productivity Commission, *Workplace Relations Framework*, Draft Report, August 2015, p25; Barron Statement (Exhibit R3), pars [13], [27], [28]; Goddard Statement (Exhibit R4), par [31]; D’Oreli Statement (Exhibit R8), par [19], [20]; Antonieff Statement (Exhibit R6), par [19]; Gough Statement (Exhibit R5), par [20]) and in that sense the position of some (low paid) employees will improve.
177. Additionally, even if the Full Bench takes the view that all employees in the fast food industry were low paid, the factor would not preclude the Full Bench from making the Ai Group Penalty Rates Draft Determination – the factors in section 134(1) do not point all in the one way, with a degree of tension between some of the factors (see *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [33] per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [20] per Ross J, Harrison SDP, Hampton C; *Annual Wage Review 2015* [2015] FWCFB 3500 at [12], [64], [96], [335] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb; see also SDA Outline of Submissions and Findings dated 5 October 2015, par 7), and the Commission has previously varied a modern award so as to reduce the level of penalty rates even though employees were treated as low paid (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](a) per Hatcher VP, Boulton J and McKenna C).

V2. Collective Bargaining (Section 134(1)(b))

178. There is no evidence that the level of weekend penalty rates in the Fast Food Award (or the commencement time for evening penalty rates) are encouraging or discouraging collective bargaining.
179. In current times, the fast food industry has significant collective bargaining – most of the major employers (including McDonald’s and Hungry Jack’s) are parties to and covered by enterprise agreements (compare *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [98] per Watson VP (diss)) (see paragraph [110] of this outline).
180. Ai Group submits that there is insufficient evidence to suggest that the making of the changes sought in the Ai Group Penalty Rates Draft Determination will encourage or discourage collective bargaining (see also *Junior Rates Case* [2014] FWCFB 1846 at [129]-[130], [132] per Boulton J, Harrison SDP, Roe C; *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](b) per Hatcher VP, Boulton J and McKenna C).
181. Ai Group submits that this factor is neutral and the Full Bench ought to attach no weight to this factor in deciding whether to make the changes sought in the Ai Group Penalty Rates Draft Determination.
182. The Commission has previously treated this factor as neutral when varying the level of penalty rates (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](b) per Hatcher VP, Boulton J and McKenna C; see also SDA Outline of Submissions and Findings dated 5 October 2015, par 7).
183. In any event, the Commission has proceeded previously on the basis that, whilst it is relevant that a proposed variation to an award provision may not act as an incentive for enterprise bargaining and that such consideration needs to be taken into account or given significance, it is not determinative in deciding whether the proposed variation is necessary to meet the modern award objective (see *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [331] per Ross J, Harrison SDP, Hampton C) and does not preclude a conclusion that the proposed variation is necessary to meet the modern award objective (see *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [332] per Ross J, Harrison SDP, Hampton C). Equally, the Commission has recognised previously that there is a degree of tension between some of the factors identified in section 134(1) (see *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788; (2014) 241 IR 189 at [33] per Ross J, Hatcher VP, Acton SDP, Hamberger SDP, Hampton C; *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [20] per Ross J, Harrison SDP, Hampton C; see also SDA Outline of Submissions and Findings dated 5 October 2015, par 7).
184. In the alternative, Ai Group submits that, even if the Full Bench wishes to attach some weight to this factor, it is not determinative and does not preclude the Full Bench from making the changes sought in the Ai Group Penalty Rates Draft Determination (especially

given the tension existing amongst all of the factors and the need to attach greater weight to other factors).

V3. *Need to Promote Social Inclusion through Increased Workforce Participation (Section 134(1)(c))*

185. The Commission has treated the need to promote social inclusion through increased workforce participation as increased employment (see, for example, *Annual Wage Review 2015* [2015] FWCFB 3500 at [51], [419] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb).
186. It is axiomatic that if the changes sought in the Ai Group Penalty Rates Draft Determination were made, the costs of employers would reduce (given the smaller period of operation of the evening penalty rate and the lower level of penalty rate on a Sunday) and it is likely, based on economic theory and application, that additional employment opportunities (in the form of additional jobs) will be provided to employees in the fast food industry, thereby increasing workforce participation.
187. As at May 2015, the ABS estimated that 147,300 people aged 15-19 years were unemployed (see Toth First Affidavit (Exhibit AIG 24), par 5(c) (AiG Tender Bundle, Document 1, Part 1 of 2, p4)), representing about 19 per cent of people aged 15-19 years participating in the workforce (see Toth First Affidavit (Exhibit AIG 24), par 5(h) (AiG Tender Bundle, Document 1, Part 1 of 2, p4)). Additionally, as at May 2015, the ABS estimated that 269,800 people aged 15-24 years were unemployed (see Toth First Affidavit (Exhibit AIG 24), par 6(b) (AiG Tender Bundle, Document 1, Part 1 of 2, p4)), representing about 13 per cent of people aged 15-24 years participating in the workforce (see Toth First Affidavit (Exhibit AIG 24), par 6(e) (AiG Tender Bundle, Document 1, Part 1 of 2, p5)). In 2013, unemployment in the accommodation and food services industry was estimated to be 47,000 (see Synergies Economic Consulting Report (Exhibit SDA 52), p7, fifth bullet point), equivalent to an estimated unemployment rate of 5.6 per cent for the industry (see Synergies Economic Consulting Report (Exhibit SDA 52), p7, sixth bullet point). In 2011 to 2015, youth unemployment (as well as unemployment generally, long term unemployment and underemployment) has grown (see *Annual Wage Review 2015* [2015] FWCFB 3500 at [28], [67], [228], [233], [236], [302] per Ross J, Watson and Harrison SDPP, Hampton C, Mr Cole, Professor Richardson, Mr Gibb). In 2010, Australian part-time workers generally wanted to work on average an additional 4 hours per week (see Pezzullo First Affidavit (Exhibit PG 34), p14, last paragraph).
188. Ai Group submits that this factor will be met if the changes sought in the Ai Group Penalty Rates Draft Determination were made, particularly given the level of unemployment in the 15-19 years and 15-24 years age groups.
189. The Commission has previously treated this factor as providing slight support for the making of changes to the level of penalty rates on a Sunday (see *Re Restaurant and Catering*

Association of Victoria [2014] FWCFB 1996; (2014) 243 IR 132 at [139](c) per Hatcher VP, Boulton J and McKenna C).

V4. *Need to Promote Flexible Modern Work Practices and Efficient and Productive Performance of Work (Section 134(1)(d))*

190. Ai Group submits that this factor is not relevant to the level of penalty rates or the commencement time of evening penalty rates.
191. The Commission has previously treated this factor as neutral when deciding to reduce the level of penalty rates on Sundays (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](d) per Hatcher VP, Boulton J and McKenna C; see also *Junior Rates Case* [2014] FWCFB 1846 at [147], [148], [149] per Boulton J, Harrison SDP, Roe C).

V5. *Need to Provide Additional Remuneration for Working Unsocial Hours or Weekends (Section 134(1)(da))*

192. Ai Group submits that this factor will be met after the changes sought in the Ai Group Penalty Rates Draft Determination are made.
193. The Commission has previously treated this factor as met when deciding to reduce the level of penalty rates on Sundays (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](da) per Hatcher VP, Boulton J and McKenna C).

V6. *Principle of Equal Remuneration for Equal Work (Section 134(1)(e))*

194. Ai Group submits that this factor is currently met, and will continue to be met after the changes sought in the Ai Group Penalty Rates Draft Determination were made.
195. The Commission has previously treated this factor as being met, and continuing to be met, when deciding to reduce the level of penalty rates on Sundays (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](e) per Hatcher VP, Boulton J and McKenna C; see also *Junior Rates Case* [2014] FWCFB 1846 at [147], [148], [149] per Boulton J, Harrison SDP, Roe C).

V7. *Likely Impact on Business, including Productivity, Employment Costs and Regulatory Burden (Section 134(1)(f))*

196. It is axiomatic that if the changes sought in the Ai Group Penalty Rates Draft Determination were made, the costs of employers would reduce (given the smaller period of operation of the evening penalty rate and the lower level of penalty rate on a Sunday).
197. Ai Group submits that this factor provides some support for the making of the changes sought in the Ai Group Penalty Rates Draft Determination.

198. The Commission has previously treated this factor as providing slight support when deciding to reduce the level of penalty rates (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](f) per Hatcher VP, Boulton J and McKenna C).

V8. *Need for a Simple and Sustainable Modern Award System (Section 134(1)(g))*

199. Ai Group submits that this factor is not relevant to the level of penalty rates or the commencement time of evening penalty rates. (In the alternative, this factor supports a single weekend penalty rate as the calculation of pay for penalty rates will be simpler (in an administration and payroll sense) if there is a single weekend rate, as opposed to separate Saturday and Sunday rates.)
200. The Commission has previously treated this factor as neutral when deciding to reduce the level of penalty rates on Sundays (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](g) per Hatcher VP, Boulton J and McKenna C; see also *Junior Rates Case* [2014] FWCFB 1846 at [147], [148], [149] per Boulton J, Harrison SDP, Roe C).

V9. *Likely Economy Wide Effects (Section 134(1)(h))*

201. Ai Group submits that the reduction in the level of penalty rates, or the change in the commencement time of evening penalties, will not have economy wide effects.
202. The Commission has previously treated this factor as neutral when deciding to reduce the level of penalty rates on Sundays (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](h) per Hatcher VP, Boulton J and McKenna C).
203. At a general level, the Commission has previously recognised that not every paragraph in section 134(1) is relevant to every proposed variation to an award provision (see *Re SDA* [2011] FWA FB 6251; (2011) 211 IR 462 at [18] per Lawler VP, Watson SDP, Hampton C; *Re Four Yearly Review - Annual Leave Decision* [2015] FWCFB 3406 at [19] per Ross J, Harrison SDP, Hampton C).

W. *Summary*

204. Given:
- (a) the characteristics of the typical employee in the fast food industry (14 to 24 years; single; studying; working part time 1 to 15 hours per week; living with one or both parents; not supporting dependents; working regular shifts (as opposed to overtime shifts) at similar shift times each weekend; preferring to work on weekends; and wishing to work more hours on weekends (see paragraph [79], [86], [102], [103], [104] and [106] of this outline));

- (b) the nature of the modern fast food industry (production of non-preservable items on weekends to meet significant consumer demand on weekends at constant shift times each weekend) (see paragraphs **[93]**, **[94]**, **[97]**, **[98]**, **[99]**, **[100]**, **[102]** and **[103]** of this outline)); and
- (c) the similarities (and the lack of disability) for the typical fast food employee of working a shift of up to six hours and socialising at other times during the day on Saturdays and working a shift of up to six hours and then socialising at other times of the day on Sundays (see paragraphs **[80]**, **[81]**, **[82]**, **[84]**, **[87]**, **[120]** and **[141]** of this outline),

the Commission should vary the Fast Food Award in the manner set out in the Ai Group Penalty Rates Draft Determination as:

- (d) the circumstances prevalent at the time of the introduction of penalty rates in 1919 (married male employees working on a full time (48 hour) basis for standards hours Monday to Saturday being permitted to have Sunday (a non-work day) as a day of rest for family, social and religious reunion) no longer exist in 2016 (see paragraphs **[41]**, **[42]**, **[152]** and **[154]** to **[157]** of this outline);
- (e) the three purposes of penalty rates – deterrence, compensation and incentiveness (see paragraph **[39]** of this outline) – do not apply to the fast food industry in 2016, given the willingness and preference of the typical employee in the fast food employee to work on weekends, the consumer demand for fast food products on the weekend, the regularity and predictability of work in the fast food industry on the weekend and the lack of difficulty in recruiting employees to work on the weekend in the fast food industry (see paragraphs **[104]** to **[112]** and **[158]** to **[161]** of this outline) (noting too that the loadings provided in the variations will provide fair (additional) compensation for working on a Sunday);
- (f) the variations will ensure consistency between the Fast Food Award and the Restaurant Award, especially over the commencement time of the evening penalty rate, in circumstances where work in both industries is very similar and the Commission has previously ensured consistencies between those two awards (see paragraphs **[113]** and **[133]** of this outline);
- (g) the variations are consistent with the lack of greater social disability associated with working on a Sunday in the fast food industry in comparison to working on a Saturday in the fast food industry;
- (h) the variations will not produce adverse health consequences (see paragraphs **[116]** to **[119]** of this outline);
- (i) the variations will not produce adverse social consequences (see paragraphs **[82]**, **[107]** and **[121]** to **[126]** of this outline);

- (j) the variations are consistent with the recommendations of the Productivity Commission Final Report (see paragraph [146] of this outline);
- (k) the variations are consistent with the operative factors (or alternatively the balance of operative factors) in section 134 that the Commission is required to consider (see paragraphs [166] to [203] of this outline);
- (l) the variations will ensure that employees in the fast food industry receive additional, but not over-compensated, remuneration for work on Sundays;
- (m) the current level of penalty rates for working on Sundays, and the current commencement time for the start of evening penalty rates, are not essential, imperative or indispensable to meeting the modern awards objective (a fair and relevant safety net); and
- (n) the variations are essential, imperative or indispensable to the Fast Food Award meeting the modern awards objective.

H J Dixon SC
A B Gotting
Counsel for Ai Group

5 February 2016

Schedule A

Ai Group Penalty Rates Draft Determination

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 yearly review of modern awards

Fast Food Industry Award 2010

AM2014/305

PRESIDENT ROSS MELBOURNE, XX XX 2015

- A. That clause 25.5 of the *Fast Food Industry Award 2010* be varied by deleting “9pm” in sub-clause 25.5(a)(i) and replacing it with “10pm”, as follows:

25.5 Penalty rates

(a) Evening work Monday to Friday

- (i) A loading of 10% will apply for ordinary hours of work within the span of hours between ~~9.00 pm~~ 10pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.*
- (ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.*

- B. That sub-clause 25.5(c)(i) be amended by deleting the reference to “50%” and replacing it with “25%”, and sub-clause 25.5(c)(ii) be amended by deleting the reference to “75%” and replacing it with “50%” as follows:

25.5 Penalty rates

...

(c) Sunday work

- (i) A ~~50%~~ 25% loading will apply for all hours of work on a Sunday for full-time and part-time employees.*
- (ii) A ~~75%~~ 50% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.*

Schedule B

Analysis of Ai Group Employee Survey

SB1. Nature of Ai Group Employee Survey

250. The details relating to the Ai Group Employee Survey are:

- (a) The population (see Pratley Affidavit (Exhibit AIG 17), p22, par 27) or target population (see Bartley Report (Exhibit SDA 33), par 78) was employees working in the fast food industry during July 2015;
- (b) The sampling frame (see Pratley Affidavit (Exhibit AIG 17), p22, par 28; p41, par 13; Bartley First Report (Exhibit SDA 33), par 73; Bartley Cross Examination, 5 November 2015, PN22022) was employees working for McDonald's and Hungry Jack's in stores during July 2015;
- (c) The sampling frame was not probable (see Pratley Affidavit (Exhibit AIG 17), p47, par 73; Bartley Cross Examination, 5 November 2015, PN21768) but extended to all persons in two large employers in the industry during July 2015;
- (d) The Ai Group Employee Survey involved the conduct of a census (see Pratley Cross Examination, 5 November 2015, PN21584 – PN21585; see also PN21531 – PN21537; Pratley Re Examination, 5 November 2015, PN21621; note also the absence of a need for responses from all of the sample frame in a census (see Pratley Affidavit (Exhibit AIG 17), p50, par 106); compare Bartley Examination in Chief, 5 November 2015, PN21768 (intended census); Bartley Cross Examination, 5 November 2015, PN22075 – PN22076 (no convenience sampling));
- (e) The Ai Group Employee Survey was distributed to 101,201 McDonald's employees (see Kopias First Affidavit (Exhibit 21), pars 10, 13) and 13,564 Hungry Jack's employees (see Feast Affidavit (Exhibit AIG 23), par 16) working in stores (a total of 114,765 employees);
- (f) The Ai Group Employee Survey was distributed via a link contained within an email sent to the McDonald's and Hungry Jack's employees working in stores (see Kopias First Affidavit (Exhibit AIG 23), par 5, 9; Feast Affidavit (Exhibit AIG 23), pars 8, 14; see also Deasy Amended First Affidavit (Exhibit AIG 11), par 10);
- (g) The sample (the respondents to the Ai Group Employee Survey) was 32,518 employees (see Deasy Amended First Affidavit (Exhibit AIG 11), par 15);
- (h) The sample self-selected (see Bartley Second Report (Exhibit SDA 34), par 8) but from within the sampling frame (and so the Commission is aware of the characteristics of the group from which the sample came);

- (i) The response rate was 28.3 per cent (32,518 employees of a sample frame of 114,765 employees);
- (j) Some responses to the Ai Group Employee Survey were excluded on the grounds of incompleteness (see Deasy Amended First Affidavit (Exhibit AIG 11), par 15) or inaccurate or duplicate identification numbers (see Deasy Amended First Affidavit (Exhibit AIG 11), par 16);
- (k) The responses to the Ai Group Employee Survey which were treated as valid (and subsequently analysed) were from 21,579 employees (see Deasy Amended First Affidavit (Exhibit AIG 11), par 16);
- (l) On any view, the number of valid responses was large (21,579) (see also the comments of Dr Muurlink on a “massive” number of participants in the Costa study (21,505) (see Muurlink Cross Examination, 4 November 2015, PN 20926; PN 20928; PN20934));
- (m) The valid response rate was 18.8 per cent (21,579 employees (combined McDonald’s and Hungry Jack’s) of a sample frame of 114,765 employees) (see also Pratley Affidavit (Exhibit AIG 17), p48, par 74);
- (n) The Ai Group Employee Survey was conducted and administered by an independent survey company (see Deasy Amended First Affidavit (Exhibit AIG 11), annexure PD3, p18, par 1);
- (o) None of Ai Group, McDonald’s or Hungry Jack’s determined the questions in the survey;
- (p) None of Ai Group, McDonald’s or Hungry Jack’s selected the sample (the respondents to the Ai Group Employee Survey);
- (q) None of Ai Group, McDonald’s or Hungry Jack’s supervised the completion of responses by the sample;
- (r) No incentive was provided to the sampling frame or the sample to complete the Ai Group Employee Survey;
- (s) The Ai Group Employee Survey is representative of McDonald’s, Hungry Jack’s and major chains in the fast food industry (see Pratley Affidavit (Exhibit AIG 17), p41, pars 13, 14; Pratley Cross Examination, 5 November 2015, PN21518; Pratley Re Examination, 5 November 2015, PN21661) except where the Ai Group Employee Survey relates to an issue concerning 24/7 trade (see Pratley Cross Examination, 5 November 2015, PN21519); and
- (t) McDonald’s, Hungry Jack’s and the major chains in the fast food industry employ approximately 184,000 employees in the industry of approximately 215,000

employees (that is, approximately 86 per cent of the fast food industry) (see Pratley Affidavit (Exhibit AIG 17), p56, par 155; p58, table 2; p59, par 171).

- (u) The Ai Group Employee Survey was representative as no employee in the sample frame was excluded and every employee in the sampling frame was a possible respondent (see Macdonald Cross Examination, 15 December 2015, PN24103).

251. Bearing in mind the number of valid respondents (21,579), the rule of thumb is that, for over 3,000 respondents, the information gathered is accurate within plus or minus 2 per cent (see Charlesworth Cross Examination, 15 December 2015, PN23838, PN23843).

SB2. Bartley Second Report

252. The SDA relies on the report of Ms Helen Bartley entitled "*Expert Opinion – Report to Fair Work Commission*" and dated 28 August 2015 (the "**Bartley Second Report**") (see Exhibit SDA 34). However:

252.1 To the extent that Ms Bartley suggests that she cannot be confident that the data from the Ai Group Employee Survey is reliable (see Bartley Second Report (Exhibit SDA 34), pars 8, 14, 19; Bartley Cross Examination, 5 November 2015, PN21781; PN21804):

- (a) there was a large number of respondents to the Ai Group Employee Survey (over 20,000) (with a large sample being one factor (but not the sole factor) in determining the reliability of answers from the survey (see Bartley Cross Examination, 5 November 2015, PN21916); Charlesworth Cross Examination, 15 December 2015, PN23843; Pezzullo Cross Examination, 16 December 2015, PN25705, PN25709);
- (b) there are very few surveys where 100 per cent response rate is obtained (see Bartley Examination in Chief, 5 November 2015, PN21775; Bartley Cross Examination, 5 November 2015, PN22081), particularly in a survey where over a 100,000 persons are invited to respond;
- (c) a response rate of one to two per cent is a good response rate for a sampling frame of over 100,000 (see Deasy Re Examination, 27 October 2015, PN19343);
- (d) there is a narrow confidence interval for the data (see Pratley Affidavit (Exhibit AIG 17), p32, pars 155, 158; p33, par 164; see also Peetz and Watson Report (Exhibit SDA 36), p4, lines 13-15; p8; Muurlink Cross Examination, 4 November 2015, PN20937);
- (e) the respondents were spread over various age groups, genders and locations (see Deasy Amended First Affidavit (Exhibit AIG 11), pp24-27; Pratley Affidavit (Exhibit AIG 17), p51, par 113, figure 1; see also comments

of Asbury DP (Transcript, 5 November 2015, PN21791); see further Deasy Re Examination, 27 October 2015, PN19346);

- (f) neither Dr Pratley nor Ms Bartley identified actual bias in the data (see Pratley Affidavit (Exhibit AIG 17), p40, par 4; p55, par 152(ii); p56, par 153; Pratley Cross Examination, 5 November 2015, PN21598; Pratley Re Examination, 5 November 2015, PN 21623 – PN21625; see also the absence of identified actual bias in the Second Bartley Report or the Bartley Cross Examination, 5 November 2015);
- (g) Ms Bartley posited the possibility of non-response bias (see Bartley Second Report (Exhibit SDA 34), pars 8, 14), as opposed to other types of potential bias;
- (h) Ms Bartley could not state categorically that there were differences, or were not differences, between the employees who responded to the survey and the employees who did not respond (see Bartley Examination in Chief, 5 November 2015, PN21781) (and so could not state that there was actual non-response bias);
- (i) Ms Bartley could not (and did not) say that the data "was" unreliable (see Bartley Examination in Chief, 5 November 2015, PN21804);
- (j) Ms Bartley could only say that the data "could" or had the "potential" to be unreliable (see Bartley Second Report (Exhibit SDA 34), pars 8, 14, 19; see also Bartley Examination in Chief, 5 November 2015, PN21804);
- (k) Dr Pratley undertook some analysis of the reliability of the data (see Pratley Affidavit (Exhibit AIG 17), pp51-52, Figure 1 and pars 113 to 122) and the analysis indicated reliability of the results of the Ai Group Employee Survey;
- (l) Ms Bartley did not conduct any analysis of the reliability of the data;
- (m) Ms Deasy undertook some comparisons of the data and noted that the responses of McDonald's employees and Hungry Jack's employees were consistent to within 0.1 per cent (see Deasy Cross Examination, 27 October 2015, PN19323; Deasy Re Examination, 27 October 2015, PN19331, PN19333 – PN19338);
- (n) Both Dr Pratley and Ms Deasy regarded the results of the survey as reliable and representative (at least of McDonald's, Hungry Jack's and the major chains) (see Pratley Affidavit (Exhibit AIG 17), p41, pars 13, 14; Pratley Cross Examination, 5 November 2015, PN21518; Pratley Re Examination, 5 November 2015, PN21661; Deasy Cross Examination, 27 October 2015, PN19318 – PN19319; PN19326; Deasy Re Examination, 27 October 2015,

PN19341; PN19355); and

- (o) the concern of Ms Bartley related to “attitudes”, “perceptions” and “opinions” questioned in the survey, not demographics or characteristics of employees (see Bartley Examination in Chief, 5 November 2015, PN21792; Bartley Cross Examination, 5 November 2015, PN22103), and most questions in the survey related to the latter, rather than the former, issue.

252.2 To the extent that Ms Bartley emphasises the "low" or "very low" response rates in the Ai Group Employee Survey (see Bartley Second Report (Exhibit SDA 34), pars 14, 15, 16; see also Bartley First Report (Exhibit SDA 33), par 26):

- (a) high response rates are connected in practice to low sampling frames (see Bartley Cross Examination, 5 November 2015, PN21771 – PN21773 (90 per cent response rate for sampling frame of 100 people));
- (b) there are very few surveys where 100 per cent response rate is obtained (see Bartley Cross Examination, 5 November 2015, PN21775);
- (c) a response of over 20,000 from the sample frame was regarded as a high response rate (see Deasy Cross Examination, 27 October 2015, PN19312; PN19317);
- (d) a response rate of one to two per cent is a good response rate for a sampling frame of over 100,000 (see Deasy Re Examination, 27 October 2015, PN19343);
- (e) there is no direct relationship between response rate and non-response bias (see Deasy Cross Examination, 27 October 2015, PN19304; Pratley Re Examination, 5 November 2015, PN21624);
- (f) the limited response rates (and the (obverse) non-response rates) do not necessarily indicate bias (see Pratley Affidavit (Exhibit AIG 17), p49, par 96; Pratley Re Examination, 5 November 2015, PN21624; Deasy Cross Examination, 27 October 2015, PN19300; Bartley Examination in Chief, 5 November 2015, PN21781; PN21804); and
- (g) In some contexts, given the large number of persons in the sampling frame, a (valid) response rate of five per cent is acceptable in order to be able to rely on the data (see Pezzullo Cross Examination, 16 December 2015, PN24980).

- 252.3 To the extent that Ms Bartley suggests that the survey involved convenience sampling (see Bartley Report, par 10), the Ai Group Employee Survey sought to obtain the views of all members of the sampling frame (that is, all employees in stores at McDonald's and Hungry Jack's) (see Pratley Affidavit (Exhibit AIG 17), p47, pars 69, 71; see also Bartley Examination in Chief, 5 November 2015, PN21768; Bartley Cross Examination, 5 November 2015, PN22075 – PN22076) and did not seek to obtain merely the members of the sampling frame who were readily accessible (such as members at a particular store or stores) (see Pratley Affidavit (Exhibit AIG 17), p47, par 72; Bartley Re Examination, 5 November 2015, PN22113). (The Ai Group Employee Survey involved a census – see Pratley Affidavit (Exhibit AIG 17), p47, par 73; compare Bartley Examination in Chief, 5 November 2015, PN21768 (intended census).)
- 252.4 To the extent that Ms Bartley suggested that data from the Ai Group Employee Survey needed to be weighted (see Bartley Cross Examination, 5 November 2015, PN22090):
- (a) weighting is not logical where a census is conducted (see Pratley Affidavit (Exhibit AIG 17), p54, par 145) and in any event weighting should not occur post hoc (having seen the data) (see Pratley Affidavit (Exhibit AIG 17), p55, par 147); and
 - (b) it seems that the premise for weighting was the existence of differences between the demographics or opinions of employees at McDonald's and employees at Hungry Jack's (see Bartley Examination in Chief, 5 November 2015, PN22090) yet there is no evidence to suggest, and no basis to suggest, such a difference in demographics and views between the two groups of employees and, in any event, Ms Deasy analysed the data of the two groups of employees and found a lack of difference (see Deasy Cross Examination, 27 October 2015, PN19323; Deasy Re Examination, 27 October 2015, PN19331; PN19333 – PN19338) such that there was no need for weighting (see Deasy Cross Examination, 27 October 2015, PN19323).
253. To the extent that the Bartley Second Report implies that no reliance at all should be placed on the results of the Ai Group Employee Survey, the real position is that the Commission may, at best for the SDA, apply some "caution" to extrapolating the opinions on subjective matters to the total population. (By way of example, the Watson Report indicates the need for "caution" for extrapolating opinions on subjective matters (such as views on poverty or prosperity) to the total population (see Watson Report (Exhibit SDA 35), p57, lines 6-7).) However, even if the Commission was to apply such caution, it still should accept comfortably the representativeness of the Ai Group Employee Survey.

Schedule C

Analysis of Non-Economic Expert Evidence Called by Unions

SC1. Markey Report

255. The ACTU places reliance on the report of Professor Raymond Markey entitled "*The continuing importance of penalty rates for weekend work*" and dated 2 September 2015 (the "**Markey Report**") (see Exhibit ACTU 2). However:

- 255.1 The Markey Report was prepared with significant bias – not to review objectively but to "*refute*" strongly arguments that may be raised by experts relied upon by the employer parties (see the record of the approach in the internal emails between Professor Markey and his assistant (Dr McIvor) during the preparation of the Markey Report (see Exhibit AIG 12; Exhibit PG 27; see also Markey Cross Examination, 28 October 2015, PN19930 – PN19942; PN20088; PN20359 – PN20377; see also the title of the Markey Report ("*The continuing importance of penalty rates for weekend work*")).
- 255.2 The Markey Report was generally prepared across all industries, as opposed to specific industries (such as the fast food industry) (see Markey Cross Examination, 28 October 2015, PN19944 – PN19946; PN19949 – PN19952). (Where Professor Markey relied upon data relating to a specific industry, it was based on Division G (the "Retail Trade" division) of the Australian and New Zealand Standard Industry Classification system (the "**ANZSIC System**") which does not relate to the fast food industry (see Markey Cross Examination, 28 October 2015, PN19955 – PN19959; PN19960).)
- 255.3 To the extent that the Markey Report suggests that many Australian workers rely on penalty rates to meet household expenses (see Markey Report, p2, par 5; see also Markey Report Executive Summary, par 2):
- (a) the Markey Report cites three working patterns (only weekend work, both evening and weekend work and only Sunday work) which are not reflective of the working patterns for the majority of employees of McDonald's, Hungry Jack's or the fast food industry in that the typical pattern at McDonald's is to work both weekdays and weekends (as opposed to only weekend work or only Sunday work), for less than 20 hours per week and not late at night (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11; p31, table 13; see also Limbrey First Affidavit (Exhibit AIG 3), pars 40, 43);
 - (b) it is estimated that over 75 per cent of workers at McDonald's or Hungry Jack's live with one or both of their parents (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 9) (and thus do not meet household expenses); and

- (c) in any event, the Markey Report does not specify (or provide data on) the amount of the penalty rates upon which workers allegedly rely or conduct any analysis of the extent of the alleged reliance.

255.4 To the extent that the Markey Report suggests that the vast majority of Australian weekend workers generally are not dependent students (see Markey Report, par 7; see also Markey Report Executive Summary, par 2), the Markey Report does not reflect the characteristics of employees at McDonald's and Hungry Jack's, where it is estimated that over 75 per cent of employees are dependent students (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 9; see also paragraph **[73]** of this outline).

255.5 To the extent that the Markey Report suggests that weekend work is very much the exception rather than the rule (see Markey Report, pars 6, 30; see also Markey Report Executive Summary, par 3), the Markey Report is inconsistent with:

- (a) the characteristics of employees at McDonald's and Hungry Jack's, where it is estimated that 64 per cent of employees work on Saturdays and 58 per cent of employees work on Sundays (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 22); and
- (b) its own terms, where it is recognised that around 60 per cent of employees in the accommodation and food services sector (of which the fast food industry is part) work on weekends (see Markey Report, par 5).

It is also relevant that the retail employees who work on Sundays (and gave evidence in these proceedings) do so knowing that, at the time they applied for employment, their job involved Sunday work (see SDA Witness 16 Cross Examination, 20 October 2015, PN17865; SDA Witness 17 Cross Examination, 20 October 2015, PN17991 – PN17993; SDA Witness 18 Cross Examination, 20 October 2015, PN18065 – PN18068; SDA Witness 19 Cross Examination, 21 October 2015, PN18150 – PN18153; SDA Witness 20 Cross Examination, 21 October 2015, PN18229 – PN18232; SDA Witness 21 Cross Examination, 21 October 2015, PN18277 – PN18278), thereby implying a willingness to work (and thus a lack of exception to work) on Sundays.

255.6 To the extent that the Markey Report suggests that penalty rates have little impact on demand by employers for workers to work on Sundays (see Markey Report, pars 15, 16; see also Markey Report Executive Summary, par 5), the Markey Report is inconsistent with:

- (a) most employees in the fast food industry (those employed at McDonald's and the main employers) being covered by an all up hourly rate (see paragraph **[110]** of this outline);
- (b) the evidence of some employers in the proceedings (see Xynias Cross Examination, 15 October 2015, PN1624; PN 1639; PN1679; Lewellin Cross

Examination, 15 October 2015, PN1754; PN1765; PN1799; see also Daggart Cross Examination, 19 October 2015, PN17038 – PN17041; PN17051 – PN17052; Fantis Statement (Exhibit RCI 20), par 8; Fantis Cross Examination, 26 October 2015, PN18877); and

- (c) its own terms, which suggests that there is no empirical evidence (as opposed to a lack of relationship) regarding the impact of penalty rates on demand for labour (see Markey Report, pars 3, 18; see also Markey Report Executive Summary, pars 7, 14).

255.7 To the extent that the Markey Report suggests that spending time with family and friends on weekends is missed by weekend workers and cannot be made up (see Markey Report, par 28; see also Markey Report Executive Summary, par 9):

- (a) there is no logical reason that some groups of weekend workers in the fast food industry are unable to reschedule socialising or leisure activities (a fact accepted by Professor Markey in relation to part-time workers generally (see Markey Cross Examination, 28 October 2015, PN20185)), especially given the typical (short) shift length of employees at McDonald's and Hungry Jack's on a Sunday (see Limbrey First Affidavit (Exhibit AIG 3), par 173 (average shift length of 5.28 hours); Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11) (and noting that retail employees endeavour to plan their social activities and family interactions to occur at times when they are not working (see SDA Witness 17 Cross Examination, 20 October 2015, PN18003 – PN18004; SDA Witness 21 Cross Examination, 21 October 2015, PN18282; see also SDA Witness 16 Cross Examination, 20 October 2015, PN17992 – PN17994; SDA Witness 18 Cross Examination, 20 October 2015, PN18075 – PN18076));
- (b) there is academic research (cited in the Markey Report Executive Summary, par 9) that suggests that part-time employees, men and workers on short weekend shifts are able to make up shared leisure time after working on a weekend (see Craig, Brown, "Weekend Work and Leisure Time with Family and Friends: Who Misses Out?", (2014) *Journal of Marriage and Family* 710 at 710, 723; Markey Cross Examination, 28 October 2015, PN20185; PN20223 – PN20225; see also Muurlink Cross Examination, 4 November 2015, PN21114, PN21118 (employees working limited hours on Sundays have greater propensity to recoup leisure time));
- (c) there is in fact amongst a majority of McDonald's and Hungry Jack's employees evidence of either a positive impact or no impact of weekend work on socialising (see Deasy Amended First Affidavit (Exhibit AIG 11), p47, p55); and
- (d) a significant proportion (at close to 50 per cent) of McDonald's and Hungry Jack's employees prefer to work on one day of the weekend and socialise

with family and friends on the other day of the weekend (see Deasy Amended First Affidavit (Exhibit AIG 11), p62, table 28, first entry; p63, table 29, third entry).

- 255.8 To the extent that the Markey Report suggests that many weekend workers also work at night (see Markey Report, par 34; see also Markey Report Executive Summary, par 9), the Markey Report does not reflect the characteristics of employees at McDonald's and Hungry Jack's, with an estimate of 77 per cent of such employees being students (the majority of whom are unable pursuant to legislation or a responsible student policy to work at night) (see Limbrey First Affidavit (Exhibit AIG 3), par 38 and annexure KTL5; Eagles Cross Examination, 27 October 2015, PN19210 – PN19214).
- 255.9 To the extent that the Markey Report suggests that 62 per cent of employees working on a weekend would not work in the absence of a penalty rate (see Markey Report, par 42; see also Markey Report Executive Summary, par 13), the Markey Report does not reflect:
- (a) the characteristics of the fast food industry where it is estimated that 58 per cent of employees work on weekends without receiving a premium for doing so (see Deasy Amended First Affidavit (Exhibit AIG 11), 19, par 22; see also paragraph **[110]** of this outline);
 - (b) the recognition in the academic research (cited in the Markey Report – see p22) that significant classes of employees are prepared to work weekends without receiving penalty rates (see Daly, "Evenings, Nights and Weekends: Working Unsocial Hours and Penalty Rates", Centre for Work + Life, University of South Australia, (2014), Table 13; see also pp18-19; see also Markey Cross Examination, 28 October 2015, PN20140 – PN20143; PN20257 – PN20277; see further Muurlink Cross Examination, 4 November 2015, PN21097); and
 - (c) the evidence of employees in these proceedings (who would continue to work on a Sunday if the penalty rates for a Sunday were reduced) (see SDA Witness 17 Cross Examination, 20 October 2015, PN17985; SDA Witness 18 Cross Examination, 20 October 2015, PN18061; SDA Witness 19 Cross Examination, 21 October 2015, PN18155 – PN18156; SDA Witness 21 Cross Examination, 21 October 2015, PN18280; SDA Witness 22 Cross Examination, 21 October 2015, PN18342) (and noting too that some employees choose to work on Sundays (see, for example, SDA Witness 15 Cross Examination, 20 October 2015, PN17658 – PN17659; SDA Witness 22 Cross Examination, 21 October 2015, PN18339)).
- 255.10 To the extent that the Markey Report suggests that the reasons for employers restricting staff levels on weekends are not necessarily tied to penalty rates (see Markey Report, pars 11, 15), the suggestion:
- (a) is not based on evidence;

- (b) constitutes speculation;
- (c) effectively amounts to the identification of other possible explanations only; and
- (d) is, in any event, inconsistent with the evidence of some operators in the fast food industry, who have stated that their staff levels are restricted by penalty rates (see Fantis Statement (Exhibit RCI 20), par 8; Fantis Cross Examination, 26 October 2015, PN18877; see also Xynias Cross Examination, 15 October 2015, PN1624; PN 1639; PN1679; Lewellin Cross Examination, 15 October 2015, PN1754; PN1765; PN1799; see also Daggart Cross Examination, 19 October 2015, PN17038 – PN17041; PN17051 – PN17052).

SC2. O'Brien Report

256. The ACTU (as well as the SDA and United Voice) relies upon the report of Dr Martin O'Brien relating to the national fast food workforce and dated 4 September 2015 (the "**O'Brien Report**") (see Exhibit ACTU 3). However:
- 256.1 To the extent that the O'Brien Report cites data relating to average weekly earnings (see O'Brien Report, p2, second paragraph; p6, par 6; tables 1.1 to 1.12), the data is generally not confined to the fast food industry but is based on the accommodation and food services sector (and thus includes the hospitality, restaurant and cafes industries) (see O'Brien Report, p5, par 3; O'Brien Cross Examination, 15 December 2015, PN23307, PN23335), with the fast food industry only comprising 31 per cent of employees in the data (see O'Brien Report, p6, par 3; O'Brien Cross Examination, 15 December 2015, PN23332), and so the data does not represent accurately the fast food industry;
 - 256.2 To the extent that the O'Brien Report cites data relating to average weekly earnings, most of the data is based on a combination of full-time employees, part-time employees and casuals (see O'Brien Cross Examination, 15 December 2015, PN23356, PN23364), even though part-time, non-adult employees in the accommodation and food services sector comprise an estimated 570,700 of 739,700 total employees (or approximately 77 per cent of total employees) (see O'Brien Report, tables 1.1 and 1.2; O'Brien Cross Examination, 15 December 2015, PN23359) and, due to the lower total of working hours of part-time, non-adult employees, produce a lower average weekly earnings (see O'Brien Cross Examination, 15 December 2015, PN23372, PN23374, PN23377, PN23379, PN23381);
 - 256.3 To the extent that the O'Brien Report cites data relating to average weekly earnings, most of the data is based on a combination of full-time employees, part-time employees and casuals, even though 41 per cent of employees in takeaway services earn less than \$200 per week (see O'Brien Report, p21, table 1.13; O'Brien Cross

Examination, 15 December 2015, PN23380) and even though such a significant portion of employees will produce lower average weekly earnings;

- 256.4 To the extent that the O'Brien Report uses data specifically relating to the fast food industry (see O'Brien Report, p5, par 3), the data is limited to 2011 (see O'Brien Report, p5, par 3; p20, par 26; O'Brien Cross Examination, 15 December 2015, PN23335, PN23382);
- 256.5 To the extent that the O'Brien Report cites data relating to Food Preparation Assistants (see O'Brien Report, p6, par 4; p15, par 20; p20, par 25; O'Brien Cross Examination, 15 December 2015, PN23321), the data is not confined to the fast food industry but includes the restaurant, café and retail industries (see O'Brien Cross Examination, 15 December 2015, PN23328 – PN23331);
- 256.6 To the extent that the O'Brien Report estimates the proportion of low paid employees (see O'Brien Report, p2, third paragraph), a lot of the data upon which the estimates are based is not confined to the fast food industry but includes the restaurant and café industries (see O'Brien Report (Exhibit ACTU 3), p22, par 29; O'Brien Cross Examination, 15 December 2015, PN23307, PN23335) and the data is based on full-time employees, part-time employees and casual employees (see O'Brien Cross Examination, 15 December 2015, PN23356);
- 256.7 To the extent that the O'Brien Report cites data relating to household characteristics (see O'Brien Report, pp26-33), the data is not confined to the fast food industry but includes the restaurant and café industries (see O'Brien Cross Examination, 15 December 2015, PN23307, PN23335) (with the latter industries having a higher proportion of older workers – see O'Brien Report, p26, par 44) and the data is based on full-time employees, part-time employees and casual employees (see O'Brien Cross Examination, 15 December 2015, PN23356);
- 256.8 To the extent that the O'Brien Report cites data relating to wage relativities of employees in the fast food industry and employees generally, it is significant that employees in the fast food industry aged 15, 16, 17 and 18 years of age are paid equally with employees generally of those ages (see O'Brien Report, p14, par 19).

SC3. Muurlink Wellbeing Report

257. United Voice (and the SDA) place reliance on the report of Dr Olav Muurlink entitled "*The impact of weekend work: Consecutivity, Overload, Uncontrollability, Unpredictability, Asynchronicity and Arrhythmia*" (the "**Muurlink Wellbeing Report**") (see Exhibit UV 26). However:
- 257.1 The Muurlink Wellbeing Report focuses on the impact of weekend work on employees generally across the nations, not Australian employees and not

Australian employees in the fast food industry (see Muurlink Cross Examination, 4 November 2015, PN20810; PN20842 – PN20843).

- 257.2 The Muurlink Wellbeing Report is not based on an analysis of data (whether supplied by United Voice or undertaken by Dr Muurlink as primary research) relating to employees in an Australian industry (see Muurlink Cross Examination, 4 November 2015, PN20771 – PN20774), including data relating to age, gender, marital status, caring responsibilities, days worked, working hours, abnormal working hours, shift work, shift work hours, shift lengths, rotating shifts, consecutive shifts, intra-work breaks, rest days, leisure time usage or staff turnover (see Muurlink Cross Examination, 4 November 2015, PN 20776, PN20779 – PN20800, PN20803, PN20806).
- 257.3 The Muurlink Wellbeing Report focuses upon associations between weekend work and adverse health consequences but (as the Muurlink Wellbeing Report recognises expressly) association is distinct from, and does not establish, causation (see Muurlink Wellbeing Report, p19, par 19; see also Muurlink Wellbeing Report, p21, par 24; p22, par 28; p23, par 30; p26, par 36 (statements relating to association only); see further comments of Ross J (see Transcript, 14 October 2015, PN15434, PN15438, PN15529, PN15611)).
- 257.4 The Muurlink Wellbeing Report is premised on weekend workers undertaking long hours (see Muurlink Wellbeing Report, p7, par 2; p18, par 16; p23, par 30; p24, par 31; p30, par 45; p58, par 109), an assumption not reflective of workers at McDonald's and Hungry Jack's where it is estimated that 80 per cent of employees work less than 20 hours per week (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11; see also Yu Cross Examination, 6 November 2015, PN22758 – PN22759) and where a typical shift at McDonald's on a Sunday is 5.28 hours (see Limbrey First Affidavit (Exhibit AIG 3), par 173) (noting too that in Queensland high school students are only permitted to work four hours on a school day and 12 hours in a week (see Dunn Re Examination, 26 October 2015, PNPN18549 – PN18550)).
- 257.5 The Muurlink Welfare Report is premised on weekend workers undertaking work during abnormal hours (see Muurlink Wellbeing Report, p7, par 2), an assumption not reflective of workers in the fast food industry where it is estimated that 64 per cent of McDonald's and Hungry Jack's employees make themselves available on a Saturday and it is estimated that 58 per cent of such employees make themselves available on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p31, table 13) (in other words, with work on weekends being "normal" in the fast food industry).
- 257.6 The Muurlink Wellbeing Report is premised on weekend workers being "overworked" or "overloaded" (see Muurlink Wellbeing Report, p8, par 4; p23, par 30; p24, par 31; p47, par 84; pp57-62, especially pars 110 and 111; p70, par 131; Muurlink Cross Examination, 4 November 2015, PN20955), an assumption not reflective of workers in the fast food industry where it is estimated that 80 per cent of employees work less than 20 hours per week (see paragraph **[257.4]**

of this outline) and where it is estimated that over 70 per cent of employees seek to work more hours each week on a Saturday or a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p37, table 16; p40, table 17; see also Dunn Cross Examination, 26 October 2015, PN18507).

- 257.7 The Muurlink Wellbeing Report is premised on weekend workers being subject to “night work” (see Muurlink Wellbeing Report, p8, par 4; p19, par 19; p29, par 45; p52, par 98), an assumption not reflective of workers in the fast food industry, particularly given the restrictions on young workers performing night work (see Limbrey First Affidavit (Exhibit AIG 3), par 38 and annexure KTL6; see also Dunn Re Examination, 26 October 2015, PN18549 – PN18550) (and noting that, according to analysis cited in the Muurlink Wellbeing Report, only eight per cent of Australian workers across all industries work on Saturdays, Sundays and in evenings (see Muurlink Wellbeing Report, p43, Figure 2)).
- 257.8 The Muurlink Wellbeing Report recognises that employee control over working hours affects wellbeing (see Muurlink Wellbeing Report, p8, par 5; p10, par 10; p15, par 6; p18, par 16; p21, par 25; p23, par 30; p30, par 47; p48, par 89; Muurlink Cross Examination, 4 November 2015, PN20874, PN20877) in circumstances where employees of McDonald’s exercise control over their hours by determining the availability of their work hours (on both a permanent and temporary basis) (see, for example, Dunn Cross Examination, 26 October 2015, PN18512 – PN18515; Haydar Cross Examination, 26 October 2015, PN18762, PN18766, PN18768, PN18683, PN18685, PN18687, PN18692, PN16693; Dando Cross Examination, 26 October 2015, PN18744 – PN18751, PN18757) (and which control should, according to the studies cited in the Muurlink Wellbeing Report, lead to better health outcomes, fewer symptoms, faster recovery from illness and even longer life (see Muurlink Wellbeing Report, p48, par 89; p49, par 91; see also Muurlink Cross Examination, 4 November 2015, PN20878 – PN20880)).
- 257.9 The Muurlink Wellbeing Report emphasises the importance of predictability of working hours on wellbeing (see Muurlink Wellbeing Report, p22, par 25; Muurlink Cross Examination, 4 November 2015, PN20955) in circumstances where it is estimated that over 80 per cent of workers at McDonald’s and Hungry Jack’s work consistent hours each week (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 20; see also Muurlink Cross Examination, 4 November 2015, PN20973; PN20977).
- 257.10 The Muurlink Wellbeing Report focuses upon the impact of the precariousness of employment on wellbeing (see Muurlink Wellbeing Report, p54, par 102) in circumstances where there is no evidence of precariousness in the fast food industry (and in circumstances where there is no inevitable link between precariousness and wellbeing (see Muurlink Wellbeing Report, p54, par 103; see also p53, fn 23)).
- 257.11 The Muurlink Wellbeing Report seeks to emphasise the negative physical health consequences of weekend work (see Muurlink Wellbeing Report, p11, last

paragraph), including the direct effect of premature death by heart and related diseases (see Muurlink Wellbeing Report, p25, par 34) and the indirect effect of increased smoking and alcohol consumption and greater eating of unhealthy food (see Muurlink Wellbeing Report, p14, par 2; p15, par 10; p24, par 33; p48, par 87), in circumstances where there is no evidence of adverse physical (or other) health consequences of weekend work in the fast food industry.

- 257.12 The Muurlink Wellbeing Report suggests that weekend work disrupts circadian rhythms (see Muurlink Wellbeing Report, p14, par 2; p18, par 16; p21, par 24; p38, par 60; p52, par 99) in circumstances where there is no evidence of the disruption of circadian rhythm of employees in the fast food industry, where most work on a weekend is performed in the peak periods of breakfast, lunch and dinner (thereby having no impact on circadian rhythms) (see Limbrey First Affidavit (Exhibit AIG 3), par 194) and where very few employees at McDonald's start their shift between 7pm and midnight on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p49, table 22, n count for 6pm to midnight; p57, table 27, n count for 6pm to midnight; see also Muurlink Cross Examination, 4 November 2015, PN20964).
- 257.13 The Muurlink Wellbeing Report notes that on-call work may have negative impacts on wellbeing (see Muurlink Wellbeing Report, p14, par 2; p15, par 6; p16, pars 10, 11; p21, pars 23, 24; p80, par 156; p81, par 156) in circumstances where employees at McDonald's do not have arrangements to be on-call (see Limbrey Second Affidavit (Exhibit AIG 4), pars 6, 7) and where there is no evidence that other employees in the fast food industry have on-call arrangements (see also Muurlink Cross Examination, 4 November 2015, PN20977).
- 257.14 The Muurlink Wellbeing Report notes that compressed working weeks may have negative impacts on wellbeing (see Muurlink Wellbeing Report, p35, par 56) in circumstances where employees at McDonald's corporate stores do not generally work compressed working weeks (see Limbrey Second Affidavit (Exhibit AIG 4), par 12) and where there is no evidence that other employees in the fast food industry work compressed working weeks.
- 257.15 The Muurlink Wellbeing Report emphasises the impact of rotating shifts on wellbeing (see Muurlink Wellbeing Report, p53, par 100) in circumstances where employees at McDonald's do not work rotating shifts (see Limbrey Second Affidavit (Exhibit AIG 4), pars 9, 10) and where there is no evidence that other employees in the fast food industry work rotating shifts.
- 257.16 The Muurlink Wellbeing Report focuses on the impact of weekend work on time spent with children (see Muurlink Wellbeing Report, p15, par 8; p16, par 11; p20, par 20; p25, par 36; p26, pars 37, 38) in circumstances where it is estimated that 92 per cent of employees in stores at McDonald's and Hungry Jack's do not have caring responsibilities (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 11) and in circumstances where Dr Muurlink states that there is insufficient evidence to enable a conclusive answer on the impacts

of weekend work on an employee with carer responsibilities (see Muurlink Wellbeing Report, p14, par 4; p26, par 37).

- 257.17 The Muurlink Wellbeing Report emphasises the need to consider, in assessing the impact of working on weekends, the type of shift worked, the length of shift, the number of consecutive shifts, the length of intra-work rest breaks and the frequency of rest breaks (see Muurlink Wellbeing Report, p29, par 44; p61, par 113) but a consideration of such factors in a large player in the fast food industry show no adverse impacts – employees at McDonald’s usually perform a breakfast, lunch or dinner shift (see Limbrey First Affidavit (Exhibit AIG 3), par 194), of 6 or less hours (see Deasy Amended First Affidavit (Exhibit AIG 11), p43, table 19; p51, table 23), with limited consecutive days worked (at most three days) and with one intra-work rest break after four hours of work (see clause 29 of the *McDonald’s Australia Enterprise Agreement 2013*).
- 257.18 The Muurlink Wellbeing Report emphasises the impact of working more than five consecutive days on wellbeing (see Muurlink Wellbeing Report, p17, par 12; p18, par 16; p21, par 23; p47, par 84; pp63-71, especially p70, par 131), and an (asserted) “*accumulated exhaustion built up over a sequence of days*” (see Muurlink Wellbeing Report, p21, par 23), in circumstances where it is estimated that only 5 per cent of employees at McDonald’s and Hungry Jack’s work on a full-time basis (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 10), where crew members at McDonald’s and Hungry Jack’s do not work more than five days consecutively, particularly as most work less than 20 hours per week (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11), and where there is no evidence of accumulated exhaustion (let alone based on sequencing) in the fast food industry (see also Muurlink Cross Examination, 4 November 2015, PN20977).
- 257.19 The Muurlink Wellbeing Report suggests that weekend work has created a “*serious public health issue*” (see Muurlink Wellbeing Report, p18, par 15) in circumstances where there is no evidence of public health issues (let alone serious public health issues) for weekend work in the fast food industry (see also Limbrey First Affidavit (Exhibit AIG 3), par 178).
- 257.20 The Muurlink Wellbeing Report suggests that weekend work is out of step with the majority of society (see Muurlink Wellbeing Report, p18, par 16) in circumstances where it is estimated that 58 per cent of employees at McDonald’s and Hungry Jack’s work on weekends (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 22; see also Peetz and Watson Report (Exhibit SDA 36), p2, table 1, item 3 (up to 62 per cent of retail employees work on weekends)).
- 257.21 The Muurlink Wellbeing Report suggests that lower rhythmicity (and thus predictability of working hours) affects adversely wellbeing (see Muurlink Wellbeing Report, p18, par 16) in circumstances where it is estimated that 81 per cent of employees at McDonald’s and Hungry Jack’s work predictable hours

(see Deasy Amended First Affidavit (Exhibit AIG 11), p30, table 11B, “Yes” column).

- 257.22 The Muurlink Wellbeing Report emphasises the importance of duration, position and division of work over a working week (see Muurlink Wellbeing Report, p19, par 18) but does not seek to apply such factors to workers in an industry, especially the fast food industry where it is estimated that most employees at McDonald’s and Hungry Jack’s work less than 20 hours per week (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11) over both weekdays and weekends (see Deasy Amended First Affidavit (Exhibit AIG 11), p31, table 13).
- 257.23 The Muurlink Wellbeing Report suggests that Sunday work is associated with higher injury rates (see Muurlink Wellbeing Report, p22, par 28) in circumstances where Sunday work does not result in higher injury rates in McDonald’s restaurants (see Limbrey First Affidavit (Exhibit AIG 3), par 178).
- 257.24 The Muurlink Wellbeing Report cites studies relating to the association between fatigue (on the one hand) and accidents and injuries (on the other hand) (see Muurlink Wellbeing Report, p75, par 144; p77, par 149) in circumstances where there is no evidence of fatigue being suffered by employees in the fast food industry and no evidence of accidents or injuries caused by fatigue being suffered by workers in the fast food industry.
- 257.25 The Muurlink Wellbeing Report assumes that the reason for high turnover of employees working on weekends is dissatisfaction with working weekends (see Muurlink Wellbeing Report, p27, par 42; p37, par 59) in circumstances where an alternative (plausible) explanation (supported by evidence) for the high turnover is the lack of career intentions in the fast food industry (see Deasy Amended First Affidavit (Exhibit AIG 11), p70, table 35) and where employees do not complain to their fast food employer over working on weekends (see paragraph **[105]** of this outline).
- 257.26 The Muurlink Wellbeing Report is unnecessarily alarmist and overstates the real position (see, for example, “*fatal consequences*” of working on weekends (see Muurlink Wellbeing Report, p17, par 13)); “*serious public health issues*” of working on weekends (see Muurlink Wellbeing Report, p18, par 15); “*premature death*” (see Muurlink Wellbeing Report, p17, 25, par 34)).
- 257.27 The Muurlink Wellbeing Report cites studies that have no relevance to employees in the fast food industry, including studies based on work practices of workers undertaking extremely long hours (see Muurlink Wellbeing Report, p74, pars 140, 141), train drivers and air crew (see Muurlink Wellbeing Report, p21, par 23; p74, par 140), police officers (see Muurlink Wellbeing Report, p49, par 91), steel workers (see Muurlink Wellbeing Report, p52, par 100), nurses (see Muurlink Wellbeing Report, p53, par 103; p58, par 109; p64, par 122; p65, figure 4; p74, pars 141, 142; p79, par 154), power station operators (see Muurlink Wellbeing Report, p64, par 122), the medical profession (see Muurlink

Wellbeing Report, p68, par 127; p70, par 131; p80, par 156), military personnel (see Muurlink Wellbeing Report, p69, par 130; p79, par 154), six-day a week construction workers (see Muurlink Wellbeing Report, p75, par 142), truck drivers (see Muurlink Wellbeing Report, p76, par 145; p80, par 154), meat workers (see Muurlink Wellbeing Report, p76, par 146), car manufacturing workers (see Muurlink Wellbeing Report, p78, par 150), school teachers (see Muurlink Wellbeing Report, p79, par 152), ship engineers (see Muurlink Wellbeing Report, p80, par 156) and electrical and gas engineers (see Muurlink Wellbeing Report, p81, par 156).

- 257.28 The Muurlink Wellbeing Report cites many overseas studies (see Muurlink Cross Examination, 4 November 2015, PN20843), including studies from Saudi Arabia (see Muurlink Wellbeing Report, p15, par 6), Korea (see Muurlink Wellbeing Report, p15, par 6), Hungary (see Muurlink Wellbeing Report, p23, par 30), Finland (see Muurlink Wellbeing Report, p24, par 31), Tunisia (see Muurlink Wellbeing Report, p54, par 102), India (see Muurlink Wellbeing Report, p63, par 116), Sweden (see the Muurlink Wellbeing Report, p64, par 121), Ukraine (see Muurlink Wellbeing Report, p64, par 122; p65, par 128), the Netherlands (see Muurlink Wellbeing Report, p79, par 152), Israel (see Muurlink Wellbeing Report, p79, par 154), Germany (see Muurlink Wellbeing Report, p79, par 154) and France (see Muurlink Wellbeing Report, p81, par 156), with many societal and cultural differences existing amongst the nations (as recognised expressly (see Muurlink Wellbeing Report, p41, par 67; see also Muurlink Cross Examination, 4 November 2015, PN20845)) and many employment practice differences amongst the nations (as recognised by Dr Muurlink (see Muurlink Cross Examination, 4 November 2015, PN20844, PN20847, PN20849, PN20851 – PN20856, PN20860) and Ms Yu (see Yu Cross Examination, 6 November 2015, PN22750; PN22762 – PN22764)).
- 257.29 The Muurlink Wellbeing Report cites some studies that do not distinguish between weekend workers who work no or few hours during weekdays (on the one hand) and weekend workers who work significant hours during weekdays (see Muurlink Cross Examination, 4 November 2015, PN21009; PN21033; PN21058; PN21061; PN21064) (with workers in the latter category being more susceptible to overload and consecutivity issues (see Muurlink Cross Examination, 4 November 2015, PN21024)).

SC4. Charlesworth Report and Charlesworth & Macdonald Report

258 The SDA relies upon the report of Professor Sara Charlesworth dated 31 August 2015 (the **“Charlesworth Report”**) (see Exhibit SDA 44) and the combined report of Professor Charlesworth and Dr Fiona Macdonald dated 26 August 2015 (the **“Charlesworth & Macdonald Report”**) (see Exhibit SDA 43). However:

- 258.1 The Charlesworth and the Charlesworth & Macdonald Report focus upon the retail industry, as opposed to the fast food industry (and so has limited, if any, relevance to the fast food industry).

- 258.2 To the extent that the Charlesworth Report focuses upon weighted data from AWALI 2014 (see Charlesworth Report, pp3-4, pars 8-14), the AWALI data was not intended to be used at the industry level (see Charlesworth Cross Examination, 15 December 2015, PN23652) and so has limited, if any, relevance;
- 258.3 To the extent that the Charlesworth Report focuses upon weighted data from AWALI 2014 (see Charlesworth Report, pp3-4, pars 8-14), the AWALI data is based on questions that are biased towards obtaining a negative answer (see Charlesworth Cross Examination, 15 December 2015, PN23703 to PN23705) and in any event are too generalised or non-specific (see Charlesworth Cross Examination, 15 December 2015, PN23709, PN23710, PN23713, PN23714, PN23718, PN23719);
- 258.4 To the extent that the Charlesworth Report focuses upon weighted data from AWALI 2014 (see Charlesworth Report, pp3-4, pars 8-14), it does not address the position of employees aged 14 to 17 years (noting that no AWALI respondent was aged 14 to 17 years (see AWALI 2014 Report (Exhibit SDA 45), p2, last paragraph; p11; Charlesworth Examination in Chief, 15 December 2015, PN23547; Charlesworth Cross Examination, 15 December 2015, PN23607, PN23620, PN23626, PN23644, PN23645; see also Daly, "Evening, Nights and Weekends: Working Unsocial Hours and Penalty Rates", Centre for Work + Life, University of South Australia, (2014) (Exhibit PG 33), p2)), in circumstances where approximately 66 per cent of employees working in stores for McDonald's and Hungry Jack's were aged 14 to 17 years (see paragraph [65] of this outline), and so the data has little application to the fast food industry.
- 258.5 To the extent that the Charlesworth Report focuses upon weighted data from AWALI 2014 (see Charlesworth Report, pp3-4, pars 8-14), with 77 per cent of AWALI respondents having a college or university qualification (see Charlesworth Report, p7, table 1; Charlesworth Cross Examination, 15 December 2015, PN23637), with 44 per cent of AWALI respondents having caring responsibilities for children (see Charlesworth Report, p8, table 3) and 14 per cent of AWALI respondents being aged 18 to 24 years (see Charlesworth Report, p11, table 8), the data has little application to the fast food industry where it is estimated that 77 per cent of employees at McDonald's and Hungry Jack's are still at high school (see Deasy Amended First Affidavit (Exhibit AIG 11), p27, table 7), 92 per cent of such employees do not have caring responsibilities (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 11) and 91 per cent of such employees are aged between 14 to 24 years (see Deasy Amended First Affidavit (Exhibit AIG 11), p24, table 1).
- 258.6 To the extent that the Charlesworth Report emphasises that having children is an important determinant of work-life interference (see Charlesworth Report, p5, par 16), the emphasis has little significance for the fast food industry where it is estimated that 92 per cent of employees at McDonald's and Hungry Jack's have no caring responsibilities (including children caring responsibilities) (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 11) (with the result that the

concerns expressed in the Charlesworth Report over work-life interference associated with caring responsibilities having no application to the fast food industry).

- 258.7 To the extent that the Charlesworth & Macdonald Report focuses upon long hours having a negative work-life interference (see Charlesworth and Macdonald Report, p6, par 11; see also Charlesworth Examination in Chief, 15 December 2015, PN23574), the focus has little significance for the fast food industry where it is estimated that 80 per cent of employees working at McDonald's work less than 20 hours per week (see Deasy Amended First Affidavit (Exhibit AIG 11), p28, table 11).
- 258.8 To the extent that the Charlesworth & Macdonald Report emphasises negative work-life interference generally, they omit to record that part-time employees have less work-life interference than the average employee (see AWALI 2014 Report (Exhibit SDA 45), p15, first and third paragraphs; p20, last paragraph; see also AWALI 2008 Report (Exhibit PG 32), executive summary, p1).
- 258.9 To the extent that the Charlesworth & Macdonald Report emphasises dissatisfaction with work-life interference associated with Sunday work (see Charlesworth and Macdonald Report, p9, par 25, last bullet point; p10, par 27, last bullet point), the Charlesworth & Macdonald Report has engaged in significant selectivity by ignoring (or failing to note) the considerable satisfaction (between 64 and 69 per cent), close to three times higher than dis-satisfaction (21 per cent)), with work-life interference associated with Sunday work (see Charlesworth & Macdonald Report, p9 and p10; compare p33, tables 13 and 14; Charlesworth Cross Examination, 15 December 2015, PN23673 to PN23692).
- 258.10 To the extent that the Charlesworth & Macdonald Report explores the comparative work-life interferences of working Saturdays to Sundays based on data for all employees from AWALI 2014 (see Charlesworth & Macdonald Report, p9, par 25; p10, par 27; pp29-33, tables 5 to 14), the conclusions do not extend to the fast food industry (due to the differences between the AWALI 2014 respondents and the typical employee in the fast food industry).
- 258.11 To the extent that the Charlesworth & Macdonald Report explores the comparative work-life interferences of working Saturdays to Sundays in the retail industry (see Charlesworth & Macdonald Report, p3, par 7; p10, par 30; pp34-38, tables 15 to 24), the conclusions are limited due to the small number of employees analysed (see Charlesworth & Macdonald Report, p7, par 12, second bullet point) and some (intended) analysis could not be undertaken due to the small cell size (see Charlesworth & Macdonald Report, p10, par 31).
- 258.12 To the extent that the Charlesworth & Macdonald Report explores the comparative work-life interferences of working Saturdays to Sundays in the retail industry (see also Charlesworth and Macdonald Report, p11), the conclusions are based on the

retail industry being Division G in the ANZSIC system (see Charlesworth Cross Examination, 15 December 2015, PN23721) and so the conclusions do not relate to the fast food industry.

258.13 To the extent that the Charlesworth & McDonald Report focuses upon qualitative matters summarised by Dr Macdonald into themes, the summary:

- (a) is based on only 25 responses from retail industry employees (see Charlesworth & McDonald Report (Exhibit SDA 43), p3, par 4; p4, par 10) who were not shown to be representative of the views of the retail industry employees generally or the fast food industry (noting too that five of the 25 responses were from full time employees (see Charlesworth & McDonald Report (Exhibit SDA 43), p15, par 16; see also Interview Transcripts (Retail Exhibit 11), pp1, 7, 26, p54, p138), [REDACTED] (see Interview Transcripts (Retail Exhibit 11), p15, p35) and ten of the 25 responses were from employees aged above 25 years (see Charlesworth & McDonald Report (Exhibit SDA 43), p15, par 16));
- (b) is reflective of the leading nature of some questions asked during the interviews (see the questions recorded in the Interview Transcripts (Exhibit Retail 11));
- (c) is highly selective (see Macdonald Cross Examination, 15 December 2015, PN24192, PN24206, PN24227, PN24358, PN24359; Transcript of Interviews (Exhibit Retail 11), p7) and ignores other themes (especially those relating to workers choosing or accepting a job that allowed or involved weekend work (see Macdonald Cross Examination, 15 December 2015, PN24185, PN24188, PN24206, PN24212, PN24224, PN24229, PN24263, PN24346), choosing or accepting shifts that involved weekend work (see Macdonald Cross Examination, 15 December 2015, PN24189, PN24331, PN24339), selecting weekend shifts to suit work-life balance, including study commitments (see Macdonald Cross Examination, 15 December 2015, PN24191, PN24209, PN24229, PN24246, PN24308, PN24333, PN24349, PN24356) and stating a lack of difficulty in working weekends (see Macdonald Cross Examination, 15 December 2015, PN24194, PN24196, PN24221, PN24252, PN24255, PN24257, PN24296, PN24314, PN24322, PN24326, PN24336, PN24352, PN24361, PN24371, PN24386, PN24389, PN24393, PN24396, PN24401; Transcript of Interviews (Exhibit Retail 11)); and
- (d) ignores the general finding that the majority of employees in the retail industry are satisfied with their work-life balance (see Macdonald Cross Examination, 15 December 2015, PN24258; see also Charlesworth Cross Examination, 15 December 2015, PN23906).

SC5. Oliver Report

259 United Voice relies upon the report of Dr Damian Oliver entitled "*Impact of Penalty Rates on Wages of Hospitality Workers*" and dated 4 September 2015 (the "**Oliver Report**") (see Exhibit UV 28). However:

- 259.1 The Oliver Report focuses upon the hospitality industry, as opposed to the fast food industry (and so has limited, if any, relevance to the fast food industry).
- 259.2 The data in the section of the Oliver Report based on the AWRS survey (see Oliver Report, pars 71 to 113) includes data relating to the fast food industry but merges the data with a greater amount of data relating to the hospitality industry (and given the differences in demographics of employees in the two industries (see Oliver Report, par 43; see also paragraphs [56] to [91] of this outline), and given the greater proportion of data relating to the hospitality industry, the merged data does not reflect accurately the fast food industry).
- 259.3 The data in the section of the Oliver Report based on the AWRS survey (see Oliver Report, pars 71 to 113) is not fairly representative of the fast food industry as the AWRS survey over-represents older workers, permanent workers and full time workers (see Oliver Report, pars 6, 42) and under-represents younger workers, casual employees, part time workers and students (see Oliver Report, par 68) in circumstances where it is estimated that 90 per cent of employees at McDonald's and Hungry Jacks are aged between 14 to 24 years, 67 per cent of such employees are casuals, 20 per cent of such employees are part time employees and 77 per cent of such employees are students (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, pars 12, 17; compare Oliver Report, pars 88, 91) (thereby indicating the limited relevance of the data to the fast food industry).
- 259.4 The data in the section of the Oliver Report based on the AWRS survey has a limited sample relating to the sub-population of employees receiving penalty rates (see Oliver Report, par 56; Oliver Cross Examination, 4 November 2015, PN21366) which entails that there is a need for some "caution" to extrapolate the data in the survey to the entire population of employees working in accommodation and food services industries (see Oliver Cross Examination, 4 November 2015, PN21366) (thereby indicating the limited relevance of the data to the fast food industry, all in circumstances where the sub-population of employees receiving penalty rates includes hospitality workers).
- 259.5 The data in the section of the Oliver Report based on the Household, Income and Labour Dynamics in Australia ("**HILDA**") survey (see Oliver Report, pars 114 to 131, including tables 17 to 27) was manipulated by Dr Oliver to exclude fast food employees (and thus the data has no relevance to the fast food industry) (see Oliver Report, par 44; Oliver Cross Examination, 4 November 2015, PN21370 – PN21375).

259.6 The data in the Oliver Report relating to average total earnings (see Oliver Report, par 16) includes the earnings of full-time, part-time and casual employees (see Oliver Cross Examination, 4 November 2015, PN21360 – PN21362) in circumstances where in the fast food industry it is estimated that 67 per cent of such employees are casuals and 20 per cent of such employees are part time employees (see paragraph [65] of this outline) with reduced total hours of work and thus lower average total earnings.

SC6. Watson Report and Peetz & Watson Report

260 The SDA relies upon the report of Dr Ian Watson entitled “*Employee Earnings in the National Retail Industry*” and dated 30 April 2015 (the “**Watson Report**”) (Exhibit SDA 35) and the report by Professor David Peetz and Dr Watson entitled “*Characteristics of the Workforce in the National Retail Industry*” and dated 2 September 2015 (the “**Peetz and Watson Report**”) (Exhibit SDA 36). However, the data in both reports relates to employees classified in Division G (the “Retail Trade” division) of the ANZSIC system (see Watson Report, pvi, lines 8, 12; p2, lines 9-17, fn4; p4, lines 6-11, 16; p5, lines 6-10; p19, table 3.9; Peetz and Watson Report, p1, line 19; p4, lines 21-22; Watson Cross Examination, 6 November 2015, PN22170) and Division G does not cover the fast food industry (see Exhibit AIG 18; see also O’Brien Report (Exhibit ACTU 3), p2; see further Sands Report (Exhibit Retail 2), Appendix A; Pezzullo First Affidavit (Exhibit PG 34), p27), with the consequence that the data and analysis in both reports is not directly relevant to the fast food industry. (The fast food industry is part of Division H (the “Accommodation and Food Services” division) (see O’Brien Report, p5, par 3; O’Brien Cross Examination, 15 December 2015, PN23307, PN23310; Pezzullo First Affidavit (Exhibit PG 34), p27).)

SC7. Kirchner Report

261 The SDA relies upon the report of Mr Kevin Kirchner entitled “*A Critique of the Report ‘Retail Award Research’ by ACRS, Monash Business School*” and dated August 2015 (the “**Kirchner Report**”) (Exhibit SDA 32) responding to the Rose Report. Ai Group does not rely upon the Rose Report or the Kirchner Report directly. However, the data in the Kirchner Report relates to sales, profit margins, profits, employment costs, on-line purchases and exits in the “retail industry” (see Kirchner Report, pp9-10) which in turn concerns the industry classified in Division G (the “Retail Trade” division) of the ANZSIC system (see Kirchner Report, p18, first paragraph; p56, second and fourth paragraph), entailing that the Kirchner Report is not relevant to the fast food industry.

SC8. Yu Report

- 262 The SDA places reliance on the report of Ms Serena Yu entitled “*Evaluating the Impact of Sunday Penalty Rates in the NSW Retail Industry*” and dated 30 October 2015 (the “**Yu First Report**”) (see Exhibit SDA 39). However:
- 262.1 The Yu First Report focuses upon the impact of increases in penalties on Sundays in NSW (from 50 per cent to 100 per cent), and the absence of increases in penalties in Victoria, on employment in the retail industry in New South Wales and Victoria (see Yu First Report, p3) in circumstances where there was no increase in penalties in NSW in the fast food industry (compare the level of penalty in the Fast Food Award (50 per cent loading for full-time and part-time employee and 75 per cent for casuals)).
- 262.2 The Yu First Report focuses upon the impact of increases on penalties on Sundays in NSW, in circumstances where the employer parties are seeking a reduction in penalties on Sundays (see Yu Cross Examination, 6 November 2015, PN22626; PN22629).
- 262.3 The Yu First Report considered data relating to the retail industry generally (classified by reference to the one digit Retail Trade division in the ANZSIC system (Division G) (see Yu Report, p11, fn 7; Yu Cross Examination, 6 November 2015, PN22643; PN22771; PN22781 – PN22783), which division includes pharmaceutical businesses), as opposed to retailers covered by the Retail Award (see Yu First Report, p11, fn 7), and so the conclusions in the Yu Report are based on non-consistent data groups (see also Yu Cross Examination, 6 November 2015, PN22611 – PN22612 (no data available)).
- 262.4 The Yu First Report was premised on common trends in employment numbers and aggregate hours in NSW and Victoria (see Yu First Report, p12) in circumstances where there was a lack of common trend (in fact a diverging trend) between the two States in the period from February 2009 to May 2010 (see Pezzullo Critique Report dated 2 November 2015 (“**Pezzullo Critique Report**”) (Exhibit Retail 12), p7, par 3.4(a); p8, par 3.5; see also Yu Cross Examination, 6 November 2015, PN22658 – PN22663; PN22678 – PN22682; compare Yu Third Statement dated 18 December 2015 (Exhibit SDA 55), pars 4(a), 6(ii); Yu Examination in Chief, 21 December 2015, PN25888).
- 262.5 The Yu First Report assumed that Victoria was an appropriate control group in circumstances where there were two structural changes in Victoria – the first in 2008 and the second in 2010 – that were not replicated in NSW (see Pezzullo Examination in Chief, 21 December 2015, PN25832, PN25835, PN25837).
- 262.6 The Yu First Report did not consider a variety of factors relevant to the appropriateness of Victoria as a control group (see also Yu First Report, p10, second paragraph), including demand based factors, the location of employees in the State (including the spread amongst metropolitan and regional areas), the profit margins

of businesses, the operating profits of businesses and employee productivity (see Yu Cross Examination, 6 November 2015, PN22684 – PN22696; PN22703; see also Yu Re Examination, 6 November 2015, PN22879), thereby raising concerns over the validity of the conclusions in the Yu First Report (and noting too that the Yu Third Statement (Exhibit SDA 55), which undertakes a revised analysis, does not consider such factors).

- 262.7 The Yu First Report did not consider, and could not consider (due to a lack of data), relevant issues that may have influenced the level of employment numbers and aggregate hours in NSW, including business confidence, workers compensation premium reductions, payroll tax cuts and other business cost savings (see Yu Cross Examination, 6 November 2015, PN22701 – PN22703; PN22811 – PN22817; PN22828 – PN22843; PN22846 – PN22851; see also Safe Work Industry Rates and Industry Claims (Exhibit ABI 16 and Exhibit ABI 17), NSW WorkCover Fact Sheets (Exhibit ABI 17 and Exhibit ABI 18) and Office of State Revenue Historical Rates of Payroll Tax (Exhibit ABI 20)), thereby raising concerns over the validity of the conclusions in the Yu First Report (and noting too that the Yu Third Statement (Exhibit SDA 55), which undertakes a revised analysis, does not consider such factors).
- 262.8 The Yu First Report did not consider a variety of factors relating to employer preferences (to be given by direct evidence or survey evidence and not made available to Ms Yu) (see Yu Cross Examination, 6 November 2015, PN22631 – PN22632).
- 262.9 The conclusions in the Yu First Report are industry specific, State specific and time specific (see Yu Cross Examination, 6 November 2015, PN22773 – PN22775) and there is no evidence that the same conclusions would be reached if the experiment was applied to the fast food industry.
- 262.10 The Yu Report utilises data from HILDA (see Yu First Report, pp14-15), with approximately 25 per cent of workers being 14-24 years, approximately 37 per cent married, approximately 24 per cent students and approximately 24 per cent working on Sundays (see Yu First Report, p15) in circumstances where it is estimated that 90 per cent of employees at McDonald's and Hungry Jack's are aged 14-24 years, only 6 per cent of such employees are married, approximately 89 per cent of such employees are students and approximately 58 per cent of such employees work on a Sunday (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 22; p24, table 1; p25, table 3; p27, table 6).
- 262.11 The Yu First Report assumes that other economic factors were held constant (see also Lewis Cross Examination, 1 October 2015, PN10445, PN10449), an assumption that was doubted to be accurate (see Lewis Cross Examination, 1 October 2015, PN10447), especially given the large number of factors to be held constant (see Lewis Cross Examination, 1 October 2015, PN 10446, PN10450), and which was not accurate (see the factors identified in paragraphs [262.6] and [262.7] of this outline; also Lewis Cross Examination, 1 October 2015, PN10449).

262.12 The Yu First Report does not address the perception of business owners – the real indicator of likely increases in employment, not economic theory – that they are likely to engage additional employees, or utilise existing employees for longer hours, if penalty rates were reduced (see Xynias Cross Examination, 15 October 2015, PN1624; PN 1639; PN1679; Lewellin Cross Examination, 15 October 2015, PN1754; PN1765; PN1799; see also Daggart Cross Examination, 19 October 2015, PN17038 – PN17041; PN17051 – PN17052; Fantis Statement (Exhibit RCI 20), par 8; Fantis Cross Examination, 26 October 2015, PN18877).

SC9. Altman Report

263 The SDA places reliance on the Altman Report (see Exhibit SDA 31), a report directed at the Rose Report (see Exhibit ABI1). Ai Group does not rely directly on the Rose Report or the Altman Report. However, at a general level:

- (a) To the extent that the Altman Report criticises the assumption made in the Rose Report that work scheduling is voluntary (see Altman Report, pars 35, 36), the criticism has no application to the fast food industry where employees at McDonald's (representing over 50 per cent of the fast food industry) exercise control over their hours by determining the availability of their work hours (on both a permanent and temporary basis), including on a Sunday (see, for example, Dunn Cross Examination, 26 October 2015, PN18512 – PN18515; Haydar Cross Examination, 26 October 2015, PN18762, PN18766, PN18768, PN18683, PN18685, PN18687, PN18692, PN16693; Dando Cross Examination, 26 October 2015, PN18744 – PN18751, PN18757)).
- (b) To the extent that the Altman Report criticises the assumption made in the Rose Report that Sundays are not the preferred day of rest and friendship by reference to a majority of Australians not working on weekends (see Altman Report, par 36), the criticism has no application to employees of McDonald's and Hungry Jack's as it is estimated that 64 per cent of such employees work on Saturdays and it is estimated that 58 per cent of such employees work on Sundays (see Deasy Amended First Affidavit (Exhibit AIG 11), p19, par 22).

Schedule D

Analysis of Economic Expert Evidence

- 264 The Ai Group anticipates that the Unions will emphasise the disputed nature of the economic evidence. However:
- (a) First, it is common ground amongst the experts that there is little published literature directly applicable to the impact of penalty rates on employment (see Quiggin Report (Exhibit UV24), par 13 and appendix B, par 2; Borland Report (Exhibit UV25), par 9; see also Lewis First Supplementary Report (Exhibit ABI 4), p6; Markey Report (Exhibit ACTU 2), par 3, 18; Synergies Economic Consulting Report (Exhibit SDA 52), p8, last bullet point; Deloitte Access Economics Scoping Study (Exhibit SDA 54), second page, third paragraph; p10, first paragraph; p12, section 3.2.1, first paragraph);
 - (b) Secondly, it is common ground amongst the experts that Professor Lewis endeavoured, by simulated modelling, to estimate the impact of penalty rates on employment (see Lewis Report (Exhibit ABI3), tables 4A and 4B; Borland Report (Exhibit UV25), pars 7(b), 17);
 - (c) Thirdly, it is common ground amongst the experts that the impact of penalty rates on employment is dependent upon the extent of the reduction in penalty rates and the elasticity of employment (see Lewis Report (Exhibit ABI3), pp24-25; tables 4A and 4B; Borland Report (Exhibit UV25), par 18; Borland Examination in Chief (PN11598; PN11645); Borland Cross Examination (PN11691 – PN1693); see also Deloitte Access Economics Scoping Study (Exhibit SDA 54), p11, fourth paragraph), with the elasticity of employment also known as the elasticity of labour demand (see Lewis Report (Exhibit ABI3), p24; Borland Examination in Chief (PN11645));
 - (d) Fourthly, it seems to be common ground amongst the experts that there are no Australian studies on the elasticity of employment, let alone Australian studies on the elasticity of employment in the retail or hospitality industries (see Lewis Second Supplementary Report (Exhibit ABI5), p5, text under par 9; Lewis Cross Examination (PN11200 – PN11201); see also Borland Cross Examination (PN11696));
 - (e) Fifthly, it is common ground amongst the experts that there is published literature relating to the impact of minimum wages on employment (see also Lewis First Supplementary Report (Exhibit ABI4), p6, p9; see also Lewis Cross Examination (PN11086 – PN11087)), although there is a dispute amongst the experts on the effect of that literature, including the extent of the impact of minimum wages on employment as revealed in the literature (see Quiggin Report (Exhibit UV24), pars 15, 16, 17; Quiggin Cross Examination (PN11288 – PN12889; PN11293; PN11360); Borland Report (Exhibit UV25), par 9; Borland Cross Examination (PN11675 – PN11676); Lewis Second Supplementary Report (Exhibit ABI5), p5; p7), and the extent to which such literature might be an appropriate proxy for the impact of penalty rates on employment (see Borland Report (Exhibit UV25), pars 7(a), 9, 10; Borland Examination in Chief (PN11599; PN11610); Borland Cross Examination

- (PN11693); see also Lewis Cross Examination (PN10812)), yet (significantly) it must be noted that Professor Lewis relies on the published literature relating to minimum wages not for the purpose of estimating the ultimate impact of penalty rates on employment but instead for estimating the elasticity of employment (an integer in the ultimate estimate) (see Lewis Second Supplementary Report (Exhibit ABI5), p4, text under par 8; see also Lewis Cross Examination (PN10813; PN10818; PN10824));
- (f) Sixthly, it seems to be common ground amongst the experts that some studies cited by Professor Lewis in estimating the elasticity of employment are the top end of the range of elasticity (see Lewis Cross Examination (PN11080); Quiggin Report (Exhibit UV24), pars 15, 16; Quiggin Examination in Chief (PN11266); Borland Cross Examination (PN11696));
- (g) Seventhly, it seems to be common ground amongst the experts that the elasticity of employment is dependent upon the scale effect and the substitution effect (see Borland Report (Exhibit UV25), pars 18, 27; Borland Examination in Chief (PN11599); Borland Cross Examination (PN11697); Lewis Report (Exhibit ABI3), p25; Lewis First Supplementary Report (Exhibit ABI4), p8; Lewis Cross Examination (PN11117 – PN11119); see also observation of Ross J (Transcript, 1 October 2015, PN 10738 – PN 10740));
- (h) Eighthly, it seems to be common ground that the scale effect is concerned with the impact on output as a result of the change in wage rates (see Borland Report (Exhibit UV25), par 27);
- (i) Ninthly, it seems to be common ground that the scale effect is likely to be higher in an industry with greater competition, even if there is not perfect competition in that industry (see Borland Cross Examination (PN 11808));
- (j) Tenthly, it seems to be common ground amongst the experts that the substitution effect involves two aspects – the substitution of capital for labour and the substitution of labour for labour (see Borland Report (Exhibit UV25), par 28; see also Lewis Cross Examination (PN11093; PN11096); Borland Examination in Chief (PN11600));
- (k) Eleventh, there is a significant dispute amongst the experts on the effect of the simulated modelling performed by Professor Lewis (see Quiggin Report (Exhibit UV24), pars 15, 16 and Appendix B; Borland Report (Exhibit UV25), pars 7(b), 22, 24, 25; Lewis First Supplementary Report (Exhibit ABI4), p7), including as to the scale effect and the substitution effect (see Quiggin Examination in Chief (PN11269)), particularly given some assumptions made by Professor Lewis (see Borland Report (Exhibit UV25), par 22, 23, 24, 26; Borland Examination in Chief (PN11614)), which may over-estimate the overall effect of penalty rates on employment (see Borland Examination in Chief (PN11615));
- (l) Twelfth, the Union experts suggest that Professor Lewis has over-estimated the elasticity of employment in his modelling (see Borland Examination in Chief

(PN11645)), particularly as Professor Lewis focuses upon a single day rather than multiple day analysis (which entails, according to the Union experts, that there is no allowance for demand shifting and demand shifting would lower the effects on employment) (see Quiggin Examination in Chief (PN11276); Borland Report (Exhibit UV25), par 7(b)(ii); Borland Examination in Chief (PN11622 – PN11627; PN11642); Borland Cross Examination (PN11739); see also Lewis Cross Examination (PN11147 – PN11149)), as Professor Lewis assumes the imposition rather than reduction of penalty rates (see Borland Report (Exhibit UV25), par 7(b)(iii); Borland Examination in Chief (PN11645)) and as Professor Lewis does not consider the offsetting effect of a reduction in Sunday surcharges (see Quiggin Report (Exhibit UV24), par 25).

- (m) Thirteenth, it seems to be common ground amongst the Union experts that, whilst in their view Professor Lewis has over-estimated the elasticity of employment (and thus over-estimated the impact of penalty rates on employment), it is likely that there is some effect on employment from a reduction in penalty rates (albeit that none of the Union experts sought to quantify).
- (n) Fourteenth, it seems to be common ground that, given the purpose of penalty rates is in part to act as a disincentive for employment, a reduction in penalty rates for Sundays is likely to increase the employment of hired labour (see Quiggin Report (Exhibit UV24), par 24; Quiggin Cross Examination (PN11411); Lewis First Supplementary Report (Exhibit ABI4), p12), although there is some dispute over whether such increases will be offset by decreases in employment of hired labour at other times during the week.
- (o) Fifteenth, it is a large question as to the extent that demand shifting can occur across multiple days in the restaurant (and, by analogy, the fast food) industries, particularly if the penalty rates are absorbed by the restaurant (and, by analogy, fast food) operator (see Quiggin Cross Examination (PN11431 – PN11432); observation of Ross J (see Transcript, 1 October 2015, PN11509); compare Quiggin Cross Examination (PN11312 – PN11323)) and, in any event, the Union experts are not able to estimate the effect of demand shifting (see Borland Cross Examination (PN11740)).
- (p) Sixteenth, it seems to be common ground that the fast food industry has high competition amongst the businesses which participate in it (see Pezzullo Report (Exhibit PGA 34), p8; Krishnamurphy Affidavit (Exhibit AIG 20), pars 12, 13, 14, 28; Fast Food Environmental Scan 2014 (Exhibit AIG 16), p2, last paragraph; note Borland Cross Examination (PN11761));
- (q) Seventeenth, it seems to be common ground that there is no Sunday surcharge in the fast food industry and so the offsetting effect is irrelevant to that industry.

265. As an aside, it is relevant to note that it has been estimated that an increase in wages in the accommodation and food services sector (of which the fast food industry is part) in Queensland (by one standard deviation to the wage price index) would result in a decrease in employment (by 1.3 per cent) after 18 months (see Synergies Economic Consulting Report (Exhibit SDA 52), p4, fourth paragraph; p11, second last bullet point; Deloitte Access Economics Scoping Study (Exhibit SDA 54), p17, third paragraph).

Schedule E

Analysis of Workplace and Economic Research Reports

SE1. AFS Industry Profile Report

266. The Commission has referred to the report entitled "*Industry Profile – Accommodation and Food Services*" prepared by the Workplace and Economic Research section of the Commission and dated December 2015 (see Transcript, 15 December 2015, PN23178; see also [2015] FWCFB 6588 at [2]) (the "**AFS Industry Profile Report**"). However:
- (a) It seems that the AFS Industry Profile Report was not intended to apply to the fast food industry, particularly given that the Fast Food Award is not identified as one of the relevant awards to which the AFS Industry Profile Report relates (see AFS Industry Profile Report, p1, first paragraph) and with some of the data relating to the Fast Food Award possibly being excluded from the profile (see AFS Industry Profile Report, p19; p20, note).
 - (b) To the extent that the AFS Industry Profile Report is based on ABS data (see AFS Industry Profile Report, p2; see also section 3), it is focussed generally at the one-digit divisional level (Division H (the "Accommodation and Food Services" division) in the ANZSIC system) (see, for example, AFS Industry Profile Report, section 3; section 4.1.2; section 4.1.3; section 4.1.4; section 4.3.1; section 4.3.2; section 4.3.3; section 4.3.4; section 5.3; section 5.4; section 5.5; section 5.7; section 6.1; section 6.2; section 7.2), as opposed to the four digit class level (Class 4512 ("Takeaway Food Services" class) in the ANZSIC system), with the consequence that the data merges information relating to accommodation, cafes, restaurants, pubs, taverns, bars and clubs with information relating to the fast food industry (see AFS Industry Profile Report, p1).
 - (c) To the extent that the AFS Industry Profile Report addresses the two-digit subdivision level (Subdivision 45 ("Food and Beverages Services" subdivision) of the ANZSIC system) (see, for example, AFS Industry Profile Report, section 4.1.1; section 4.2.1; section 4.2.2; section 4.3.5; section 4.3.6; section 6.1), it merges information relating to cafes, restaurants, pubs, taverns and clubs with information relating to the fast food industry.
 - (d) To the extent that the AFS Industry Profile Report addresses the three-digit group level (Group 451 ("Café, Restaurants and Take Away Food Services" group) in the ANZSIC system) (see AFS Industry Profile Report, section 5.1; section 5.2; section 5.8), it merges information relating to cafes and restaurants with information relating to the fast food industry.
 - (e) To the extent that the AFS Industry Profile Report is based on Australian Workplace Relations Study ("**AWRS**") data (see AFS Industry Profile Report, p2; p6;

p10; p11; p12; section 7.1; p50; p51), it is focussed at the one-digit divisional level and therefore merges information relating to accommodation, cafes, restaurants, pubs, taverns, bars and clubs with information relating to the fast food industry (see AFS Industry Profile Report, p1) and, in any event, the AWRS data under-represents younger employees, employees working part time, casual employees and employees currently studying (all types of employees well represented in the fast food industry (see Oliver Report (Exhibit UV 28), par 26).

- (f) To the extent that the AFS Industry Profile Report is based on the Award Reliance Survey of the Commission (see AFS Industry Profile Report, p2; p39), it is focussed at the one-digit divisional level and therefore merges information relating to accommodation, cafes, restaurants, pubs, taverns, bars and clubs with information relating to the fast food industry.
- (g) To the extent that the AFS Industry Profile Report is based on the Workplace Agreement Database of the Commonwealth Department of Employment (see AFS Industry Profile Report, p2; section 6.3), it is focussed at the one-digit divisional level and therefore merges information relating to accommodation, cafes, restaurants, pubs, taverns, bars and clubs with information relating to the fast food industry.

SE2. Retail Industry Profile Report

267. The Commission has referred to the report entitled "*Industry Profile – Retail Trade*" prepared by the Workplace and Economic Research section of the Commission and dated December 2015 (see Transcript, 15 December 2015, PN23178; see also [2015] FWCFB 6588 at [2]) (the "**Retail Industry Profile Report**"). However:

- (a) It seems that the Retail Industry Profile Report was not intended to apply to the fast food industry, particularly given that the data for Takeaway Food Services was excluded from the profile (see Retail Industry Profile Report, section 2).
- (b) To the extent that the Retail Industry Profile Report addresses ABS data, it is focussed on the one-digit divisional level (Division G ("Retail Trade")) (see, for example, Retail Industry Profile Report, section 3; section 4.1.2; section 4.1.3; section 4.1.4) which is separate to the fast food industry.

SE3. Changing Work Patterns Report

268. The Commission has referred to the report entitled "*Changing Work Patterns*" prepared by the Workplace and Economic Research section of the Commission and dated December 2015 (see Transcript, 15 December 2015, PN23178; see also [2015] FWCFB 6588 at [2]) (the "**Changing Work Patterns Report**"). However:

- (a) To the extent that the Changing Work Patterns Report emphasises the level of part-time employment in Australian society generally (see Changing Work Patterns

Report, p1, third paragraph; see also Chart 2.2), the Changing Work Patterns Report does not reflect the fast food industry (and understates the level of part-time employment in the fast food industry) where approximately 85 per cent of employees working in stores for McDonald's and Hungry Jack's worked on a part-time or casual basis (see paragraph [67] of this outline).

- (b) To the extent that the Changing Work Patterns Report suggests that most employed persons work Monday to Friday (see Changing Work Patterns Report, p1, fourth paragraph; p9, Table 3.1; p10, Table 3.2; p24, third paragraph), the suggestion does not reflect the fast food industry where 63 per cent of employees working for McDonald's and Hungry Jack's preferred to work both weekdays and weekends (see paragraph [77] of this outline) and younger employees (representing the clear majority of employees) working for McDonald's and Hungry Jack's preferred not to work on week days only (see paragraph [77] of this outline) (noting too that, based on data from the (limited) HILDA survey, only 13 per cent of employed persons in accommodation and food services worked Monday to Friday in 2014 (see Changing Work Patterns Report, p18, Table 3.14)).
- (c) To the extent that the Changing Work Patterns Report suggests that almost one in three employees work on weekends (see Changing Work Patterns Report, p1, fourth paragraph; p8, fourth and fifth paragraphs; p24, fourth paragraph), the suggestion does not reflect the fast food industry where 63 per cent of employees working for McDonald's and Hungry Jack's preferred to work both weekdays and weekends (see paragraph [77] of this outline) (noting too that, based on data from the (limited) HILDA survey, around 75 per cent of employed persons in accommodation and food services usually worked on weekends in 2014 (see Changing Work Patterns Report, p20, Table 3.17; see also p19, Table 3.15, Table 3.16; see further paragraph [56] of this outline)).
- (d) To the extent that the Changing Work Patterns Report suggests that employed persons who work weekends have variations in their working days and work a rotating shift or irregular schedule (see Changing Work Patterns Report, p1, fifth paragraph; p11, last paragraph; p12, Table 3.4; p13, last paragraph; p14, Table 3.5), the suggestion does not reflect the fast food industry where approximately 80 per cent of employees working for McDonald's and Hungry Jack's worked the same or similar hours each week (see paragraph [71] of this outline).
- (e) To the extent that the Changing Work Patterns Report suggests that almost one quarter of employed persons who usually work weekends were enrolled in study in 2014 (see Changing Work Patterns Report, p15, Table 3.10), this suggestion does not reflect the fast food industry where approximately 77 per cent of employees working for McDonald's and Hungry Jack's were students and worked on Saturdays and approximately 72 per cent of employees working for McDonald's and Hungry Jack's were students and worked on Sundays (see paragraph [75] of this outline).

- (f) To the extent that the Changing Work Patterns Report notes the increase in level of casual employees in Australian society generally (see Changing Work Patterns Report, p6, second bullet point; see also p7, Chart 2.6), it is important to bear in mind the greater level of casual employees for young people and in the fast food industry (see paragraph [49], [50] and [67] of this outline) (noting too that, based on data from the (limited) HILDA survey, at least 66 per cent of employed persons in accommodation and food services who usually worked on a weekend were engaged casually (see Changing Work Patterns Report, p21, Table 3.19)).
- (g) To the extent that the Changing Work Patterns Report focuses upon the accommodation and food services industries (see Changing Work Patterns Report, p1, fifth paragraph), it is important to bear in mind that such industries include a variety of industries in addition to the fast food industry, with some differences in employee characteristics existing between those other industries and the fast food industry.

269. At the same time, it is significant to note specific aspects of the Changing Work Patterns Report:

- (a) The average number of hours worked per month has, across Australian society generally, reduced from 147 hours to 139 hours (see Changing Work Patterns Report, p3, Chart 2.2), thereby consistent with a greater amount of social and non-work time each month.
- (b) The number of students who usually work weekends has, across Australian society generally, increased from 2006 to 2014 (see Changing Work Patterns Report, p15, Table 3.10).
- (c) 75 per cent of employed persons in the accommodation and food services industries usually worked weekends (see Changing Work Patterns Report, p17, second paragraph; p20, Table 3.17).
- (d) 37 per cent of employed persons in the accommodation and food services industries indicated a preference in 2014 to work more hours (see Changing Work Patterns Report, p21, Table 3.21).
- (e) Almost half of HILDA survey respondents did not attend a religious service (see Changing Work Patterns Report, p23, Table 4.23).

SE4. Research Reference List – Additional Articles and Books

270. The Commission has referred to its intent to consider a variety of academic articles, reports and books (see Research Reference List, Part II – Additional Articles). At this stage, Ai Group is not aware of the propositions which the Commission intends to draw from any of the articles, reports and books and so it not possible to understand the potential use of the articles, reports and books. However:

(a) The article by Ahlburg and Schumann entitled “Increased Penalty Rates for Overtime and Job Creation in Australia” and published in (1986) 28 *Journal of Industrial Relations* 102 seems to have no relevance as it relates to:

- (i) overtime rather than penalty rates (see (1986) 28 *Journal of Industrial Relations* 102 at 102);
- (ii) increases, as opposed to reductions, in loadings (see (1986) 28 *Journal of Industrial Relations* 102 at 102); and
- (iii) the economic position in the 1980s, not current times (see (1986) 28 *Journal of Industrial Relations* 102 at 102, 106, 107),

and it appears to recognise that the impact of loadings on employment are dependent upon assumptions and data which may differ from country to country and from time to time (see (1986) 28 *Journal of Industrial Relations* 102 at 106).

(b) The article by Allan, Brosnan and Walsh entitled “Non-Standard Working Time Arrangements in Australia and New Zealand” and published in (1998) 19 *International Journal of Manpower* 234 seems to have little relevance as it relates to a survey conducted in 1995 and partly in New Zealand (see (1998) 19 *International Journal of Manpower* 234 at 235, 241), although some of the trends identified in the article are still applicable in current times:

- (i) the growth of services that are offered on a 24 hour basis (see (1998) 19 *International Journal of Manpower* 234 at 237), with work time in service industries being driven primarily by market demand (see (1998) 19 *International Journal of Manpower* 234 at 247);
- (ii) the significant growth in the participation of women in the labour force (see (1998) 19 *International Journal of Manpower* 234 at 237);
- (iii) the rapid expansion of students undertaking secondary and tertiary education who are seeking work outside school and university hours such as evening, weekends and holidays (see (1998) 19 *International Journal of Manpower* 234 at 237).

(c) The article by Brown, Bradley, Lingard, Townsend and Ling entitled “Labouring for Leisure? Achieving Work-Life Balance through Compressed Working Weeks” and published in (2011) 14 *Annals of Leisure Research* 43 is not relevant as the article:

- (i) focuses upon the construction industry, an industry with significantly different employee characteristics and working hours to the fast food industry (as noted in (2011) 14 *Annals of Leisure Research* 43 at 49);

- (ii) focuses on the results of qualitative research (interviews and focus groups) of less than 100 persons (see (2011) 14 *Annals of Leisure Research* 43 at 49, table 1);
 - (iii) focuses on the effect of work life balance following the introduction of a compressed working week (see (2011) 14 *Annals of Leisure Research* 43 at 49, 57) in circumstances where there is no evidence of the use of compressed working weeks in the fast food industry (see also Limbrey Second Affidavit (Exhibit AIG 4), par 12) (and, it should be inferred, no need for such weeks, given the employee characteristics of the fast food industry); and
 - (iv) includes a literature review that focuses upon dual-earner couples (see (2011) 14 *Annals of Leisure Research* 43 at 44, 45), including dual earner couples with children (see (2011) *Annals of Leisure Research* 43 at 46, 48), in circumstances where dual earner couples are not a feature of the typical employee in the fast food industry.
- (d) The article by Hamermesh and Stancanelli entitled “Long Workweeks and Strange Hours” and published in (2015) 68 *ILR Review* 1007 is not relevant as it:
- (h) focuses on working hours in the United States (see (2015) 68 *ILR Review* 1007 at 1007);
 - (ii) compares those working hours to those worked in France, Germany, the Netherlands and the United Kingdom (see (2015) 68 *ILR Review* 1007 at 1008, 1016); and
 - (iii) examines the anticipated effect on working hours in the United States if restrictions on working hours in Europe were implemented (see (2015) 68 *ILR Review* 1007 at 1008, 1013).
- (e) The report of the International Labour Organization entitled “Working Time in the Twenty-First Century” for its Tripartite Meeting of Experts on Working Time Arrangements (the “**WT21C Report**”) seems to be irrelevant as it:
- (i) summarises a range of international conventions and recommendations addressing working time arrangements (see WT21C Report, pp3-11), some of which have not been adopted by Australia and none of which relate directly to penalty rates;
 - (ii) sets out, at a regional or national level (rather than an industry within a country level), a series of data relating to working hours and seeks to identify trends and developments (see WT21C Report, pp12-36) (with one exception – see WT21C Report, p24); and

- (iii) sets out at a regional or national level (rather than an industry within a country level), a series of data relating to work scheduling (see WT21C Report, pp37-59);
 - (iv) sets out a series of propositions concerning work sharing (a concept separate to job sharing) and seemingly having no relevance to penalty rates (see WT21C Report, pp60 -63);
 - (v) Identifies a series of policy issues for consideration (none of which relate to penalty rates) (see WT21C Report, pp64-67);
 - (vi) does not appear to address the issue of payment for working hours or work scheduling (apart from one small section (see WT21C Report, p44, par 101)); and
 - (vii) to the extent that it addresses data relating to Australia, is based on data from 2008 or 2010 rather than current times (see, for example, WT21C Report, p24; p43, pars 96, 97; p44, par 100; p45, par 101; p46, par 106; p71, fourth entry)
- (f) The chapter by Jenkins and Osberg entitled “Nobody to Play With? The Implications of Coordination” in the book *The Economics of Time Use* (2004) seems to be irrelevant as it:
- (i) seeks to develop an economic (or statistical) model of time use (see generally but, for example, abstract on p113), directed particularly at the synchronisation of working hours and leisure hours;
 - (ii) tests the model by reference to data on time use from Britain (see generally but, for example, abstract on p113 and section 5.3);
 - (iii) tests the model by reference to data relating to couples (see generally but, for example, abstract on p113, p125 and section 5.3);
 - (iv) tests the model by reference to persons aged 18-59 years (see p125);
 - (v) tests the model by reference to data from the 1990 to 1999, not current times (see generally but, for example, abstract on p113 and p125); and
 - (vi) appears to be premised on working time increasing, and social leisure time decreasing, when social leisure times become harder to arrange (due to others working more hours) (see pp122-124), a premise that does not seem logical and a premise that does not hold true (and has not been shown to be true) for the fast food industry.

(g) The article by King entitled “Penalty Rates and Enterprise Bargaining” and published in (1993) 26 *Australian Economic Review* 58 is irrelevant as it:

- (i) focuses on the likely effect of the introduction of enterprise bargaining on penalty rates (see (1993) 26 *Australian Economic Review* 58 at 58) (and not the appropriateness of a specified level of penalty rates as a safety net);
- (ii) seeks to develop an economic (or statistical) model on the likely effect of enterprise bargaining (see (1993) 26 *Australian Economic Review* 58 at 59); and
- (iii) seems to assume, in the development of the model, that a reduction in penalty rates might only occur if there was an increase in standard wage as compensation (see (1993) 26 *Australian Economic Review* 58 at 60-61, 62),

although the article includes a brief two sentence summary concerning the introduction of penalty rates in Australia (see (1993) *Australian Economic Review* 58 at 58).

(h) The article by Kirby entitled “Employment in Retailing – Unsociable Hours and Sunday Trading” and published in (1992) 20 *International Journal of Retail & Distribution Management* 19 seems to be irrelevant as it:

- (i) focuses on the views of employees in Britain (see (1992) 20 *International Journal of Retail & Distribution Management* 19 at 20);
- (ii) relates to views of such employees in August 1991 (see (1992) 20 *International Journal of Retail & Distribution Management* 19 at 21);
- (iii) relates to the views of 483 employees only (see (1992) 20 *International Journal of Retail & Distribution Management* 19 at 21);
- (iv) relates to the views of persons who were mainly above 30 years of age (see (1992) 20 *International Journal of Retail & Distribution Management* 19 at 22); and
- (v) relates to the views of persons who had children (see (1992) 20 *International Journal of Retail & Distribution Management* 19 at 22).

- (i) The book by Lee, McCann and Messenger entitled “Working Time Around the World” and published in 2007 seems not to be relevant as the book:
- (i) traces the history of regulation of working hours over time, including the introduction of regulations relating to the 48 hour week and the 40 hour week (see Chapter 2, see also p24, pp139-140);
 - (ii) focuses on global trends in actual working hours by workers at a national level (as opposed to industry (or sub industry) trends within countries) (see Chapter 3);
 - (iii) focuses in part on the manufacturing sector (see p62);
 - (iv) focuses heavily on trends in developing and transitional countries (of which Australia is neither) (see, for example, pp113-118; Chapter 6);
 - (v) seems to only include data up to 2005 (see pp16, 19, 70, 72); and
 - (vi) appears to contain limited data relating to Australia (see pp13, 14, 15, 16, 19, 24, 25, 26, 27, 28, 46, 56, 59, 60, 70, 72, 74, 75, 76, 90, 91, 170, 171),
- although the book notes:
- (vii) the significant proportion of workers who are underemployed by working less than desired hours (see Foreword, pp58-60);
 - (vii) the decline in annual working hours in Australia from 2,900 hours in 1870 to 1,800 hours in 1992 (see pp24-25) (see also Productivity Commission, *Workplace Relations Framework*, Final Report, (December 2015), p387 (1,600 hours in 1998));
 - (viii) the substantial increase of women’s participation in paid work in the 1990s and 2000s (see p65);
 - (ix) the high proportion of part-time work by young workers (see p81); and
 - (x) the hours of work, and organisation of work time, in service industries being very different to working time patterns in traditional industries such as manufacturing, mining and construction (see p86).

- (j) The article by Trent and Mayer entitled “Working the Night Shift: The Impact of Compensating Wages and Local Economic Conditions on Shift Choice” and published in (2014) *Economics Research International* 1 is not relevant as the article:
- (i) relates to data from the USA (see (2014) *Economics Research International* 1 at 1, 5);
 - (ii) relates to data from 2001 (see (2014) *Economics Research International* 1 at 1, 5);
 - (iii) focuses on night shifts (see (2014) *Economics Research International* 1 at 1) (which appears to refer to working throughout the night, as opposed to merely 10pm);
 - (iv) seeks to develop an economic (or statistical) model on compensating wage differentials associated with night shift work (see (2014) *Economics Research International* 1 at 1); and
 - (v) considers local economic conditions (including labour market strength and the local unemployment rate) as an element of the model (see (2014) *Economics Research International* 1 at 1-2).
- (k) The article by Young and Lim entitled “Time as a Network Good: Evidence form Unemployment and the Standard Workweek” and published in (2014) 1 *Sociological Science* 10 appears not to be relevant to the variations sought by the Ai Group as the article:
- (i) relates to data from surveys conducted in the USA (see (2014) 1 *Sociological Science* 10 at 10, 11, 15);
 - (ii) explores the perceptions of emotional wellbeing associated with socialising on weekends (see (2014) 1 *Sociological Science* 10 at 17); and
 - (iii) does not reveal the characteristics of persons surveyed, including whether the persons surveyed worked on weekends or (if they did so) the amount of hours they worked on the weekend.
- (l) The chapter by Pocock and Charlesworth entitled “Job Quality and Work-Life: Unsocial Work Hours, Casual Work and Work-Life Outcomes in Australia” in Know, Warhurst (eds) *Job Quality in Australia* (2015) seems not to be relevant as the article:
- (i) examines the impact of job security (especially precariousness of employment for casuals) on job quality and work-life outcomes, including incomes, risk of injury and psychological risk (see p103; p114; p123) in

circumstances where there is no evidence of such effects in the fast food industry;

- (ii) focuses on the retail industry, as opposed to the fast food industry (see p103; pp105-106; p111; p123);
- (iii) emphasises the impact on women with caring responsibilities (see p104);
- (iv) explores the wishes of casual employees to obtain permanent employment (see pp118-122; p124);
- (v) draws heavily on data from the AWALI survey (see p107), despite the non-involvement of persons under the age of 18 years in that survey (see paragraph **[258.4]** of this outline); and
- (vi) may not be truly independent, given the role that the SDA seemingly had in assisting the preparation of the chapter (see p103, fn1; see also pp114-115).

Ai Group has not been able to obtain (to review) the remaining article in the Research List.