

**Outline of Submissions in Reply by the SDA to the Submissions of the Australian
Industry Group relating to Directions issued on 3 August 2016**

1. The Commission has directed the Ai Group to provide a breakdown of the results of the survey evidence attached as “PAD2” to the affidavit of Patricia Ann Deasy with such breakdown to be based on the classification level of employees.
2. The Ai Group has stated that it is not possible to provide the requested breakdown of the survey results because no question in the survey required respondents to specify or record their classification.¹
3. In response to an invitation from the Commission, the Ai Group has suggested alternative measures which may provide a proxy for classification level. It has also provided a breakdown of the survey results based on these alternative measures (as set out in the affidavit of Ms Deasy dated 19 August 2016 referred to in the Ai Group submissions as the “Additional Breakdown”).
4. The Ai Group has identified “employment status” (or type of employment) and age as alternative measures which may provide a proxy for classification level.

Appropriateness of nominated proxies for classification level

5. The Ai Group has not articulated a cogent basis for why age and employment status may provide a proxy for classification levels. The SDA submits that, in the context of the survey, neither age nor employment status are a reasonable or reliable proxy for the classification level of employees.

¹ Outline of Submissions of the Australian Industry Group relating to directions issued 3 August 2016 (the Ai Group submissions), para 2.



6. As developed below, the fundamental difficulty is that, to the extent that the characteristics of the population the subject of the survey are known, the population is overwhelmingly comprised of employees in a single classification level.
7. The survey was conducted of employees of both McDonalds and Hungry Jacks.² The survey results (set out in annexure PAD3 to the October 2015 Affidavit) relate to the combined results of the survey of McDonalds employees (20,635 “valid records”) and Hungry Jacks employees (944 “valid records”).³ It is the Ai Group’s case that the employee survey of Hungry Jacks is representative of Hungry Jacks employees and that the employee survey of McDonalds is representative of McDonalds’ employees.⁴
8. The evidence relied on by the Ai Group establishes that the *McDonalds Australia Enterprise Agreement 2013* has applied since 31 July 2013 to all employees of McDonalds and its franchisees who work in its Australian restaurants within the classifications identified in that agreement.⁵ That agreement contains three classification levels – McDonalds Employee Level 2 (“crew member” employees); McDonalds Employee Level 3 (shift supervisor employees); and McDonalds Employee Level 4 (shift or trainee manager or manager).⁶
9. As noted by the Ai Group,⁷ 92% of McDonalds employees in stores fall within the Level 2 classification, “crew member”.
10. As to Hungry Jacks, the only relevant evidence is that, on or about 23 June 2015, it employed 13,292 employees in its restaurants within a seven level classification structure comprised of: “New Employee”; “Crew”; “Special Kitchen Hand”; “Certificate 2 Retail”; “Certificate 3 Retail”; “Certificate 2/3 Retail (Qld/NSW only); and “Team Leader”.⁸ It may be noted that this classification structure is materially different to the McDonalds classification structure.

² Amended First Affidavit of Patricia Ann Deasy dated 23 October 2015 (the **October 2015 Affidavit**), para 10.

³ Annexure PAD3 to the October 2015 Affidavit, para 5.

⁴ Affidavit of Dr Andrew Pratley, 4 September 2015, exhibit AP 3, paras 166-167.

⁵ Affidavit of Krista Limbrey, para 24.

⁶ See Schedule A of the *McDonalds Australia Enterprise Agreement 2013*.

⁷ Ai Group submissions, para 4.

⁸ Affidavit of Gina Feast dated 10 August 2015, paras 2 and 9.



11. There is no evidence of the numbers or proportions of Hungry Jacks employees in each of these classification levels.
12. The end result is that the Commission has before it a survey of employees of two employers in relation to which 96% of respondents come from one employer (McDonalds).⁹ Those McDonalds survey respondents in turn are drawn from a population of which 92% of employees are employed in a single classification, "Level 2, Crew Members". It follows then from the claimed representativeness of the survey that the overwhelming majority of survey respondents will be within the same classification level.
13. The near homogenous nature of the survey respondents in terms of classification level has the consequence that, absent identification in the survey itself of a respondent's particular classification level or the existence of a clear and cogent linkage between an employee's classification level and some other identifiable attribute, there is no reliable basis upon which the Commission can safely rely on alternative or indirect measures of classification levels.
14. The Ai Group has not established or articulated how, in the case of McDonalds and Hungry Jacks employees the subject of the survey, age or employee status are a reliable proxy or substitute for work classification. The evidence does not provide a basis for the Commission to so find.
15. There is no evidence before the Commission which establishes a link between the age and the classification level of McDonalds or Hungry Jacks employees. Nor is there any evidence which establishes a link between employment status and the classification level of McDonalds and Hungry Jacks employees. None of the industrial instruments which apply to McDonalds and Hungry Jacks contain any restriction by age or employment status to workers employed at any given classification level.

⁹ As noted above, the total number of "valid records" in the survey was 21,579. The "valid records" from McDonalds employees was 20,635, being 96%.



16. As to Hungry Jacks, the only relevant evidence (outside of the survey itself) concerns the classification levels which apply at stores; the total number of crew members across these classifications; and the age of crew members.¹⁰ There is no evidence of the employment status of Hungry Jacks employees. And in respect of age of employees, there is no evidence which shows the dispersal of employees according to age across the seven level classification structure. These gaps are not remedied by the fact that, in the survey, respondents were asked their age and their type of employment: no correlation or linkage has otherwise been established between those attributes and employee classification level.
17. Although the evidence in respect of McDonalds' employees is more detailed, the same fundamental deficiencies arise. In terms of demonstrating a linkage between classification level and age or employment status, the highest that evidence rises is to establish that all Level 4 employees and most Level 3 employees are over 18 years of age. Logically however, it does not therefore follow that *all* employees aged over 18 years are Level 3 or 4 employees. The evidence before the Commission does not establish the dispersal of employees according to age or employment status across the McDonalds three level classification structure such that any one of those classification levels can be linked to age or employment status for the purpose of establishing a reasonable or reliable proxy. Again these gaps are not remedied by the fact that, in the survey, respondents were asked their age and their type of employment: no correlation or linkage has otherwise been established between those attributes and employee classification level.

Response to AI Group's submissions on the Additional Breakdown

18. The SDA notes that the Additional Breakdown results confirm that for employees there are express differences in their reasons for working on Sundays when compared to working on Saturdays (Tables 123, 125, 129, 131, Annexure PAD-1 to Affidavit of Ms Deasy dated 19 August 2016). The Ai Group's focus on the reason attracting the highest response from any given category of employee is simplistic and overlooks the other varied reasons provided by significant numbers of respondents. For example, in Table 121 referred to in paragraph 9(g) of the Ai Group's submissions, whilst the most common reason held by 16 year olds for preferring to work on Saturday rather than Sunday was

¹⁰ Affidavit of Gina Feast dated 10 August 2015, paras 2, 9 and 23-26.



due to study commitments (50%), spending time with family for the same age group came in at 47.2%.

19. The Ai Group submits that, across all age groups and employment types, the most common response given by employees as to why they made themselves available to work weekday evening including past 9pm, was that they wanted to maximise the times they are available to work, to get more shifts (para 9(k)). It is notable that no such question was asked of Sunday or Saturday workers. Neither was this an answer able to be selected by respondents in answering the question of why they would like to work on Saturday/Sunday. This inconsistency highlights an inherent limitation and weakness in the survey itself.

Other observations

20. The Ai Group Submissions and this Reply were provided in respect of the indication by the Full Bench that it would like to consider whether, in the context of the survey, employee preferences vary depending on their classification. In the broader context of the proceeding, that indication may raise wider questions about the nature of any relationship between penalty rates and work performed by employees at particular classification levels.
21. In that respect, even if the above submissions are rejected, there is no proper basis for the Commission to distinguish between classification levels in respect of the fixation of penalty rates in light of the evidence which demonstrates that a penalty rate reduction for lower classifications has no employment effect. The *Restaurants Award Transitional Review* provided a natural experiment to test that hypothesis. The evidence was clear; it had no employment effect: see Outline of Closing Submissions by SDA at [147]-[148]; Outline of Closing Submissions by United Voice at [198]-[205]. Further, Professor Lewis' evidence about the claimed employment effect of the *Restaurants Award Transitional Review* was completely undermined: see Outline of Closing Submissions by SDA at [149]-[156]; Outline of Closing Submissions by United Voice at [198]-[205].
22. Even if the above submissions are rejected, any conclusions drawn from AIG 11 and the Additional Breakdown referred to in Ms Deasy's affidavit dated 19 August 2016 cannot be applied more broadly beyond the two employers in relation to whom the survey was conducted. In that regard, the SDA restates its Closing Submissions (at [659]-[667]) that



the evidence adduced from Ms Deasy (and the other evidence relied on by the Ai Group) at best only supports findings in respect of McDonalds and Hungry Jacks and does not support findings in respect of the fast food industry.

26 August 2016

STEVEN MOORE QC

ANNA FORSYTH

A handwritten signature in black ink, appearing to read 'A Forsyth', located in the bottom right corner of the page.