**IN THE FAIR WORK COMMISSION**

**4 YEARLY REVIEW OF MODERN AWARDS**

**APPLICATION BY HAIR AND BEAUTY AUSTRALIA – *HAIR AND BEAUTY INDUSTRY AWARD 2010***

**AM2017/40**

# SUBMISSION OF HAIR AND BEAUTY AUSTRALIA


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**Ai GROUP WORKPLACE LAWYERS**

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# 4 YEARLY REVIEW OF MODERN AWARDS - APPLICATION BY HAIR AND BEAUTY AUSTRALIA – *HAIR AND BEAUTY INDUSTRY AWARD 2010* - AM2017/40

# SUBMISSION OF HAIR AND BEAUTY AUSTRALIA

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# A. BACKGROUND

1. Ai Group Workplace Lawyers files this submission on behalf of Hair and Beauty Australia (**HABA**).

2. HABA is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. It represents the interests of employers in the hair and beauty industries.

3. This submission is filed in accordance with the directions issued by Vice President Catanzariti on 4 October 2017, and the subsequent extension of time granted on 2 March 2018.

4. HABA seeks that the Fair Work Commission (**Commission)** vary the *Hair and Beauty Industry Award 2010* (**HBI Award** or **Award**) in the terms set out in section C of this submission.

5. HABA is pursuing its claim in the context of the Commission's 4 Yearly Review of Modern Awards (**Review**), which is being conducted pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

6. The proposed variation meets all of the relevant requirements of the FW Act, including that the terms proposed are necessary to meet the modern awards objective in s.134 of the Act.

## B. PERMISSION TO REPRESENT

7. Ai Group Workplace Lawyers seeks permission to represent HABA in these proceedings.

8. Granting leave would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. Accordingly, s.596(2) of the FW Act enables the Commission to grant permission to Ai Group Workplace Lawyers to represent HABA in these proceedings.

9. Numerous other legal representatives have been granted permission to represent employer and union parties in penalty rate cases during the Review, given the complexity of these matters.

10. In *4 yearly review of modern awards – Penalty Rates*[1] (***2017 Penalty Rates Decision***), at paragraph [2062], the Full Bench called for expressions of interest from employer representatives prepared to take on the proponent role in a review of penalty rates within the Award. HABA, as represented by Ai Group Workplace Lawyers, was the only party to file an expression of interest.

[1] [2017] FWCFB 1001, 23 February 2017.

## C. THE CHANGES SOUGHT

11. HABA has filed a draft determination that reflects the following variations to the HBI Award:

- By varying clause 31.2(d) as follows:

> **(d) Sunday work**
>
> ~~A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday.~~ A full-time, part-time and casual employee will be paid **150%** of the minimum hourly rate for all hours worked on a Sunday

- By varying clause 35.3 as follows:

> **35.3** Work on a public holiday must be compensated by payment ~~at the rate of double time and a half~~ of **225%** of the minimum hourly rate for full-time, part-time and casual employees.

12. The effect of the proposed changes would be to:

a) Reduce the penalty rate payable for all work performed on a Sunday to full-time, part-time and casual employees from 200% of the minimum hourly rate to 150% of the minimum hourly rate.

b) Reduce the penalty rate payable for all work performed on a public holiday to full-time, part-time and casual employees from 250% of the minimum hourly rate to 225% of the minimum hourly rate.

## D. THE STATUTORY FRAMEWORK AND THE COMMISSION'S APPROACH TO THE REVIEW

13. HABA is pursuing its proposed variation in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the FW Act.

14. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

15. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

16. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.

17. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[2] provides the framework within which the Review is to proceed.

18. In *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd,*[3] Allsop CJ, North and O'Callaghan JJ described the Commission's task during a 4 Yearly Review in the following manner: (emphasis added)

> **28** The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[3] [2017] FCAFC 123.

conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

**29** Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

19. HABA's proposed variation to the HBI Award aligns with all of the relevant statutory requirements and the principles in the *Preliminary Jurisdictional Issues Decision.* Accordingly, the proposed variation should be made.

## E. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

20. The issue of penalty rates payable under the HBI Award has been before the Commission and its predecessors on three occasions outlined below. Our research has not revealed any other detailed consideration of the appropriate quantum for Sunday and public holiday rates in the hair and beauty industry.

21. It was observed by the Commission in the *Preliminary Jurisdictional Issues Decision* that the Commission should take into account previous decisions that are relevant to a contested issue and that previous Full Bench decisions "should generally be followed, in the absence of cogent reasons for not doing so": (emphasis added)

> **[25]** Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq*."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):*
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

22. The *2017 Penalty Rates Decision* provides examples of cogent reasons for *not* following previous Full Bench decisions: (emphasis added)

> **[255]** As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision,* while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the FW Act;
> - the extent to which the relevant issue was contested, and, in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; or
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.[5]

23. As the summary of the relevant decisions below will demonstrate, the decisions below should not be followed because of the following cogent reasons:

    a) They were made in a legislative context that was materially different to the one that here applies;

    b) The limited nature of the evidence and submissions put in the previous proceedings renders those decisions of little weight; and

    c) The specific bases upon which the Full Bench refused to reduce the penalty rates also renders those decisions of little weight.

## E.1 THE 2008 DECISION

24. The Award was made during the Part 10A Award Modernisation process. No detailed consideration was given to the appropriate Sunday and public holiday penalty rates under that Award at that time. Indeed:

    a) On 1 August 2008, the SDA filed a draft award covering the 'retail industry', which was expressed to cover the hair and beauty industry as

[5] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

contemplated by the Award. It proposed a rate of 200% for work on a Sunday and 250% for work on a public holiday.

b) On 12 September 2008, the Australian Industrial Relations Commission (**AIRC**) published an exposure draft titled 'Retail Industry Award 2010', which was expressed to cover 'hair and beauty establishments' and adopted the Sunday and public holiday rates proposed by the SDA. Little was said by the AIRC in its accompanying statement about the hair and beauty industry and nothing specific was said about Sunday and public holiday penalty rates.[6]

c) Various employers and employer representatives opposed the incorporation of the hair and beauty industry within the proposed Retail Industry Award.[7] The submissions filed by those parties did not respond in detail to the specific terms and conditions proposed in the aforementioned exposure draft, including Sunday and public holiday penalty rates. The focus was on the appropriate coverage of the exposure draft and the creation of a separate award for the industry.

d) On 19 December 2008, the AIRC issued a decision in which it referred to the parties' opposition to the inclusion of the hair and beauty industry under the proposed Retail Industry Award[8] and determined that there would be a separate modern award covering the hair and beauty industry.[9] The Award was published with the decision (i.e. there was no exposure draft of the Award first published for comment). The Full Bench stated that it had "generally followed the main federal industry awards where possible and had regard to all other applicable instruments".[10]

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[6] *Award Modernisation* [2008] AIRCFB 717 at [88] – [92].

[7] Hair and Beauty SA submission dated 6 October 2008; Business SA submission dated 9 October 2008; NRA and ANRA submission dated October 2008 and ARA submission dated 10 October 2008.

[8] *Award Modernisation* [2008] AIRCFB 1000 at [281].

[9] *Award Modernisation* [2008] AIRCFB 1000 at [284].

[10] *Award Modernisation* [2008] AIRCFB 1000 at [286].

e) The Draft awards audit list on the Commission's website identifies nine award-based transitional instruments of relevance to the HBI Award, those being: three federal awards that operated in Victoria, the ACT and the NT; five NAPSAs that operated in NSW, QLD, SA, WA and Tasmania; and a Victorian Minimum Wages Order. The "main federal industry award" in the hair and beauty industry (as referred to by the Award Modernisation Full Bench[11]) would appear to have been the *Hairdressing and Beauty Services - Victoria - Award 2001*. This award contained the following penalty rates for work on Sundays and public holidays, which are similar to the current rates in the HBI Award:

- **Sundays:** 200% for full-time, part-time and casual employees; (i.e. the casual loading was not payable on Sundays).
- **Public holidays:** 250% for full-time, part-time and casual employees (i.e. the casual loading was not payable on Sundays).

25. Self-evidently, the AIRC's decision should not be followed because of the following cogent reasons:

a) It was made in a legislative context that was materially different to the one that here applies;

b) There was no evidence or submissions put before the AIRC regarding the appropriate Sunday or public holiday penalty rates; and

c) The Full Bench's decision does not reveal any detailed consideration of the appropriate Sunday or public holiday penalty rates. Rather, it appears that terms and conditions under the Award were set on the basis of that which prevailed in the main federal pre-modern industry award (consistent with the AIRC's general approach during the Award Modernisation process).

[11] *Award Modernisation* [2008] AIRCFB 1000 at [286].

## E.2 THE 2010 DECISION

26. A reduction in the Sunday penalty rates in the HBI Award was sought by Hair and Beauty Australia Ltd soon after the Award was made.

27. Relevantly:

    a) No evidence was filed in support of the application; and

    b) The application was determined pursuant to item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, which gave Fair Work Australia limited power to make an order varying a modern award if it considered that the variation was necessary to give effect to the award modernisation request as it was in effect immediately before 1 January 2010. The award modernisation request did *not* require that the tribunal ensure that modern awards contained only terms necessary to ensure that they provided a fair and relevant minimum safety net, taking into account the matters now listed at s.134(1).

28. The basis upon which the claim was advanced was summarised by the Full Bench as follows:

> **[16]** The HBA submits that prior to the modern award coming into effect, the Sunday penalty rates were either 50% or 100% in different States across Australia. It submits that the penalty payable under the modern award will lead to increased costs for employers who are required by the terms of their lease within shopping complexes to open salons on Sundays. Those that previously paid a 50% penalty for work performed on Sunday will have an additional cost impost which will not enable them to operate profitably.[12]

29. The following paragraph sets out the reasons given by the Full Bench for dismissing the application: (emphasis added)

> **[18]** The adoption of a single national penalty payment for Sundays will inevitably have an impact on cost or employee entitlements where employees are paid near the modern award level and the variation between state instruments is significant. <u>It would be inconsistent with the general approach in award modernisation to adopt a rate lower than the rate that previously applied in most states. We therefore dismiss this part of</u>

[12] Re *Hair and Beauty Industry Award 2010* [2010] FWAFB 1983 at [16].

the application. The transitional provisions have been developed to ameliorate the impact of such changes on employers.[13]

30. As can be seen, the application was dismissed on the basis that if granted, it would have been inconsistent with the general approach in award modernisation; that being the adoption of the penalty rate that applied in most states and territories. The reasons for the Full Bench's decision did not turn on any of the issues raised in the matter here before the Commission.

31. For the reasons articulated above, this decision should therefore not be followed by the Commission.

## E.3 THE 2013 DECISION

32. During the two year review of modern awards, the Hair and Beauty Industry Association sought the abolition of Saturday and Sunday public holiday rates in the Award.[14]

33. The decision noted the very different legislative context governing the two year review in the following terms: (emphasis added)

> **[5]** The principal legislative provision in respect of the Transitional Review is Item 6 of Schedule 5 to the Transitional Provisions Act:
>
> > "**6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**
> >
> > (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
> >
> > Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.
> >
> > (2) In the review, FWA must consider whether the modern awards:
> >
> > > (a) achieve the modern awards objective; and
> > >
> > > (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

[13] Re *Hair and Beauty Industry Award 2010* [2010] FWAFB 1983 at [18].

[14] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [15].

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.

(3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

…

**[7]** At the outset it is important to note that the Transitional Review contemplated in Item 6 is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act* 2009 (Cth) (the Act). The scope of the Transitional Review was a matter of contention in the June 2012 Full Bench proceeding.

…

**[12]** These considerations led the June 2012 Full Bench to conclude as follows:

"[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a "one off" process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:

> "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . ."

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for

> the making of variation determinations in the Review, as proposed by the Australian Government and others.…[15]

34. It appears from the Commission's decision that the only evidence in support of the Hair and Beauty Industry Association's claim was that which was led from one employer in the industry.[16] The Full Bench described the evidentiary case as consisting of "little or no probative evidence dealing with the proposed penalty rate reductions".[17]

35. The Full Bench ultimately dismissed the application as follows:

> **[154]** There is little evidence concerning the general trading, employment and other circumstances applying in this industry.
>
> **[155]** There is no evidence of any significant change since the making of the modern award.
>
> …
>
> **[318]** … Despite the fact that such a variation would represent a major change to this award nothing of substance was put to us to justify the change. No cogent reason has been established for altering the penalty rate provisions determined by the Award Modernisation Full Bench.
>
> **[319]** There is no basis to vary clause 31 of this award as part of the Transitional Review.[18]

36. Further to the reasons articulated above, this decision should not be followed because:

    a) The variation sought was markedly different to that which is here proposed (i.e. the complete abolition of Saturday and Sunday public holidays as compared to a *reduction* to Sunday and public holiday penalty rates);

[15] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [5] – [12].

[16] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [125].

[17] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [120].

[18] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [154] – [155] and [318] – [319].

b) The legislative context applying to the two year review rendered it narrower in scope than the current Review. Further, it is not necessary in this Review for the proponent of a claim to establish that there has been a "significant change since the making of the modern award".

c) The nature of the case here advanced by HABA (including the presentation of probative evidence) means that it cannot be the subject of the same criticism made by the Commission during the two year review.

d) The Commission determined that, "as part of the [two year review]", Saturday and Sunday penalty rates would not be abolished. The Commission did *not* make any general finding or ruling regarding a potential reduction to penalty rates under the Award.

## F. THE 2017 PENALTY RATES DECISION

37. In February 2017, a five-Member Full Bench of the Commission handed down its decision[19] regarding Sunday and public holiday penalty rates in various awards, having considered detailed written and oral submissions and considerable evidence. The claims there before the Commission were considered in the context of the current Review.

38. The following key findings made and conclusions reached by the Full Bench in the *2017 Penalty Rates Decision* are relevant to the Commission's consideration of HABA's claim.

39. **First,** deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates: (emphasis added)

> **[39]** Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, we have concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. We accept that the imposition of a penalty rate may have the *effect* of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the *objective* of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates.[20]

40. Accordingly, when determining the appropriate Sunday and public holiday penalty rates, the Commission should not be misguided by any desire to set a rate that deters employers from scheduling work on Sundays or public holidays. Rather, Sunday and public holiday penalty rates are to be set having regard to the disutility associated with working on Sundays and public holidays.

41. **Second,** the extent of the disutility associated with working on Sundays is much less than times past.[21] Therefore, the existing Sunday penalty rate in the HBI Award (which was set during the Part 10A Award Modernisation process based on the main federal pre-modern award) is not consistent with the provision of a 'relevant' safety net.

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[19] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

[20] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [39].

[21] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [689].

42. **Third,** the disutility associated with working on public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on reasonable grounds on such days. Section 114(3) of the FW Act is a significant contextual matter which was not taken into account when the existing public holiday penalty rates were set.[22] Therefore, the existing public holiday penalty rate in the HBI Award (which was set during the Part 10A Award Modernisation process based on the majority of pre-modern awards) is not consistent with the provision of a 'relevant' safety net.

43. **Fourth**, consistent with the view expressed in the Productivity Commission Report, there are likely to be some positive employment impacts from reducing Sunday penalty rates.[23] Despite the potential difficulty associated with quantifying the extent of that positive impact,[24] this is factor that lends favour to reducing Sunday penalty rates, particularly where supported by employer lay evidence[25] as is here the case. This is so even though the impact will not be the same on all employers in the industry.[26]

44. **Fifth,** the expectation of consumers to access services in the 'hospitality, entertainment, retail, restaurants and cafes' industries (which includes the hair and beauty industries as covered by the HBI Award[27]) on the weekend is a distinguishing feature, which is relevant to the setting of Sunday penalty rates: (emphasis added)

> **[76]** It is important to appreciate that the conclusions we have reached in relation to the weekend and public holiday penalty rates in the *Hospitality and Retail Awards* is largely based on the circumstances relating to these particular awards. The Hospitality and Retail sectors have a number of characteristics which distinguish them from other industries.
>
> **[77]** The distinguishing characteristics of the Hospitality and Retail sectors are alluded to in the PC Final Report, where it explains the rationale for focussing on the 'HERRC' (hospitality, entertainment, retail, restaurants and cafes) industries.

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [74].
[23] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [684].
[24] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [684].
[25] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [683].
[26] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [72].
[27] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [314].

> '… the appropriate *level* for regulated penalty rates for weekend work — particularly on Sundays in a number of discretionary consumer service industries — has become a highly contested and controversial issue. The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry-level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.' (footnotes omitted)[28]

45. **Sixth,** the aforesaid consumer expectations have developed over time and as such represent a material change in circumstances. Specifically:

    a) The share of weekly retail sales on Sunday has more than doubled over the last few decades.[29]

    b) The average daily foot traffic in shopping centres between 2009 and 2014 was greater for Sunday than the remaining days of the week.[30]

46. These findings are relevant to the hair and beauty industry because those businesses generally operate in similar conditions to those in the retail industry more broadly; particularly those that are located in shopping centres.

47. **Seventh,** weekend work is more prevalent amongst employers and employees as a result of points five and six. See para 504 – 505 and para 596 of the Decision.

48. **Eighth,** the notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.[31] Therefore, public holiday penalty rates should not be disproportionately higher than Sunday penalty

[28] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [76] – [77].

[29] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [505], [1589] and Chart 57.

[30] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [58] and Chart 58.

[31] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1950].

rates.[32] This consideration should also be taken into account once the Commission has determined the appropriate Sunday penalty rate.[33] In our submission if the Sunday penalty rate is reduced, it necessarily follows that in order to maintain proportionality between the Sunday and public holiday penalty rates, the public holiday penalty rate must also be reduced. This would be consistent with the approach adopted by the Commission in relation to the *Hospitality Industry (General) Award 2010,* the *Restaurant Industry Award 2010*, the *General Retail Industry Award 2010*, the *Fast Food Industry Award 2010* and the *Pharmacy Industry Award 2010*.[34]

49. **Ninth,** greater consistency (short of uniformity) in Sunday and public holiday penalty rates is a relevant consideration.[35] This is particularly so in circumstances such as the hair and beauty industry, which in various regards operates under similar circumstances as the retail and pharmacy industries, which were the subject of the *2017 Penalty Rates Decision*.

[32] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1952].

[33] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1954].

[34] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1954].

[35] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [64].

## G. THE SCOPE OF THE HAIR AND BEAUTY INDUSTRY

50. "Hairdressing and Beauty Services" is described in the ANZSIC system as follows:[36]

| | |
|---|---|
| Division S | OTHER SERVICES |
| Subdivision 95 | PERSONAL AND OTHER SERVICES |
| Group 951 | PERSONAL CARE SERVICES |
| **Class 9511** | **Hairdressing and Beauty Services** |

This class consists of units mainly engaged in providing hairdressing services or in providing beauty services such as nail care services, facials or applying make-up.

**Primary activities**

- Barber shop operation
- Beauty service
- Electrolysis service
- Hair restoration service (except hair transplant service)
- Hairdressing service
- Make-up service
- Nail care service
- Skin care service
- Tanning (solarium) service

**Exclusions/References**

Units mainly engaged in providing medical skin care services such as cosmetic surgery and dermatology services, or in providing medical or surgical hair replacement or transplant services, are included in Class 8512 Specialist Medical Services.

51. There is a considerable degree of alignment between the description of "Hairdressing and Beauty Services" in ANZSIC Code 9511 and the definition of "hair and beauty industry" in the HBI Award.

[36] Australian Bureau of Statistics,1292.0 - Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 1.0) http://www.abs.gov.au/ausstats/abs@.nsf/0/30A09B2C856967A2CA25711F0014704B?opendocument

52. The definition in the HBI Award is:

**hair and beauty industry** means:

**(a)** performing and/or carrying out of shaving, haircutting, hairdressing, hair trimming, facial waxing, hair curling or waving, beard trimming, face or head massaging, shampooing, wig-making, hair working, hair dyeing, manicuring, eye-brow waxing or lash tinting, or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and/or

**(b)** performing and/or carrying out manicures, pedicures, nail enhancement and nail artistry techniques, waxing, eyebrow arching, lash brow tinting, make-up, analysis of skin, development of treatment plans, facial treatments including massage and other specialised treatments such as lymphatic drainage, high frequency body treatments, including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques, body hair removal, including (but not limited to) waxing chemical methods, electrolysis and laser hair removal, aromatherapy and the application of aromatic plant oils for beauty treatments, using various types of electrical equipment for both body and facial treatments

53. The classification structure in the HBI Award is located in Schedule B. It is relatively short. It covers hair and beauty employees within the same structure, rather than including different streams. The occupations specifically referred to in the structure are: hairdresser, beauty therapist, beautician, nail technician, make-up artist, cosmetologist, trichologist, receptionist and sales assistant.

54. The classification structure is reproduced below:

**Schedule B—Classifications**

**B.1** **Hair and Beauty Employee Level 1** means a receptionist or salon assistant.

**B.2** **Hair and Beauty Employee Level 2** means:

**(a)** a make-up artist who holds a Certificate II in make-up services (or equivalent);

**(b)** a nail technician who holds a Certificate II in Nail Technology (or equivalent); or

**(c)** an unqualified beautician or cosmetologist.

**B.3** **Hair and Beauty Employee Level 3** means:

**(a)** a beautician who holds a Certificate III in Beauty Services (or equivalent); or

**(b)** a hairdresser who holds a Certificate III in Hairdressing (or equivalent).

**B.4** **Hair and Beauty Employee Level 4** means a Beauty Therapist who holds a Certificate IV in Beauty Therapy (or equivalent).

**B.5** **Hair and Beauty Employee Level 5** means:

**(a)** a hairdresser who holds a Certificate IV (or equivalent); or

**(b)** a trichologist who is a hairdresser and holds a Certificate IV in Trichology (or equivalent).

**B.6** **Hair and Beauty Employee Level 6** means a beauty therapist who holds a Diploma in Beauty Therapy (or equivalent)

# H. THE NATURE OF THE HAIR AND BEAUTY INDUSTRY

## H.1 THE WORKFORCE IN THE HAIR AND BEAUTY INDUSTRY

55. In 2017, 54,400 hairdressers were employed in Australia, down from 62,400 in 2016 and 63,700 in 2015.[37]

56. In 2017, 35,400 beauty therapists were employed, up from 33,900 in 2015 and 26,800 in 2015.[38]

57. For hairdressers:

    a) More than half work full-time;

    b) The workforce is fairly young. The average age is 33 years (compared to the all jobs average of 40 years). Around 3 in 10 workers are young (aged 15 to 25 years). [39]

58. For beauty therapists:

    a) Part-time work is very common;

    b) The workforce is fairly young. The average age is 32 years (compared to the all jobs average of 40 years). Around 2 in 10 workers are young (aged 15 to 25 years). [40]

[37] *Australian Government Job Outlook*, 2017 – Hairdressers – ANZSCO ID 3911 http://joboutlook.gov.au

[38] *Australian Government Job Outlook*, 2017 – Beauty Therapists – ANZSCO ID – 4511.

[39] *Australian Government Job Outlook*, 2017 – Hairdressers – ANZSCO ID 3911.

[40] *Australian Government Job Outlook*, 2017 – Beauty Therapists – ANZSCO ID – 4511.

## H.2 BUSINESSES IN THE HAIR AND BEAUTY INDUSTRY

### Businesses in the industry are typically small

59. The hair and beauty Industry is predominantly made up of small to medium businesses employing less than 20 people.[4142]

60. Enterprises which employ less than 20 people account for an estimated 96.8% of hairdressing businesses, 90% of industry employment and 86% of total revenue. [43]

### Businesses face very significant cost and competitive pressures

61. As reported in IBISWorld's *Hairdressing and Beauty Services – January 2017* Report (**IBISWorld Report**):

> 'The industry is highly competitive, with a large number of small operators and high entry and exit rates. The battle for customers has put downward pressure on prices, forcing the exit of many inefficient operators. External competition has also increased over the past five years, with day spas, hotels and airports now offering a range of hair and beauty services.' [44]

62. The IBISWorld Report goes on to state:

> **Profitability and innovation**
>
> Intense competition in the Hairdressing and Beauty Services industry has caused many operators to lower prices to retain their market share. Some operators have also introduced specials to attract customers, offering deals with substantially lower prices through websites such as Groupon. This high price-based competition has caused industry profit margins to fall over the players enter the industry annually, this trend is typically offset by the high failure rate. Despite this, the number of industry enterprises is expected to rise over the five years through 2016-17.
>
> Early in the period, the industry benefited from the move beyond traditional hairdressing towards higher value services. These include laser hair removal, microdermabrasion, chemical past five years. To offset this decline, peels and dermal fillers. Salons have some hairdressers and beauty therapists have focused on promoting higher margin services and products. The introduction of new services has caused the number of industry operators to increase, which has further intensified

[41] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.2. http://rapstc.com.au/wp-content/uploads/2011/12/Hairdressing-Environmental-Scan-2015.pdf

[42] Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*, p.2. http://rapstc.com.au/wp-content/uploads/2011/12/Beauty-Environmental-Scan-2015.pdf

[43] Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.8.

[44] IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.4.

competition and downward pricing pressure. Although a large number of been able to generate growth by developing relationships with local plastic surgeons and, to a lesser extent, general practitioners and dermatologists. However, more salons are following this trend, causing price-based competition to increase and revenue growth to slow. [45]

63. A 2015 report released by the Retail and Personal Services Training Council (a body that includes industry and union representatives[46]) shows that businesses in the hairdressing industry face very significant cost and competitive pressures. Some of the drivers for these pressures are:

a) There has been an increase in the number of customers opting to purchase hair and beauty products online. This trend is largely attributed to the consumer's desire to save money. Online stores, free from salon overheads, are able to offer lower priced products, which impact upon in-store salon sales.[47]

b) Demand for hairdressing salon industry services is sensitive to changes in household disposable income, fashion and social mores.[48]

c) The industry tends to operate with a fair degree of price-based competition, resulting in a high rate of salon closure.[49]

d) Competition in this industry is high and is increasing. The main basis of competition between hairdressers is price, and therefore profit margins are very low.[50]

e) External competition comes from mobile hairdressers who perform their services in a home (as opposed to a salon), as well as from the DIY sector, as some people do their own hair treatments using off-the-shelf products.[51]

[45] IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.6.

[46] The Chairperson of the Board of Management of the Retail and Personal Services Training Council is currently Mr Ben Harris, the Assistant Secretary of the Western Australian Branch of the Shop, Distributive and Allied Employees Association (SDA).

[47] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.9.

[48] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.9.

[49] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.9.

[50] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.9.

[51] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.9.

64. The above cost and competitive pressures support the need for Sunday and weekend penalty rates to be adjusted in the manner sought by HABA.

**Labour costs represent a high proportion of total turnover**

65. ATO Benchmarking for 2014-15 (the latest available benchmarks) highlights that labour costs represent a high proportion of total turnover for the hair and beauty industry (table 1).

**Table 1: ATO Benchmarks for 2014-15**[52]

| ***Hairdressing – Key benchmarks for 2014-15*** | | | |
|---|---|---|---|
| Annual turnover: | $50,000 - $150,000 | $151,000 - $300,000 | Over $300,000 |
| Labour costs as a proportion of turnover: | 26%-37% | 29%-40% | 34%-44% |
| ***Beauty Services – Key benchmarks for 2014-15*** | | | |
| Annual turnover: | $65,000 - $200,000 | $201,000 - $400,000 | Over $400,000 |
| Labour costs as a proportion of turnover: | 22%-33% | 25%-36% | 29%-37% |

Source: *ATO Hairdressers Benchmarks 2014-15* and *ATO Beauty Services Benchmarks 2014-15.*

66. Given that labour costs represent such a high proportion of total turnover for hair and beauty businesses, it can be logically inferred that the level of penalty rates will have a larger impact on hair and beauty businesses than the impact on businesses which operate in an environment where labour costs represent a smaller proportion of total turnover. This supports the need for Sunday and weekend penalty rates to be adjusted in the manner sought by HABA.

[52] *ATO Hairdressers Benchmarks 2014-15* https://www.ato.gov.au/Business/Small-business-benchmarks/In-detail/Benchmarks-A-Z/G-K/Hairdressers/?page=1#Performance_benchmarks and ATO Beauty Services Benchmarks 2014-15 https://www.ato.gov.au/Business/Small-business-benchmarks/In-detail/Benchmarks-by-industry/Health-care-and-personal-services/Beauty-services/

**Most of the revenue in the industry comes from households**

67. The hair and beauty industry provides services to consumers and, accordingly, most of the revenue in the industry comes from households.[53]

**It is very common for hair and beauty businesses to operate on Sundays**

68. Given the fact that Australian workers are not usually able to access hair and beauty services during working hours, it is very common for hair and beauty businesses to operate on Sundays.

69. The IBISWorld Report identifies Just Cuts as the largest operator in the hair and beauty industry.[54]

70. The Just Cuts website (www.justcuts.com.au) identifies all of the Just Cuts salons in Australia. The opening hours of all 181 Just Cuts salons, except for 2 salons, are set out on the website. It can be seen from table 2 that 155 of the 179 Just Cuts salons (87 per cent) that identify their opening hours on the website, are open on Sundays. This table was prepared on 8 March 2018 on the basis of the information on the website on that date.

**Table 2: Just Cuts salons that are open on Sundays**

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| **ACT** | | |
| 1. | **Belconnen** | YES |
| 2. | **Canberra Centre** | YES |
| 3. | **Cooleman Court-Weston Creek** | YES |
| 4. | **Erindale** | YES |
| 5. | **Fyshwick** | YES |
| 6. | **Gungahlin** | YES |
| 7. | **Majura Park** | YES |

[53] Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015, p.2 and Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*, p.2-3.

[54] IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.24.

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| 8. | **Manuka** | YES |
| 9. | **Tuggeranong** | YES |
| 10. | **Woden** | YES |
| **NSW** | | |
| 11. | **Academy - Head Office** | NO |
| 12. | **Albury** | YES |
| 13. | **Armidale** | YES |
| 14. | **Balgowlah** | YES |
| 15. | **Ballina** | YES |
| 16. | **Bateau Bay** | YES |
| 17. | **Batemans Bay** | YES |
| 18. | **Bathurst** | NO |
| 19. | **Blacktown** | YES |
| 20. | **Bondi Junction Eastgate** | YES |
| 21. | **Bondi Junction Westfield** | YES |
| 22. | **Broadway** | YES |
| 23. | **Brookvale-Warringah Mall** | YES |
| 24. | **Burwood** | YES |
| 25. | **Campbelltown Macarthur Square** | YES |
| 26. | **Carnes Hill** | YES |
| 27. | **Castle Hill** | YES |
| 28. | **Castle Hill Home Hub** | YES |
| 29. | **Charlestown** | YES |
| 30. | **Chatswood** | YES |
| 31. | **Chatswood Chase** | YES |
| 32. | **Coffs Harbour-Park Beach** | YES |
| 33. | **Corrimal** | YES |
| 34. | **Dapto** | YES |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| 35. | **Dubbo 1 (Orana Mall)** | YES |
| 36. | **Dubbo 2 (Dubbo Square)** | NO |
| 37. | **Eastgardens - Pagewood** | YES |
| 38. | **Engadine** | NO |
| 39. | **Erina-The Corner** | YES |
| 40. | **Erina-The Market** | YES |
| 41. | **Figtree** | YES |
| 42. | **Forster** | YES |
| 43. | **Glendale** | YES |
| 44. | **Gordon** | YES |
| 45. | **Gosford** | NO |
| 46. | **Grafton** | NO |
| 47. | **Green Hills** | YES |
| 48. | **Hornsby** | YES |
| 49. | **Jesmond** | YES |
| 50. | **Lake Haven** | YES |
| 51. | **Lavington** | YES |
| 52. | **Leichhardt** | YES |
| 53. | **Lismore** | NO |
| 54. | **Marketown - Newcastle** | YES |
| 55. | **Marrickville** | YES |
| 56. | **Miranda** | YES |
| 57. | **Mittagong** | YES |
| 58. | **Mt Hutton** | YES |
| 59. | **Narellan** | YES |
| 60. | **Northbridge** | YES |
| 61. | **Nowra** | Not specified on website |
| 62. | **Orange** | NO |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| 63. | **Parramatta** | YES |
| 64. | **Penrith** | YES |
| 65. | **Port Macquarie-Port Central** | YES |
| 66. | **Port Macquarie-Settlement City** | YES |
| 67. | **Queanbeyan** | YES |
| 68. | **Randwick** | YES |
| 69. | **Raymond Terrace** | YES |
| 70. | **Richmond Kiosk** | YES |
| 71. | **Rockdale** | YES |
| 72. | **Roselands** | YES |
| 73. | **Rouse Hill** | YES |
| 74. | **Salamander Bay** | YES |
| 75. | **Shellharbour** | YES |
| 76. | **Singleton** | YES |
| 77. | **Sydney Central Plaza** | YES |
| 78. | **Sylvania - Southgate Shopping Centre** | YES |
| 79. | **Tamworth** | NO |
| 80. | **Taree** | YES |
| 81. | **Top Ryde** | YES |
| 82. | **Tuggerah** | YES |
| 83. | **Tweed City-Tweed Heads** | YES |
| 84. | **Wagga Wagga** | YES |
| 85. | **Warrawong** | YES |
| 86. | **Warriewood** | YES |
| 87. | **Wollongong Central** | YES |
| 88. | **Woy Woy** | YES |
| 89. | **Wyong** | NO |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| **NT** | | |
| 90. | **Casuarina** | YES |
| **QLD** | | |
| 91. | **Bundaberg** | YES |
| 92. | **Burleigh Heads** | YES |
| 93. | **Cairns 1 - Stocklands** | YES |
| 94. | **Cairns 3 - Central** | YES |
| 95. | **Cairns-Smithfield** | NO |
| 96. | **Carindale** | YES |
| 97. | **Chermside** | YES |
| 98. | **Cleveland** | YES |
| 99. | **Elanora-The Pines** | YES |
| 100. | **Gladstone** | YES |
| 101. | **Helensvale** | NO |
| 102. | **Hervey Bay** | YES |
| 103. | **Indooroopilly** | YES |
| 104. | **Ipswich** | YES |
| 105. | **Kawana** | YES |
| 106. | **Logan Hyperdome** | YES |
| 107. | **Mackay-Canelands** | YES |
| 108. | **Mango Hill-North Lakes** | YES |
| 109. | **Mt Gravatt** | YES |
| 110. | **Mt Ommaney** | YES |
| 111. | **Mt Sheridan** | YES |
| 112. | **Pacific Fair** | YES |
| 113. | **Robina** | YES |
| 114. | **Rockhampton- Stockland** | YES |
| 115. | **Rockhampton-City Centre Plaza** | YES |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| 116. | **Springfield** | YES |
| 117. | **Strathpine** | YES |
| 118. | **Toowoomba** | YES |
| 119. | **Toowoomba 2** | Not specified on website |
| 120. | **Townsville Willows** | NO |
| 121. | **Townsville-Castletown** | NO |
| 122. | **Townsville-Stocklands** | NO |
| 123. | **Underwood** | YES |
| **SA** | | |
| 124. | **Colonnades** | YES |
| 125. | **Elizabeth** | YES |
| 126. | **Kilkenny-Arndale** | YES |
| 127. | **Marion** | YES |
| 128. | **Modbury-Tea Tree** | YES |
| 129. | **Newton Village** | NO |
| 130. | **Parabanks-Salisbury** | NO |
| 131. | **Rundle Place** | NO |
| 132. | **Seaford** | NO |
| 133. | **West Lakes** | YES |
| **TAS** | | |
| 134. | **Devonport** | NO |
| 135. | **Eastlands** | YES |
| 136. | **Glenorchy** | NO |
| 137. | **Hobart-Cat And Fiddle** | NO |
| 138. | **Kingston** | YES |
| 139. | **Meadow Mews** | YES |
| 140. | **The Quadrant Mall** | NO |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| **VIC** | | |
| 141. | **Bendigo** | YES |
| 142. | **Brandon Park** | YES |
| 143. | **Delacombe** | YES |
| 144. | **Doncaster** | YES |
| 145. | **Doncaster East - The Pines** | YES |
| 146. | **Epping** | YES |
| 147. | **Frankston** | YES |
| 148. | **Greensborough** | YES |
| 149. | **Knox Westfield** | YES |
| 150. | **Lilydale** | YES |
| 151. | **Maribyrnong-Highpoint** | YES |
| 152. | **Melbourne Central** | YES |
| 153. | **Melbourne Central 2 (Ground Level)** | YES |
| 154. | **Melton-Woodgrove** | YES |
| 155. | **Mildura Central** | YES |
| 156. | **Myer - Fountain Gate** | YES |
| 157. | **Plenty Valley** | YES |
| 158. | **Point Cook** | YES |
| 159. | **Ringwood-Eastlands Vic** | YES |
| 160. | **Shepparton** | YES |
| 161. | **Southland** | YES |
| 162. | **Tarneit** | YES |
| 163. | **The Glen** | YES |
| 164. | **Victoria Gardens** | YES |
| 165. | **Watergardens** | YES |
| 166. | **Waurn Ponds** | YES |
| 167. | **Wendouree** | YES |

| No. | *Salon* | *Open on Sundays – Yes / No* |
|---|---|---|
| 168. | **Werribee Plaza** | YES |
| 169. | **Williams Landing** | YES |
| 170. | **Wodonga** | YES |
| **WA** | | |
| 171. | **Belmont** | YES |
| 172. | **Booragoon** | YES |
| 173. | **Cockburn** | YES |
| 174. | **Hay Street Perth** | NO |
| 175. | **Joondalup** | YES |
| 176. | **Karrinyup** | YES |
| 177. | **Mandurah** | YES |
| 178. | **Morley-Galleria** | YES |
| 179. | **Ocean Keys-Clarkson** | YES |
| 180. | **Warwick** | YES |
| 181. | **Whitford City** | YES |

**Lease arrangements often require hair and beauty businesses to open on Sundays and public holidays**

71. Lease arrangements in major indoor shopping malls often require tenants, including hair and beauty businesses, to be open on Sundays and on public holidays on which the shopping centre is open.

72. Accordingly, many hair and beauty businesses are not able to avoid Sunday and public holiday penalties.

## H.3 SIMILARITIES TO, AND COMPETITION WITH, BUSINESSES IN THE RETAIL INDUSTRY

73. There are obvious similarities between businesses in the retail industry and those in the hair and beauty industry, including:

    a. Businesses in both industries predominately sell to consumers;

    b. A large range of hair and beauty products are sold by businesses in both industries;

    c. Businesses in both industries operate from similar locations, e.g. shopping strips and shopping malls;

    d. The opening hours of businesses in both industries are often similar; and

    e. Lease arrangements for businesses in both industries are similar.

74. Businesses in the hair and beauty industry compete with businesses in the retail industry in respect of the sale of hair and beauty products.

75. Unless the penalty rates in the HBI Award are reduced, hair and beauty industry businesses will be at a competitive disadvantage, in respect of the sale of hair and beauty products, to businesses in the retail industry.

76. In the *2017 Penalty Rates Decision*, the Commission decided to reduce Sunday and public holiday penalty rates in the retail industry to a level substantially below the penalty rates in the HBI Award. Many of the reasons why penalty rates were reduced in the retail industry are equally relevant to the hair and beauty industry (see section F above).

## H.4 SIMILARITIES TO, AND COMPETITION WITH, BUSINESSES IN THE PHARMACY INDUSTRY

77. There are obvious similarities between businesses in the pharmacy industry and those in the hair and beauty industry, including:

    a. Businesses in both industries predominately sell to consumers;

    b. A large range of hair and beauty products are sold by businesses in both industries;

    c. Businesses in both industries operate from similar locations, e.g. shopping strips and shopping malls;

    d. The opening hours of businesses in both industries are often similar; and

    e. Lease arrangements for businesses in both industries are similar.

78. Businesses in the hair and beauty industry compete with businesses in the retail industry in respect of the sale of hair and beauty products.

79. Unless the penalty rates in the HBI Award are reduced, hair and beauty industry businesses will be at a competitive disadvantage, in respect of the sale of hair and beauty products, to businesses in the pharmacy industry.

80. In the *2017 Penalty Rates Decision*, the Commission decided to reduce Sunday and public holiday penalty rates in the pharmacy industry to a level substantially below the penalty rates in the HBI Award. Many of the reasons why penalty rates were reduced in the pharmacy industry are equally relevant to the hair and beauty industry (see section F above).

# I. APPRENTICESHIP DEVELOPMENTS

81. A recent huge decline in the number of apprenticeship commencements in the hair and beauty industry is deeply worrying for the industry.

82. The decline has been particularly pronounced since August 2013 when a Full Bench of the Commission handed down its *Modern Awards Review 2012 – Apprentices Decision*[55] (***2013 Apprentices Decision***) dramatically increasing wage rates for first and second year apprentices in the hair and beauty industry by up to $400 per week.

83. Of the more than 30 modern awards where minimum wage rates were increased for apprentices, the increases were the highest, by far, in the hair and beauty industry.

## I.1 RELEVANT STATISTICS AND TRENDS

84. The National Centre for Vocational Education Research (**NCVER**) is the national body responsible for collecting, analysing and publishing research and statistics on Australia's vocational education and training sector. NCVER was established in 1981 and is an entity owned jointly by the Australian Government and the State and Territory Governments.

85. NCVER regularly publishes statistics on apprenticeship commencements for a large number of occupations, including hairdressers.

86. In 2017, the NCVER released its *Australian Vocational Education and Training Statistics – Apprentices and trainees 2016 – Annual* publication. This publication (on page 7) includes annual statistics on apprenticeship commencements in hairdressing. Table 3 below identifies the number of commencements since modern awards were introduced in 2010.

[55] [2013] FWCFB 5411.

**Table 3: Apprenticeship commencements in hairdressing**

| *Year* | *Commencements* |
|---|---|
| 2016 | 3,700 |
| 2015 | 3,900 |
| 2014 | 4,200 |
| 2013 | 4,900 |
| 2012 | 4,900 |
| 2011 | 5,100 |
| 2010 | 6,100 |

1 January 2014 – operative date of higher apprentice wages under *2013 Apprentices Decision.*

87. It can be seen that there has been a very large decrease in apprenticeship commencements since the implementation of the Commission's *2013 Apprentices Decision* and that, so far, this trend is continuing.

## I.2 PROBLEMS RESULTING FROM THE 2013 APPRENTICES DECISION

88. The increases that were granted by the Commission for first and second year hairdressing apprentices in the *2013 Apprentices Decision* are set out in Table 4 below.

**Table 4: Increases in hairdressing apprentice wage rates as a result of the FWC *2013 Apprentices Decision***

| ***Stage of apprenticeship*** | ***Wage rate prior to FWC decision ($ per week)*** | ***Wage rate after FWC decision ($ per week)*** | ***Increase per week ($ and %)*** |
|---|---|---|---|
| Year 1 – First 3 months | **35%** of *standard rate*[56] = **$283.20** | **50%** of *standard rate* if completed Yr 12 = **$404.60** | If completed Yr 12: **$121.40 increase** (i.e. **43% increase**) |
| | | **55%** of *standard rate* if not completed Yr 12 = **$445.00** | If not completed Yr 12: **$161.80 increase** (i.e. **57% increase**) |
| | | **80%** of *standard rate* if an adult = **$647.30** | If an adult: **$364.10 increase** (i.e. **129% increase**) |
| Year 1 – After 3 months | **45%** of *standard rate* = **$364.10** | **50%** of *standard rate* if completed Yr 12 = **$404.60** | If completed Yr 12: **$40.50 increase** (i.e. **11% increase**) |
| | | **55%** of *standard rate* if not completed Yr 12 = **$445.00** | If not completed Yr 12: **$80.90 increase** (i.e. **22% increase**) |
| | | The lowest adult rate in clause 17 = **$763.20** | If an adult: **$399.10 increase** (i.e. **110% increase**) |
| Year 2 | **55%** of *standard rate* = **$445.00** | **60%** of *standard rate* if completed Yr 12 = **$485.50**<br>**65%** of *standard rate* if not completed Yr 12 = **$525.90** | **$40.50 increase** (i.e. **9% increase**) |

89. It can be seen from the above that minimum wage rates for hairdressing apprentices who were not adults increased by **up to 57% and $364.10 per week** and by **up to 129% and $399.10 per week** for adult apprentices, as a result of the Commission's *2013 Apprentices Decision*.

90. Given the huge magnitude of these increases, it is not surprising that there has been a sharp decline in the number of hairdressing apprenticeships over the period since the Decision was handed down.

[56] The standard rate is currently $809.10, as at 1 July 2017.

91. The new rates were phased-in through two annual increments on 1 January 2014 and 1 January 2015. However, given the magnitude of the increases, the phasing arrangements did little to offset the negative impacts for hair and beauty industry employers, and the consequent substantial reduction in the number of apprenticeships offered by employers in the Industry.

92. In addition to the very large minimum wage increases, the *2013 Apprentices Decision* increased costs for hair and beauty industry employers in relation to:

- Travel costs for apprentices attending training; and
- Training fees and books for apprentices.

93. The significant labour cost increases for hair and beauty industry businesses which resulted from the *2013 Apprentices Decision* were exacerbated by the weekend penalty rates that are payable under the HBI Award because the penalty rates are loaded on top of the higher minimum wage rates.

94. The modest adjustments to Sunday and public holiday penalty rates sought by HABA in these proceedings would reduce the negative impacts on businesses of the labour cost increases which resulted from the *2013 Apprentices Decision* and would potentially increase the number of apprentices in the industry.

95. An increase in the number of apprentices would deliver the following beneficial outcomes for the community, employers and employees:

- Overcoming existing skill shortages[57] and hence leading to increased productivity and competitiveness of businesses in the hair and beauty industry. (This is a matter relevant to s.134(1)(d),(f) and (h) of the Act);
- Increased employment (This is a matter relevant to s.134(1)(h)); and
- Increased participation in the workforce (This is a matter relevant to s.134(1)(c) of the Act).

[57] See Retail and Personal Services Training Council, *RAPS Hairdressing Scan* 2015 and Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*

## J. EVIDENCE IN SUPPORT OF THE PROPOSED VARIATION

96. In presenting an evidentiary case is support of its proposed variations HABA has sought to respond to the Full Bench's finding in the *2017 Penalty Rates Decision* that the Sunday penalty rates and casual penalty rates within the HBI Award require review, and the associated invitation for an employer party to act as the proponent of a variation in order to assist the Commission to negate the practical impediments that it would face if it were to act of its own motion to obtain relevant lay evidence. The relevant passage from the decision follows (emphasis added):

> **[2055]** As mentioned in Chapter 5.2, the PC Final Report identified a number of 'discretionary consumer service industries' in which the appropriate level of regulated penalty rates for Sunday work has been a highly contested issue, noting that:
>
> > 'The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.'
>
> **[2056]** As noted by the Productivity Commission the modern awards before us closely align with the HERRC awards identified in the PC Final Report. The only 2 HERRC awards which we have not dealt with are the *Amusement, Events and Recreation Award 2010* (the *AER Award*) and the *Hair and Beauty Industry Award 2010*.
>
> **…**
>
> **[2058]** The *Hair and Beauty Industry Award 2010* was the subject of a claim to reduce Sunday penalty rates, by ABI, which was part of these proceedings. In correspondence dated 14 September 2016 ABI stated that its claim in respect of this award was no longer pressed. The weekend penalty rates in the *Hair and Beauty Industry Award 2010* are set out below:

| **Full-time/part-time employee** | | **Casuals** | |
|---|---|---|---|
| Sat | Sun | Sat | Sun |
| 133% | 200% | 133% | 200% |

**[2059]** The existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees.

**[2060]** It is appropriate that these rates be reviewed.

**[2061]** There would be significant practical impediments to the Commission acting on its own motion to obtain relevant lay evidence. A proponent for change (and a contradictor) would be a useful means of measuring that all of the relevant considerations were appropriately canvassed.

**[2062]** We seek expressions of interest from employer organisations prepared to take on the proponent role. Any such expressions of interest should be filed to amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We assume that the SDA will appear as contradictor in any subsequent proceedings…

96. Given the comments of the Full Bench, HABA has sought to present relevant lay evidence, to the extent that it feasible given the resources available to it. Such material provides a sound basis for varying the Award in the terms sought. Nonetheless, as identified by the Full Bench in the context of the review of penalty rates in the Clubs Award and the Restaurant Award, these are not simply *inter partes* proceedings.[58] Section 156 imposes an obligation on the Commission to review each modern award, and as such, the onus for advancing a sufficient evidentiary case in support of a variation does not fall solely to HABA.

97. We also note that these proceedings represent a continuation of the common issues proceedings conducted as part of the 4 Yearly Review of Modern Awards. The Full Bench, as currently constituted, is entitled to have regard to the evidence adduced in those proceedings and the finding and reasoning contained in previous decisions handed down in the context of the "Penalty Rates Common Issues Proceedings".[59] HABA proposes to rely upon such material in support the proposed variations.

98. Further, the Commission should recognise in these proceedings, as it has done in other modern award proceedings, that it is inherently difficult to demonstrate and quantify by direct evidence the employment effects of a proposed modern award variation. In this regard, in *Re SDA*[60], the Full Bench relevantly stated:

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[58] [2017] FWCFB 1001 at [995] and [1156].

[59] AM2014/205.

[60] [2011] FWAFB 6251.

**[24]** In this context we note that it is inherently difficult to demonstrate by direct evidence the employment effects of a proposed award variation such as that being considered by the Vice President, let alone quantify those effects. It should also be remembered that the tribunal is not bound by the rules of evidence and that the Vice President was entitled to place weight on material such as the response of the Brotherhood of St Laurence referred to in paragraph [23] of the Vice President's decision.

24. Accordingly, in the Review the Commission should not require the identification of the precise impact of a proposed variation as a condition of varying a modern award.

## J.1 THE EMPLOYER SURVEY

99. A witness statement of Patrick Sullivan has been filed. The Statement relates to a survey conducted of HABA's membership regarding Sunday and public holiday penalty rates.

100. A total of 145 responses were received from employers covered by the Award.[61] Together those employers operate 227 salons[62] and employ 1,336 employees.[63]

101. Of the 145 respondents:

a) 37 (25%) open one or more salons on Sundays.[64] Thirty of those (81%) are required to be open on a Sunday as a condition of their lease or contract.[65]

b) 39 (27%) open one or more salons on public holidays.[66] Twenty five (64%) of those are required to be open on a public holiday as a condition of their lease or contract.[67]

[61] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 1.
[62] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 6.
[63] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 5.
[64] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 11.
[65] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 13.
[66] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 17.
[67] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 19.

102. The survey accordingly demonstrates that a large proportion of salons open on Sundays and public holidays, are required to so open as a term of their lease or contract.

103. The survey results also demonstrate that wages and other employee entitlements constitute a significant proportion of the respondents' total costs:

a) 34.5% of respondents stated that 50% or more of the total costs of their business were comprised of wages and other entitlements for employees.[68]

b) 55.18% of respondents stated that 40% or more of the total costs of their business were comprised of wages and other entitlements for employees.[69]

c) 82.08% of respondents stated that 30% or more of the total costs of their business were comprised of wages and other entitlements for employees.[70]

104. Survey respondents who at the time of the survey opened on a Sunday were invited to describe the impact on their business if the Sunday penalty rate under the Award was reduced as proposed. All responses to this question are set out at Attachment H to Mr Sullivan's statement.[71] Various common themes emerge, including:

a) The respondents' **employment costs would be lowered**.[72] This is a matter relevant to s.134(1)(f) of the Act.

i. We note that respondent 246 states that "these savings [can be directed] to extra training and educational purpose".[73]

[68] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

[69] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

[70] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

[71] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16.

[72] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 47, 68, 86, 177, 229, 239 and 246.

[73] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

b) The respondents' business **may or would no longer be unprofitable on Sundays**.[74] Some go further and state that it would ensure their viability[75] or would "stop [them] from closing down".[76] This is a matter relevant to s.134(1)(f) of the Act.

c) The respondents would **roster (or, at the very least, would consider rostering) additional staff**.[77] This is a matter relevant to s.134(1)(c) of the Act.

d) The respondents would **increase their trading hours** (or at the very least, consider doing so).[78] This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.

e) The respondents would **roster existing employees for a greater number of hours**.[79] This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.

    i. Respondent 97 observed that some employees wish to work on Sundays due their caring responsibilities, however the business is currently unable to accommodate this due to high labour costs:

> I would offer more shifts on a Sunday. At present I only ever roster on the absolute minimum required to stay open that day. Many of my team members who have children wish that they would work a Sunday as it works well with their families and partners, but I don't offer it to many people due to costs.[80]

[74] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15. See in particular response ID 34, 88, 110, 148, 220, 262 and 266.

[75] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15, response ID 81.

[76] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15, response ID 80.

[77] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 47, 49, 50, 79, 97, 110, 112, 148, 171, 204, 231, 237 and 267.

[78] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 31, 50 and 266.

[79] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 61, 97, 108, 148 and 239.

[80] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

ii. Respondent 108 highlighted the slim margin between the business' pricing structure and operating costs such as rent, which has an inevitable bearing on its scope to roster employees on Sundays:

> 1) we charged the customer $65 for one hour job, including GST
>
> 2) Rental rate is $41 an hour for the salon.
>
> We open Sunday to cover the rental cost, not for profit. If the rate is going down we can give more hours to our staffs. …[81]

f) **Service delivery would improve**.[82] This is a matter relevant to s.134(1)(h) of the Act.

105. Survey respondents who at the time of the survey opened on a public holiday were invited to describe the impact on their business if the public holiday penalty rate under the Award was reduced as proposed. All responses to this question are set out at Attachment H to Mr Sullivan's statement.[83] Various common themes emerge, including:

a) The respondents' **employment costs would be lowered**.[84] This is a matter relevant to s.134(1)(f) of the Act.

b) The respondents' business **may or would no longer be unprofitable on public holidays**.[85] This is a matter relevant to s.134(1)(f) of the Act.

i. We note that some respondents express the view that they would nevertheless remain unable to trade profitably.[86]

[81] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

[82] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15, response ID 148.

[83] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22.

[84] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 31, 47, 68, 81, 177, 239 and 246.

[85] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 34, 88, 148 and 204.

[86] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 31, 97, 110 and 266.

c) The respondents would **roster (or, at the very least, would consider rostering) additional staff**.[87] This is a matter relevant to s.134(1)(c) of the Act.

d) The respondents would **increase their trading hours including opening on additional public holidays** (or at the very least, consider doing so).[88] This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.

e) The respondents would **roster existing employees for a greater number of hours**.[89] This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.

f) **The cost of the business' services could be reduced**.[90] This is a matter relevant to s.134(1)(h) of the Act.

## J.2 EVIDENCE OF LAY WITNESSES

106. Witness Statements of the following lay witnesses have been filed:

Deborah Cook

Graham Thatcher

Annette Harman

Rocco Petrucci

Elke Richter

Benny Khoo

[87] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 30, 47, 50, 108, 166, 174 and 231.

[88] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 50, 148, 174 and 220.

[89] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 21, response ID 108.

[90] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22, response ID 243.

Sarkis Akle

Graham Downs

# K. THE SUNDAY PENALTY RATE AND THE MODERN AWARDS OBJECTIVE

107. The statutory requirements relating to ss.134 and 138 of the FW Act are addressed in section D above. The reasons why the proposed variation to the Sunday penalty rate is consistent with ss.134 and 138 are addressed below.

## K.1 A FAIR SAFETY NET

108. In exercising its modern award powers, s.134 of the Act requires that the Commission ensure that "modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions" taking into account each of the matters listed at ss.134(1)(a) – (h).

109. As identified at paragraphs [117] – [119] of the *2017 Penalty Rates Decision*, and in the authorities cited: (emphasis added).

> "…fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question."

110. Before turning to the specific matters that are required to be taken into account pursuant to s.134(1), we here raise other relevant considerations as to why the current Sunday penalty rates regime cannot be considered 'fair' from the perspective of employers.

111. One such consideration is that fact that many employers covered by the HBI Award do not have any capacity to avoid trading on a Sunday and the consequent exposure to the costs of such trading.

112. As already stated, many businesses within this industry are required as a term of their lease arrangements to open on Sundays. This is particularly common amongst those operating in major retail shopping centres. Other operators feel pressures to trade on a Sunday out of fear that they will lose clients to competitors who now trade on such days (and who, for various reasons, may not be paying penalty rates – see below.) Such businesses are consequently compelled to trade in circumstances where it is not profitable. In both circumstances, the current penalty rates regime has a significant adverse

impact on employers.

113. To the extent that market conditions are such that many employers must now trade on Sundays in circumstances where it is not financially sensible to do so, fairness dictates that there be a recalibration of the current penalty rates to reflect such contemporary circumstances.

114. The difficulties many small retailers face in negotiating the term of retail leases with the owners of large retail shopping centres are notorious. The need to have regard to such difficulties when considering what constitutes a 'fair' safety net is consistent with that element of the object of the Act which speaks to achieving a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

> "(g) acknowledging the special circumstances of small and medium-sized businesses"[91]

115. The hair and beauty industry is, overwhelmingly comprised of small businesses.

116. Another relevant consideration is the significant extent to which employers covered by the HBI Award, and complying with the current penalty rates regime, are faced with significant competition from employers that do not pay penalty rates because:

- They do not employ any staff (this includes the proportion of the sector that operates at home);
- They utilise independent contractors (whether legitimately or not); or
- They do not properly comply with their obligations under the HBI Award.

117. HABA does not seek to condone or excuse non-compliance with awards or other forms of industrial regulation. Nonetheless, the extent to which maintenance of the current expensive Sunday penalty rates regime puts employers subject to the Award at a competitive disadvantage, should be taken

[91] Section 3.

into account. A similar matter fell for consideration in the context of the award review proceedings dealing with whether overtime penalty rates should apply to casual employees covered by the *Horticulture Award 2010*.[92] A Full Bench there observed:

> **[750]** Additionally the evidence of the AWU demonstrated what we, from our collective experience, already know to be the case, namely that award non-compliance in the horticultural industry is widespread. Therefore the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.
>
> **[751]** It is necessary to bear these matters in mind in the application of overtime penalty rates to casual employees under the Horticulture Award in order to ensure that any variation is not counter-productive and frustrates the achievement of the modern awards objective…[93]

118. The current penalty rates regime results in employers struggling to compete, not only with non-compliant employers, but also with the other businesses in the industry that can legitimately avoid the HBI Award's application. In this particular industry, the level of competition with such businesses is particularly significant. A reduction in Sunday penalty rates would reduce the extent of these difficulties. This is a factor that lends support to the proposed reduction in penalty rates.

## K.2 A RELEVANT SAFETY NET

119. The changes that HABA is seeking to the HBI Award are aimed at ensuring that the Award remains relevant to the hair and beauty industry.

120. In the *2017 Penalty Rates Decision*, the Full Bench determined that the word "relevant" is intended to convey that an award should be suited to contemporary circumstances: (emphasis added)

> **[120]** Second, the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a

[92] [2017] FWCFB 3541.

[93] ibid

modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

> '527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations*.' (emphasis added)

121. HABA contends that Sunday trading has become an increasingly prominent feature of the industry. Its importance has, in part, been a product of the establishment of major retail shopping centres and the increasing extent to which businesses in the hair and beauty industry are now located in such centres. It is also a product of the growth in retail trade on Sundays, as discussed earlier. Hair and beauty businesses are now an integral part of the retail trading environment.

122. The finding in the *2017 Penalty Rates Decision* that there has also, generally, been a reduction in the disutility associated with working on a Sunday for many workers is of course also relevant in the context of the hair and beauty industry.[94] Consequently, we contend that the current level of penalty rates is not proportional to the disutility of working on a Sunday, in contemporary circumstances.

123. The penalty rates regime should be amended to reflect these factors, as proposed by HABA.

## K.3 THE MODERN AWARDS OBJECTIVE

### Section 134(1)(a) – Relative living standards and needs of the low paid

124. Section 134(1) requires that the Commission take into account 'relative living standards and the needs of the low paid. In the *2017 Penalty Rates Decision*, the Full Bench held that, "A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a)".[95]

[94] [2017] FWCFB 1001 at [689].

[95] [2017] FWCFB 1001 at [817].

125. It is accepted that a portion of employees covered by the Award would fall within the scope of this benchmark.

126. Any negative impacts on relative living standards may be ameliorated through additional hours being provided to employees on a Sunday or Public Holiday, as a consequence of the reduced disincentive to engage employees on these days. Indeed, to the extent that any reduction in relevant penalty rates is a catalyst for some employers electing to either commence trading, extend trading hours or employ addition labour on such days it may have a positive impact upon the income levels of some low paid employees in the sector (through the availability of additional hours of work attracting penalty rates).

127. Nonetheless, even if the Full Bench determines that this is a factor that weighs against the granting of HABA's proposal, this is not solely determinative of the merits of the claim. As noted by the Full Bench in the *Penalty Rates Transitional Arrangements Decision*:

> "…the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)–(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions."[96]

128. It the context of its consideration of whether to reduce penalty rates in the Retail Sector, in the *2017 Penalty Rates Decision*, the Full Bench observed:

> **[823]** The 'needs of the low paid' is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates or pay (independent of penalty rates).[97]

129. HABA contends that the current penalty rates regime applicable to the hair and beauty industry does not constitute a fair and relevant minimum safety net, when regard is had to the broader range of considerations relevant to the operation of s.134.

[96] [2017] FWCFB 3001 at [37].

[97] [2017] FWCFB 1001 at [823].

130. In the *2017 Penalty Rates Decision*, the Full Bench undertook a detailed consideration of the relevant issues in the context of the *Hospitality, Fast Food, Retail* and *Pharmacy Awards* and determined that reductions in the penalty rates regimes were warranted, notwithstanding the acknowledged adverse impact that it may have upon some employees.[98] There is no apparent reason why a consideration of the matters identified in s.134(1)(a) would warrant a different outcome in these proceedings. There is no distinguishing characteristic of employees in the hair and beauty industry which would warrant any greater weight being afforded to such factors so as to justify a divergent outcome. A consistent approach should be adopted across the relevantly similar sectors.

131. Furthermore, should the Full Bench be concerned about the impact of any change, this can be further ameliorated through the implementation of appropriate transitional arrangements. This reflects the approach adopted by the Full Bench in the context of other awards in which penalty rates have been reduced. Whilst we acknowledge that HABA has not proposed any specific transitional arrangements, it is well established that in the context of this Review the Commission is not bound to grant a remedy in the terms sought.[99] In relation to the transitional arrangements which have been implemented in relation to the awards that have already been the subject of penalty rates reductions, the Full Bench held:

> **[43]** We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the *Penalty Rates decision.* Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts

[98] [2017] FWCFB 1001.

[99] [2017] FWCFB 1001 at [110].

which provides a degree of amelioration.[100]

132. In advancing the above submissions HABA is not proposing that extended transitional arrangements are warranted. Employers covered by the Retail, Hospitality, Pharmacy and Fast Food awards are already receiving, in part, the benefits of the Commission's decision to reduce penalty rates applicable to them. It is important that employers in the hair and beauty industry receive similar relief as soon as possible, notwithstanding the iterative nature of these proceedings.

**Section 134(1)(b) – The need to encourage collective bargaining**

133. A reduction in penalty rates is likely to incentivise employees covered by the ABI Award, and any union that represents them, to engage in collective bargaining. This would be particularly likely to be the case if the change is strongly opposed. In this respect, the proposed change would be consistent with the need to encourage collective bargaining.

134. Even if it were asserted that the reduction may reduce the incentive upon employers to bargain (a point which is not conceded), there are mechanisms available to employees under the Act which could be utilised to compel an employer to bargain. On balance, we contend that s.134(1)(b) is a factor that favours the granting of the application.

**Section 134(1)(c) – The need to promote social inclusion through increased workforce participation**

135. Obtaining employment is the focus of this section.[101] In the *2017 Penalty Rates Decision,* the Full Bench concluded, on the basis of the common evidence, that a reduction in penalty rates was likely to result in some positive employment effects. The lay evidence upon which HABA intends to rely is consistent with this general proposition.

[100] [2017] FWCFB 3001.

[101] [2017] FWCFB 1001 at [179].

136. We do not propose to address the evidence to be adduced from individual witnesses in detail at this point. Their Witness Statements are attached to this submission.

137. It is clear that the current penalty rate regime under the HBI Award operates to discourage employers from engaging employees to work on a Sunday. Indeed, some have elected not to trade at all on Sundays as a result of Sunday penalty rates, or at the very least as a result of factors including Sunday penalty rates.

138. Moreover, it appears that some employers intend to respond to the proposed reduction in such rates, if granted, by expanding their engagement of labour on a Sunday. Of course, employer perceptions or intentions in relation to such matters are particularly important factors in the context of a consideration of s.134(1)(c), regardless of the extent to which they may inevitably be somewhat speculative, given they are likely ultimately determinative as to employment outcomes.

139. A consideration of the matters referred to in s.134(1)(c) lends support to the granting of the claim.

**Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work**

140. We deal with this factor below in the part of our submission that addresses s.134(1)(f).

**Section 134(1)(da) – The need to provide additional remuneration for employees**

141. The *2017 Penalty Rates Decision* sets out a number of salient observations regarding s.134(1)(da).[102] The provisions had not previously been the subject of substantive arbitral or judicial consideration.

[102] [2017] FWCFB 1001 at [184]-[203].

142. Without traversing the full breadth of the Full Bench's comments, it is particularly relevant to note the observation that, in effect, s.134(1)(da) does not mandate that employees *must* be paid additional remuneration for working in the circumstances contemplated by the provision:

> **[195]** Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a'relevant consideration' in the *Peko-Wallsend* 93 sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:
>
> > 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.
>
> **[196]** Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'

143. Relevantly, the Full Bench also observed that:

> **[45]** An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified requires a consideration of a range of matters, including:
>
> (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
>
> (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
>
> (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

144. We here address each of these three key considerations. For convenience, we deal with matters (ii) and the (iii) first.

145. In relation to matter (ii), HABA acknowledges that the minimum rates contained in the Award do not already compensate employees for working on weekends. However, it is relevant to observe that there are terms of the Award which operate to minimise the incidence of Sunday work.

146. Subclause 28.2 only permits limited scope for the working of ordinary hours on a Sunday. The provision states:

> **28.2 Ordinary hours**
>
> **(a)** Ordinary hours must not exceed an average of 38 per week and may be worked within the following spread of hours:
>
> | Days | Spread of hours |
> |---|---|
> | Monday to Friday, inclusive | 7.00 am–9.00 pm |
> | Saturday | 7.00 am–6.00 pm |
> | Sunday | 10.00 am–5.00 pm |
>
> **(b)** Hours of work on any day will be continuous, except for rest periods and meal breaks.

147. Pursuant to subclause 28.2, ordinary hours may only be worked on a Sunday between 10.00am and 5.00pm. This is a much shorter spread than is available on either a Monday to Friday or on a Saturday. This is also a much shorter span of ordinary hours than is available under the Retail Award, which provides that ordinary hours may be worked between 9.00am and 6.00pm on a Sunday.

148. HABA is not seeking to remove this limitation. It limits the extent to which employees can be required to work ordinary hours commencing early in the morning or late into the evening. This moderates part of the disutility that may be experienced by employees working on a Sunday.

149. If employees work outside the hours specified in subclause 28.2, overtime penalties apply. Importantly, the restrictive spread of hours on a Sunday, when compared to other days of the week, means that overtime rates will more readily be payable to employees. In this regard the Award already provides significant compensation for employees working before 10.00am or after 5.00pm on a Sunday.

150. Clause 30 prescribes relatively restrictive requirements regarding rostering when compared to the provisions of most awards:

> **30. Rostering principles**
>
> **30.1** A roster period cannot exceed four weeks.
>
> **30.2** Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.
>
> **30.3 Consecutive days off**
>
> **(a)** Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.
>
> **(b)** This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.
>
> **(c)** An employee can terminate the agreement by giving four weeks' notice to the employer.
>
> **30.4** Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days.
>
> **30.5** Unless otherwise mutually agreed, an employee who elects to work Sundays as part of ordinary hours is to be rostered off at least one Sunday every four weeks.

151. Clause 30 does not apply to casual employees.

152. Subclause 30.5 mandates that, for rostering purposes, an employee must be given at least one Sunday off every four weeks (absent an individual agreement to the contrary). Consequently, an employee cannot be forced to work every Sunday. This partly ameliorates the disutility of working Sundays because an employee cannot be compelled to entirely miss out on the benefits of having Sundays free from work (unless the employee otherwise agrees). It cannot be reasonable asserted that an employee who elects to work on a Sunday suffers the same disutility as one who is compelled to work on such days.

153. It is also relevant that subclauses 30.2 and 30.3 operate to ensure employees are afforded consecutive days off. This provides a meaningful benefit to employees who may be rostered to work ordinary hours over all seven days of

the week. It is not a common provision within the award system.

154. Further, HABA contends that it is very common in industry for employee preferences regarding the working of Sunday to be taken into consideration in the setting of rostering arrangements.

155. In relation to matter (iii), we observe that weekend work is a common feature of the hair and beauty industry. The survey evidence, the lay employer evidence and Table 2 in this submission are consistent with the proposition that a significant proportion of employers already operate on a Sunday.

156. The evidence also demonstrates that there is an expectation amongst some consumers that hair and beauty services are available on a Sunday. This is consistent with the Full Bench's findings regarding the retail trade generally.[103]

157. In advancing these submissions, it is acknowledged by HABA that not all employers operating in the hair and beauty industry trade on a Sunday. Nonetheless, we doubt that it is contentious that a substantial proportion of businesses in this industry do. Factors such as the location of the employer's business and the nature of the service they provide impact upon such matters. As reflected in the Employer Survey and in the lay employer witness evidence, it is particularly common for operators based in major shopping centres to be open on a Sunday. Indeed, many are subject to lease arrangements that either require or assume for costing purposes that the business will trade on Sundays.

158. The HBI Award itself reflects an acknowledgement of the fact that Sunday work is a feature of the Industry. It regulates the ordinary hours that may be worked on such days, the rates to apply and the rostering of work on such days. Such provisions could not be said to be "necessary to achieve the modern awards objective" if Sunday work was not a recognised and significant feature of the industry.

[103] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [76]-[77].

159. In relation to matter (i), there is no reason to consider that the extent of the disutility of working on a public holiday is any less pronounced for employees covered by the awards the subject of the previous penalty rates proceedings than for employees covered by the HBI Award. A consideration of this matter does not warrant higher penalty rates being applied in this sector than in the hospitality and retail industries more broadly. Employees in this sector are not immune to the reduction in the relative disutility of Sunday work that has generally occurred over time and which has been recognised by the Full Bench.[104] Indeed, Sunday work is now preferred by some employees in the sector who utilise it to balance family, study or personal commitments. Such matters warrant a reduction in Sunday penalty rates, as proposed.

160. Finally, even if the Sunday penalty rates were reduced as proposed, employees working on such days would still receive additional remuneration for working on a Sunday.

**Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value**

161. This is a neutral consideration in the context of the current proceedings.

162. Subsection 134(1)(e) requires that the Full Bench take into account the principle of equal remuneration for men and women 'for work of equal or comparable value'. If the Sunday and public holiday penalty rates are reduced as proposed, the change will apply equally to work undertaken by men and women covered by the award. Accordingly, consistent with the logic of the Full Bench in the *2017 Penalty Rates Decision*, the proposed reduction in penalty rates would not enliven s.134(1)(e).[105]

[104] [2017] FWCFB 1001 at [689].

[105] Ibid at [205] to [216].

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

163. Adopting the approach taken by Full Bench in *2017 Penalty Rates Decision*, we here address the considerations referred to in both s.134(1)(d) and s.134(1)(f).

164. In relation to s.134(1)(f), the *2017 Penalty Rates Decision* identified that the provision is "…expressed in very broad terms"[106] and that it is, "…not confined to a consideration of the impact of exercise of modern award powers on 'productivity, employment costs and the regulatory burden. It is concerned with the impact of the exercise of those powers on business."[107]

165. At paragraph [220] the Full Bench made the following salient observation:

> "It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact upon business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. The impact of a reduction in penalty rates upon productivity is less clear."

166. As in the context of the other industries considered in the *2017 Penalty Rates Decision*, it is self-evident that a reduction in Sunday and public holiday penalty rates will reduce employer costs in the hair and beauty industry and have a positive impact on business. This is a factor weighing heavily in favour of the claim.

167. In relation to the notion of productivity, as contemplated in s.134(1)(f), the *2017 Penalty Rates Decision* states:

> **[224]** The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice - Victoria Branch*:
>
> > '…we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output

[106] [2017] FWCFB 1001 at [218].

[107] Ibid at [1669].

> relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.
>
> Financial gains achieved by having the same labour input - the number of hours worked - produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.'

**[225]** While the above observation is directed at the use of the word 'productivity' in s.275, it is apposite to our consideration of this issue in the context of s.134(1)(f).

168. Even adopting this particular definition of productivity, the proposed variation would likely improve productivity in some circumstances. This would occur where the engagement of additional staff enabled more efficient servicing of clients. For example, within the context of hairdressing sector of the industry it is typical for a range of ancillary tasks to be undertaken beyond cutting/treatment of hair. This would include answering phones, greeting customers, serving drinks or other refreshments, general cleaning activities, and other miscellaneous activities. The engagement of additional staff can improve productivity, as contemplated by s.134(1)(f), by enhancing the efficiency of a salon's operations. Put simply, it enables those engaged directly in producing the relevant output (i.e. servicing clients) to undertake this work more efficiently as they are not distracted by other tasks. The extent of any such productivity gains will be dependent upon variables associated with the nature of each employer's operations and, as such, we do not suggest that the precise extent of productivity improvements at the industry level could be readily identifiable.

169. The lay evidence demonstrates that the current Sunday penalty rates have impacted upon staffing and service levels in the hair and beauty industry, with adverse consequences for employers. In the context of at least some employers the current penalty rates regime has led to businesses taking measures such as:

- Restricted trading hours on a Sunday or not opening on a Sunday;
- Seeking to minimise the number of staff who work on a Sunday, or curtailing the hours that are allocated to those staff that do work;

- Providing poorer customer service (such as extended waiting times or rushed/inferior quality services) and associated potential losses in revenue to the businesses (given the discretionary nature of spending on this industry's services and the highly competitive nature of the industry);

- Altering their rostering decision regarding the type, classification or skill level of employees selected to work; and

- Owners of salons working on Sundays instead of rostering employees.

170. A reduction in Sunday penalty rates will likely result in changes in the hair and beauty industry such as:

- More salons being open on Sundays;

- Increased Sunday trading hours by salons; and

- An increase in the availability of work for employees on a Sunday.

171. To the extent that a reduction in penalty rates removes a barrier to the engagement of additional staff and/or the simultaneously engagement of additional staff within a salon, it can be said to promote flexible modern work practices. It is also likely to facilitate the efficient and productive performance of work.

172. In terms of broader benefits businesses in this industry, the proposed variation will, by removing or reducing the barrier to engaging additional staff on a Sunday:

- Enable businesses to take greater advantage of 'walk in' customers by ensuring they are better able to meet such variable demand; and

- Afford businesses a greater opportunity to recover their fixed costs by facilitating an expansion in their level of Sunday trading.

**Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards**

173. This is a neutral consideration.

**Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

174. Given that the proposed variation would have a positive impact on employment, section 134(1)(h) weighs in favour of the variation.

**Conclusion**

175. In summary, the specific factors comprising the modern awards objective weigh strongly in favour of granting the proposed variation.

## L. THE PUBLIC HOLIDAY PENALTY RATE AND THE MODERN AWARDS OBJECTIVE

176. The *2017 Penalty Rates Decision* determined that the public holiday penalty rates for full-time and part-time employees specified in the Hospitality Award, Restaurant Award, Retail Award, Fast Food Award and Pharmacy Award would be reduced from 250 per cent to 225 per cent.[108]

177. The decision also provided that the Hospitality Award, Retail Award, Fast Food Award and Pharmacy Award would be amended to reduce the rate that must be paid to casual employees on a public holiday.

178. The HBI Award currently provides for a public holiday penalty rate of 250%. HABA proposes that the penalty rate be reduced to 225% for full-time, part-time and casual employees.

179. It is appropriate that the Full Bench, as currently constituted, grant the proposed variation pertaining to public holiday penalty rates for full-time, part-time and casual employees given:

    a. The current penalty rates regime does not constitute a fair and relevant safety net of minimum terms and conditions, as contemplated by s.134.

    b. The change in Sunday penalty rates that HABA seek would, on the grounds of proportionality, be a catalyst for a reassessment of the public holiday rates. It is appropriate that such matters be dealt with simultaneously. Such a proposition is consistent with the need for the Commission to take into account the maintenance of a "stable" modern award system in undertaking this Review (s.134(1)(g)).

    c. For reasons associated with the nature of the industry and the broader structure of the HBI Award, it is important that the penalty rates regime not be amended to introduce different and/or higher rates for casual employees working on a public holiday.

[108] [2017] FWCFB 1001

d. Many of conclusions and reasons set out in the *2017 Penalty Rates Decision* for implementing the relevant public holiday penalty rate reduction in the aforementioned awards apply with similar force in the context of the HBI Award.

e. Neither the Commission or any party has proposed that a differentiated penalty rates regime for casual employees, compared to other types of employees, be introduced.

f. All parties have been on notice of the nature of the change proposed by HABA for an extended period of time.

180. As an overarching proposition, HABA contends that the current penalty rates regime is neither a fair or relevant element of a minimum safety net of terms and conditions, as contemplated by s.134(1). The submissions advanced as to why the current Sunday penalty rates cannot be considered 'fair' or relevant' are generally equally apt in the context of the public holidays penalty rates regime. Moreover, the following mandatory considerations specifically referred to in s.134(1) support the proposed variation:

a. The need to provide additional remuneration to employees working on weekends or public holidays (s.134(1)(da)). In this regard we point to the need to adopt a proportionate approach to the fixation of weekend and public holiday rates and the amelioration of the disutility of working on a public holiday resulting from the introduction of statutory right to refuse work on public holidays pursuant to s.114(3).

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

c. The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)); and

d. The likely impact on business, including on productivity and employment costs. (s.134(1)(f)).

## L.1 SECTION 134 CONSIDERATIONS THAT WEIGH IN FAVOUR OF GRANTING HABA'S CLAIM

181. For convenience, we deal firstly with **s.134(1)(da)**.

182. As mentioned earlier, the requirement to take into account the factors identified in s.134(1)(da) necessitates a consideration of a range of matters, including:

(i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);

(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through loaded minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work

(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

183. We here address each of these matters. However, before doing so we observe that even if the penalty rates were reduced, as proposed, employees would still receive 'additional remuneration'.

184. In relation to matter (i), we note that there is no reason to consider that the extent of the disutility of working on a public holiday is any less pronounced for employees covered by the awards the subject of the previous penalty rates proceedings than for employees covered by the HBI Award. A consideration of this matter does not warrant higher penalty rates being applied in this sector than in the hospitality and retail sectors.

185. As identified in the *2017 Penalty Rates Decision*, disutility can be seen in relative terms and as such, a reduction in Sunday penalty rates may warrant a recalibration of public holiday penalty rates so they are set at a proportionate level.[109] Relevantly, in the *2017 Penalty Rates Decision* the Full Bench held: (emphasis added)

[109] [2017] FWCFB 1001 at [1950] to [1955].

**[1950]** Disutility can also be seen in relative terms. The disutility of working on public holidays is greater than the disutility of working on Sundays (which in turn is greater than Saturday work). The notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.

**[1951]** As we mentioned earlier (at [893]), in a 1993 decision in relation to the *Hotels, Resorts and Hospitality Award 1992* (a predecessor award to the *Hospitality Award*) Commissioner Gay applied a proportionality approach to the fixing of Saturday and Sunday penalty rates:

> 'The Saturday rate for ordinary time worked in this industry should be loaded over the Monday to Friday rate, but not punitively so… The Sunday ordinary time rate should be less than the overtime rate and yet appreciably more than the Saturday rate'.

**[1952]** The concept outlined by the Commissioner may be extended to the fixation of public holiday penalty rates – they should be higher than Sunday penalty rates, but not disproportionately so.

**[1953]** The proportionality approach is consistent with the findings of the time valuation modelling exercise in the Rose Report. It will be recalled that the model results were that, on average, respondent employees value working on Saturdays as somewhere between 106 to 135 per cent of their current normal hourly pay, Sundays somewhere between 126 and 165 per cent, and working on a public holiday as being between 124 and 224 per cent. As mentioned in Chapter 4.1, there are limitations to the Rose Report and the modelling results should not be mechanistically applied as a means of fixing an appropriate penalty rate. But the results do provide some insight into the *relative* disutility of Saturday, Sunday and public holiday work.

**[1954]** In determining the appropriate penalty rate for public holiday work, we have had regard to the level of Sunday penalty rates in the *Hospitality and Retail Awards* (after applying the decisions we have made to reduce those rates).[110]

186. If a consistent approach to that taken in the *2017 Penalty Rates Decision* is applied in the context of the current proceedings, the reduction in Sunday penalty rates proposed by HABA would, if granted, be a factor weighing strongly in favour of the granting of a proportionate reduction in the public holiday rates.

187. Further, as accepted in the *2017 Penalty Rates Decision*, the disutility in relation to working on public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on such days, on reasonable grounds, pursuant to s.114(3).[111] This is a significant contextual matter which was not taken into account in the setting of penalty rates currently contained within the HBI Award. Consistent with the approach taken in the *2017 Penalty*

[110] [2017] FWCFB 1001.

[111] Ibid.

*Rates Decision*, this is a factor that weighs in favour of the granting of the claim.

188. In relation to matter (ii), the minimum wage rates in the HBI Award do not appear to already compensate employees for working on public holidays.

189. In relation to matter (iii), work on public holidays is now a well-established feature of the industry. It is particularly common in businesses that trade in major shopping centres and certainly, in relative terms, is more common than in most other industries.

190. Nonetheless, it is accepted that not all employers in the industry trade on such days. Whether or not a business in the industry operates on a public holiday is undoubtedly dependent upon a range of multifaceted considerations. The level of demand for services within a particular area is one such factor. In some trading environments there is reduced demand for services from the industry on public holidays or at least on certain public holidays. In other environments, or on certain public holidays, demand for services remains very high.

191. The high cost of penalty rates currently applicable on public holidays is a factor that contributes to many employers deciding to either:

- Not trade on public holidays;
- To limit their trading hours;
- To limit their labour costs on such days by reducing the number of staff engaged and/or otherwise adjusting their rostering arrangements relating to matters such as the type or classification of employee who is rostered on such days; or
- Limit the services offered on such days and/or the activities undertaken by staff on such days.

192. Some businesses are required by the terms of applicable lease arrangements to trade on public holidays (or at least some public holidays). This is common in major retail shopping centres and, as previously identified, many employers are unable to negotiate any release from such requirements. HABA contends

that many operators in the sector only trade on such days as a consequence of lease arrangements and that, given the current penalty rates regime, it is often not commercially sensible for business to open on public holidays.

193. Other operators feel compelled to open due to a view that this is expected by at least some clients and the associated risk that such clients may be lost to competitors on an ongoing basis if such preferences are not accommodated.

194. The extent to which many operators in the industry only trade on public holidays out of compulsion (be it pursuant to lease arrangements or commercial pressures) rather than merely out of a desire to improve their profitability, renders it appropriate that a more reasonable balance is struck between the interests of employees and employers relating to public holiday rates. Fairness dictates that employers be afforded some modest relief from the currently very expensive penalty rates regime in the HBI Award.

195. **In relation to s.134(1)(c),** it is likely that a reduction in public holiday penalty rates will lead to additional employment. The nature of the hair and beauty industry and, in particular, the circumstances faced by employers in the industry, are relevantly analogous to that of employers covered by the Hospitality Award and the Retail Award. As such the common evidence which was said in the *2017 Penalty Rates Decision* to justify the conclusion that a reduction in public holiday rates in such industries was warranted also provides support for a comparable approach being taken in respect of the HBI Award.

196. The lay evidence advanced by HABA demonstrates that the current regime has been a barrier to engagement of labour on public holidays. It also demonstrates that some employers perceive that they are likely to increase the volume of labour engaged on public holidays if the HABA claim is granted.

197. **In relation to s.134(1)(d),** our submissions relating to this consideration in the context of the proposed variation to Sunday penalty rates apply with similar force in respect of the proposed variation to public holiday rates.

198. In short, we contend that the extent to which the reduction in public holiday penalty rates encourages employers to either engage additional labour on a public holiday, or to offer additional services, it is likely to have a positive effect on the 'efficient and productive performance of work' and would promote flexible modern work practices.

199. Such considerations support the granting of the proposed variation.

200. **In relation to s.134(1)(f)**, again, our submissions regarding this consideration in the context of the proposed variation to Sunday penalty rates claim apply with similar force in relation to the proposed variation to public holiday rates.

201. A reduction in public holiday penalty rates will undoubtedly be beneficial to business. It will, of course, reduce labour costs on a public holiday.

202. For those businesses that already trade on a public holiday, the change may either enhance the profitability of trading on such days or at least allow them to moderate their losses. For businesses that currently elect not to trade on such days it may be a sufficient catalyst for them to expand to operate on such days, with all the associated benefits that this affords.

203. The reduction may even permit some employers to reduce the prices they charge customers. Alternatively, it would likely be a catalyst for some to improve the quality of their services, through the engagement of addition labour on a public holiday. This could take the form of reduced waiting times, a reduction in pressure on staff (and a consequent improvement in the quality of the work) or simply the offering of services that are not currently made available on these days due to limited staffing. These changes may, in turn, enable employers covered by the HBI Award to grow their businesses or to retain regular clients. Such benefits are significant given the discretionary nature of spending on many of the services and products offered by the sector and the highly competitive nature of the industry.

## L.2 THE REMAINING SECTION 134 CONSIDERATIONS

### Section 134(a) – Relative living standards and the needs of the low paid

204. In the *2017 Penalty Rates Decision*, the Full Bench identified this consideration as a factor weighing against the granting of a reduction in penalty rates. It was not however determined that such matters warranted maintenance of the current penalty rates in the relevant awards.[112] The same approach should be adopted in the HBI Award. In support of this we raise the following arguments:

    a. The extent to which lower wages may induce a greater demand for labour on public holidays and thereby somewhat ameliorate the reduction in income per hour for such work.[113]

    b. The proposition that the purpose of such rates is to compensate employees for working on a public holiday rather than to address the needs of the low paid.[114]

    c. The Full Bench's observation that the needs of the low paid are best addressed through the setting of an appropriate minimum wage.[115]

    d. The fact that public holidays only occur intermittently and that where an employee's ordinary hours fall on a public holiday they will still be entitled to their base rate of pay for such hours if they do not work.

### Section 134(1)(b) – The need to encourage collective bargaining

205. We refer to our submissions regarding this point in the context of the proposed change to Sunday penalty rates. Our arguments apply with similar force to the proposed change to public holiday penalty rates.

[112] [2017] FWCFB1001 at [1927]-[1929].
[113] Ibid at [1928].
[114] Ibid at [1929].
[115] Ibid at [1660].

**Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value**

206. This is a neutral consideration.

**Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern awards system**

207. This is a neutral consideration, save that if favours varying the public holiday rates at the same time as the Sunday rates.

**Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

208. Given that the proposed variation would have a positive impact on employment, section 134(1)(h) weighs in favour of the variation.

## M. CASUAL PENALTY RATES

209. The Full Bench in the *2017 Penalty Rates Decision* held that it was appropriate that penalty rates for casual employees covered by the HBI Award be reviewed.[116]

210. HABA has proposed that there be a uniform reduction in the Sunday penalty rates. It has similarly proposed that there be a uniform reduction in public holiday penalty rates. That is, it has not proposed that differentiated rates apply to casual and permanent employees on such days.

211. Neither the Commission, nor any party, has raised a proposal for any variation to the Saturday rates. It is not a matter that squarely fall for consideration in the context of these proceedings.

212. We address the rational for HABA's approach to Sunday penalty rates for casual employees in this section. Before doing so we acknowledge that the 2017 *Penalty Rates Decision* reflected a 'preference' for the 'default' approach to the setting of casual loadings identified in the Productivity Commission Inquiry Report into the Workplace Relations Framework (**PC Report**).[117] Under this approach the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus relevant weekend or public holiday penalties).

213. In support of this approach the PC Report stated:

> "For neutrality of treatment, the casual loading should be added to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work…"[118]

214. Paragraph [316] of the *2017 Penalty Rates Decision* notes that a recommendation in the PC Report (Recommendation 15.1) was that the Fair Work Commission, as part of the current award review process:

[116] [2017] FWCFB 1001 at 259 to 260

[117] [2017] FWCFB 1001 at 1714

[118] at 496

"investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this."[119] (Emphasis added)

215. The Full Bench observed that the 'default approach is also consistent with the consideration arising under s.134(1)(g) of the FW Act in that it provides a casual loading that is simple and easy to understand.[120]

216. HABA contends that there is both a cogent rationale and significant merit based arguments that support its proposal to maintain an approach that sees all employees in the same classification receive the same rates for working on Sundays and public holidays, regardless of whether they have been engaged as casual or permanent employees. In essence, such an approach is warranted for reasons including the structure of the HBI Award's treatment of penalty rates, the unique nature of the industry, and certain restrictions contained within the Award regarding rostering.

**The structure of the HBI Award**

217. We deal firstly with why the structure of the HBI Award justifies applying the same rates to casual and permanent employees.

218. Central to such considerations is the manner in which the Award currently deals with the remuneration of casual employees as well as the regulation of hours of work of both casual and permanent employees. Before outlining these provisions, we note that a recent decision to vary the Award to provide casual employees with an entitlement to overtime penalties in certain circumstances appears to have introduced certain ambiguities or anomalies in the penalty rates regime contained within the Award.[121] This is a matter that we will explain further.

[119] [2017] FWCFB 1001.

[120] [2017] FWCFB 1001 at [338].

[121] We are here referring to a change introduced as a consequence of Casual and Part-time Employment Decision [2017] FWCFB 3541.

219. Clause 13 of the HBI Award deals with casual employment:

> **13.1** A casual employee is an employee engaged as such.
>
> **13.2** For all work between 7.00 am and 9.00 pm Monday to Friday, a casual will be paid both the hourly rate for a full-time employee and an additional 25% of the ordinary hourly rate.
>
> **13.3** For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%.
>
> **13.4** The following provisions of this award do not apply to casuals:
>
> - Clause 14—Termination of employment;
> - Clause 15—Redundancy;
> - Clause 21.2—Meal allowances;
> - Clause 21.4—Excess travelling costs;
> - Clause 21.5—Travelling time reimbursement;
> - Clause 21.8—Transport of employees' reimbursement;
> - Clause 28—Hours of work;
> - Clause 29—Notification of rosters; and
> - Clause 31.2(a)—Overtime and penalty rates.
>
> **13.5** Casual employees will be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

220. Subclause 31.2 sets out the overtime and penalty rates that apply to casual employees. These include rates of pay that apply on a Saturday and Sunday. The provision was recently introduced into the Award as a product of the *Casual and Part-time Employment Decision*[122] and states:

> **31.2 Overtime and penalty rates**
>
> **(a)** Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.
>
> **(b)** Hours worked by casual employees:

[122] [2017] FWCFB 3541 at [676] and [677].

**(i)** in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle;

**(ii)** in excess of 10 ½ hours per day;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).

**(c) Saturday work**

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

**(d) Sunday work**

A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday.

221. Subclause 35.3 of the Award regulates rates of pay for casuals on a public holiday:

**35.3** Work on a public holiday must be compensated by payment at the rate of double time and a half for full-time, part-time and casual employees.

222. Subject to a *potential* ambiguity regarding the interaction of the above cited provisions, the effect of the Award's current penalty rates regime upon a casual employee is as follows:

- A casual employee receives a 33% loading for any ordinary hours of work performed within the "span of hours" on a Saturday. The span of hours is that referred to in clause 28.2. It falls between 7.00am and 6.00pm.

- A casual employee receives a 50% loading for hours of work for a casual employee that are performed outside the span of hours set by subclause 28.2 on a Saturday. That is, they are paid 150%.

- All employees receive a 100% loading for all hours worked on a Sunday (regardless of whether they are ordinary hours or overtime hours).

- A casual employee that works hours within the parameters identified in clause 31.2(b), is entitled to receive 175% of the minimum hourly rate of pay for the first three hours and 225% thereafter. (Whether the relevant

rates should by calculated on the basis that each day stands alone is not specified, but we proceed on the assumption that this would be the case).

- A casual employee working on a public holiday is entitled to be paid double time and a half.

223. There is currently a potential ambiguity or anomaly in relation to whether a casual employee who works outside of the parameters specified in clause 31.2(b) on a Saturday or Sunday is to be paid the rates specified by clause 31.2(b) or the rates specified by clauses 13, 31.2(c) and 31.2(d). If the rates in clause 31.2(b) are applicable, a casual employee will receive a higher rate of pay for working at such times on a Saturday than would be applicable under the other clauses. However, adopting this approach in relation to Sunday work would result in an employee being paid a lower rate of pay for working on a Sunday than would be applicable under clause 31.2(d) or clause 13.

224. A similar difficulty arguable arises in relation to the interaction between clause 31.2(b) and clause 35.3 (which deals with public holiday rates), unless clause 35.3 operates to the exclusion of clause 31.2(b).

225. HABA contends that clause 35.3 governs the rate of pay for all hours worked by full-time, part-time and casual employees working on a public holiday.

226. HABA advanced its proposed variation in the current proceedings before the Commission varied the Award to introduce overtime rates for casual employees. That is, before clause 31.2(b) was inserted into the Award.

227. To accommodate the outcome contemplated by the *Casual and Part-time Employment Decision*,[123] HABA proposes that work performed by a casual employee on a Sunday that meets the criteria identified in clause 31.1(b) should be paid at 175%, for the first three hours and at 225% thereafter.

[123] [2017] FWCFB 3541.

228. If the Award is varied as proposed by HABA, any anomalous outcomes on a Sunday would be avoided. It would also assist in ensuring that the Award is "simple and easy to understand."[124]

229. If HABA's proposal was granted, the rate of pay for a casual employee working on a public holiday would, in all circumstances be 225%. Accordingly, there would be no inconsistency between clause 31.1(b) and clause 35.3. The *Casual and Part-time Employment Decision* did not provide that casuals should receive an additional premium for performing 'overtime' on a public holiday.

**The Importance of casual employment on weekends given the nature of the Industry**

230. The nature of the industry justifies a departure from the "default approach" to the application of casual loading on Sundays and public holidays.

231. Labour typically represents a very significant component of an employer's cost structure in this industry. Moreover, given the nature of the work typically performed within certain sectors of the industry, each client must commonly be directly serviced by an employee. Consequently, in the hair and beauty industry there is a particularly pronounced imperative for employers to align labour allocation/costs with client/customer demand. Such considerations are arguably much more important in this sector than in the retail industry more generally or in the hospitality sector.

232. There are however unique challenges that employers in this industry face in seeking to achieve such alignment. For example, it is common for clients to either cancel or make bookings at short notice. Moreover, some employers rely upon 'walk-in' trade, the volume of which is inherently variable.

233. Given these challenges, casual employment provides a crucial mechanism for achieving the abovementioned alignment.

234. The need to utilise a casual employee is particularly pronounced on Sundays and public holidays, given the application of penalty rates. Accordingly, HABA

[124] As contemplated by s.134(1)(g).

seeks to ensure that a meaningful reduction to the Sunday and public holiday rates is implemented. Obviously, the benefits of a reduction in the relevant penalty rates would be muted if it coincided with a variation to the award so that a casual loading was also payable on such days.

235. The proposal for a significant reduction in the Sunday and public holiday rates for casual employees is intended to maximise the likelihood that the reduction will facilitate additional labour being engaged on such days.

**Importance of casual employment given the structure of the HBI Award**

236. A striking element of the HBI Award's operation is that, pursuant to clause 13.4, certain provisions of the Award do not apply to casual employees. Relevantly, clause 13.4 provides that clause 31.2(a), which deals with overtime penalty rates, does not apply to casual employees. At the time of the HBI Award's commencement in 2010, this provision had the effect of excluding casual employees from any entitlement to overtime penalties.

237. In the *Casual and Part-time Employment Decision*, a Full Bench determined that the Award would be varied to extend to casual employees an entitlement to overtime penalty rates: (emphasis added)[125]

> **[676]** For these reasons, we conclude that it is necessary to vary the awards to provide for overtime penalty rates to apply to casuals in order to meet the modern awards objective. In reaching this conclusion, we have taken into account all the matters specified in s.134(1), but we have placed particular weight on s.134(1)(da)(i), and we have also considered the effect of casual overtime rates on employment costs and the operation of businesses generally pursuant to s.134(1)(f). Each award should provide that casual employees should receive the same overtime penalty rates as full-time and part-time employees performed in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle. In respect of daily hours, the position should be as follows:
>
> (1) In the Retail Award, overtime penalty rates hours should apply to hours worked outside the span of hours for each day specified in clause 27.2(a), or for hours worked by in excess of 9 hours per day, provided that one day per week a casual employee may work 11 hours without attracting overtime penalty rates (consistent with clause 27.3).

[125] [2017] FWCFB 3541 at [676].

(2) In the Fast Food Award, a casual employee should receive overtime penalty rates for hours worked in excess of 11 hours in a day, consistent with clause 25.3.

(3) In the Hair and Beauty Award, hours worked in excess of 10½ hours in a day should attract overtime penalty rates consistent with clause 28.3.

**[677]** In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not compound upon the casual hourly rate of pay.

238. The decision resulted in a Determination being issued on 12 December 2017 inserting into the HBI Award a new clause 31.2(b) in the following terms:

**(b)** Hours worked by casual employees:

**(i)** in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle;

**(ii)** in excess of 10 ½ hours per day;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).[126]

239. HABA understands, based on its involvement in the proceedings associated with the drafting of this provision, that the bracketed words "inclusive of the casual loading" contained in clause 31.2(b) are intended to clarify that that there is no separate casual loading payable, rather than to suggest that the 175% or 225% is to be calculated upon an amount that includes a casual loading. That is, no casual loading is separately payable in addition to these amounts and the rates do not compound upon a casual loading. Whilst this may not be completely apparent from the manner in which the clause is drafted, HABA understand that it was envisaged by the Commission that any dispute as to the wording of such matters is to be addressed in either the award stage proceedings or in the context of proceedings associated with the redrafting of the HBI Award in plain language.[127]

[126] PR598498

[127] [2017] FWCFB 6181 at [8].

240. The introduction of overtime penalties for casual employees is a significant development for the industry. While it is still too early to reliably identify the impact that the variation will have, it undoubtedly will increase costs for employers. In advancing this submission we acknowledge the following reasoning of the Full Bench in the *Casual and Part-time Employment Decision:*

> **[675]** We do not consider that a requirement for employers under the 3 awards to pay overtime penalty rates for casuals would result in the imposition of a significant costs burden upon them. Most casuals in the industries covered by the awards do not work full-time hours. Ms Limbrey's evidence concerning the McDonald's businesses, for example, showed that about 87% of their casual employees worked 20 hours or less per week.[128]

241. Notwithstanding such comments, we respectfully observe that the Full Bench did not have before it evidence that would properly establish working patterns of casual employees in the hair and beauty Industry. Regardless, even if it were accepted that most casuals in the industry did not work full-time hours, this does not preclude the possibility of some employers engaging casual employees to work on such a basis. Industry trends will be of little comfort to an individual employer that is adversely affected by such a change.

242. The additional costs that have been imposes upon employers through the introduction of overtime penalties for casuals is a factor that must be taken into consideration in assessing the impact of any change to penalty rates for casual employees. This is a factor that weighs in favour of the approach proposed by HABA. In the context of this review, individual award clause should not be reviewed in isolation of a consideration of the award's provisions as a whole.[129]

243. The introduction of this additional benefit to casual employees has the potential to partly ameliorate any reduction in earnings of a casual employees that may flow from a reduction in Sunday penalty rates, although, we accept that this will be dependent upon the individual circumstances at play.

244. Putting aside the issue of the application of overtime rates, the HBI Award more broadly is framed so that various strictures applicable to the engagement of full-time or permanent employees do not have application in the context of casual

[128] [2017] FWCFB 3541

[129] *CFMEU v Anglo-American Coal Pty Ltd* [2017] FCAFC 123 at 28.

employment. Most significantly, the relatively onerous provisions relating to rostering do not apply in the context of casual employment.[130]

245. It may be argued that such provisions are justifiable in circumstances where an employer is able to utilise casual employees on Sundays and public holidays without the application of such provisions and without the cost of any additional casual loading being payable on top of Sunday and public penalty rates. However, if a casual loading had to be paid in addition to such rates a reconsideration of such matters may be warranted. Of course, this argument applies with less force in circumstances where the penalty rates for all employees are being reduced and the rates for casuals are simple reduced by a smaller quantum.

246. Also relevant to the Full Bench's consideration is that a further outcome of the *Casual & Part-time employment Decision* is that the HBI Award will likely be varied to provide for casual conversion in the near future.[131] This will be another significant change for this industry. The terms of any such clause are not yet finalised. Nonetheless, suffice to say that casual employees to whom the Award applies will soon gain new rights to access permanent employment. This serves to address any concern that may be advanced about employers utilising casual employees for an extended period, in circumstances where this is not in accordance with the wishes of the employee, in order to avoid the restrictive elements of the Award.

**HABA's position in the alternative**

247. Notwithstanding the arguments advance above, it is acknowledged that the Full Bench is not bound to grant a remedy in the terms proposed by HABA.

248. If, contrary to HABA's submissions, the Full Bench considers that casual employees should receive a separate and additional loading in relation to work performed on Sundays or public holidays, this is an even greater imperative for there to be a reduction in the rates for full-time and part-time employees and in

[130] See clause 13.4 of the HBI Award.

[131] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541.

the penalty rate component of the remuneration of a casual employee for work on a public holiday.

249. That is, the rates for Sunday could be 175% (inclusive of a casual loading), while the rate for a casual rate for work on a public holiday could be retained at 250% (inclusive of a casual loading).

250. We do not propose to deal with this alternate proposition in any detail given neither the Commission or any party is proposing that an award provision introducing a separate casual loading on Sundays or public holidays is necessary, as contemplated by s.138, in the context of the hair and beauty industry.