



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Penalty Rates (AM2014/305)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE

MELBOURNE, 23 FEBRUARY 2017

4 yearly review of modern awards – penalty rates – hospitality and retail sectors

CONTENTS

Chapters	Page	Paragraph
1. Introduction	7	[1]
1.1 The Process		[16]
2. The Decision: An Overview	13	
2.1 The Legislative context and proposed changes in penalty rates		[34]
3. Legislative Framework	25	
3.1 Statutory constructions – general observations		[95]
3.2 The relevant statutory provisions		[101]
3.3 The Modern Awards Objective		[113]
3.4 The proposed ‘material change in circumstances’ test		[230]
3.5 Summary		[269]
4. Award Modernisation and the Transitional Review	61	
4.1 Overview		[271]
4.2 Award modernisation		[274]
4.3 Transitional Review 2012		[286]

Chapters	Page	Paragraph
5. Submissions overview	69	
5.1 Principal parties		[302]
5.2 <i>Productivity Commission Inquiry Report: Workplace Relations Framework</i>		[308]
5.3 Other submissions		[349]
6. Weekend work	93	
6.1 Overview of data and evidence		[424]
6.2 Expert evidence		[508]
6.3 Employment effects of changes to penalty rates		[611]
6.4 Summary		[689]
7. The Hospitality Sector		
7.1 Overview	143	[691]
7.1.1 Features of the hospitality sector		
7.1.2 Hospitality sector employees		
7.1.3 Summary		
7.2 <i>Hospitality Industry (General) Award 2010</i>	165	[745]
7.2.1 The claims		
7.2.2 Background to the <i>Hospitality Award</i>		
7.2.3 The Hospitality Industry		
7.2.4 The Evidence		
7.2.5 Consideration		
7.2.6 Conclusion		
7.3 <i>Registered and Licenced Clubs Award 2010</i>	205	[907]
7.3.1 The claims		
7.3.2 Background to the <i>Clubs Award</i>		
7.3.3 The Clubs Industry		
7.3.4 The Evidence		
7.3.5 Consideration		
7.3.6 Conclusion		
7.4 <i>Restaurant Industry Award 2010</i>	227	[1010]
7.4.1 The Claims		
7.4.2 The Cafes and restaurants industry		
7.4.3 Background to the <i>Restaurant Award</i>		
7.4.4 The Evidence		
7.4.5 Consideration		
7.4.6 Conclusion		
7.5 <i>Fast Food Industry Award 2010</i>	257	[1161]
7.5.1 The Claims		
7.5.2 Background to the <i>Fast Food Award</i>		
7.5.3 The Evidence		
7.5.4 The Fast Food industry		
7.5.5 Fast Food industry employees		
7.5.6 Consideration		
7.5.7 Conclusion		

Chapters	Page	Paragraph
8. The Retail Sector		
8.1 Overview	309	[1410]
8.1.1 Features of the Retail Sector		
8.1.2 Retail sector employees		
8.2 <i>General Retail Industry Award 2010</i>	332	[1466]
8.2.1 The claims		
8.2.2 Background to the <i>Retail Award</i>		
8.2.3 The Retail industry		
8.2.4 The Evidence		
8.2.5 Consideration		
8.2.6 Conclusion		
8.3 <i>Pharmacy Industry Award 2010</i>	384	[1721]
8.3.1 The claims		
8.3.2 Background to the <i>Pharmacy Award</i>		
8.3.3 The Pharmacy industry		
8.3.4 The Evidence		
8.3.5 Consideration		
8.3.6 Conclusion		
9. Public Holiday Penalty Rates		
9.1 Overview	423	[1893]
9.2 The claims	428	[1909]
9.3 Consideration		[1926]
9.4 Conclusion		[1947]
10. The Right to Refuse Work	441	[1982]
11. Transitional Arrangements	445	[1998]
12. Next Steps	453	[2030]
ATTACHMENTS		
Attachment A—List of witnesses	509	
Attachment B—Research reference list	516	
Attachment C—Comparison of penalty rates under key instruments against modern awards rates	526	
Attachment D—Terms of reference for Productivity Commission inquiry	535	
Attachment E—List of cases and additional references	537	
Attachment F—List of tables, figures and charts	543	

ABBREVIATIONS

AAWI	average annualised wage increases
ABI	Australian Business Industrial and the New South Wales Business Chamber
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AHA	Australian Hotels Association
AMSRS	Australian Market and Social Research Society
ANZSIC	Australian and New Zealand Standard Industrial Classification
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
ARA	Australian Retailers Association
ARS	Award Reliance Survey
ASR	Australian Survey Research Group Pty Ltd
AWRS	Australian Workplace Relations Study
Benchmarking Survey	restaurant and catering benchmarking survey conducted by RCI in 2014
CAI	Clubs Australia Industrial
<i>Clubs Award</i>	<i>Registered and Licensed Clubs Award 2010</i>
CoE	<i>Characteristics of Employment Survey</i>
Coffs Club Agreement	<i>Coffs Ex Services Memorial and Sporting Club Enterprise Agreement 2015 [AE415387]</i>
Commission ¹	Fair Work Commission
EA Survey	Survey by Elections Australia Pty Ltd of RCI Members
EEBTUM	<i>Employee Earnings, Benefits and Trade Unions Membership</i>
EEH	<i>Employee Earnings and Hours</i>
<i>Fast Food Award</i>	<i>Fast Food Industry Award 2010</i>
FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWO	Fair Work Ombudsman
FWO Wave 2 Report	National Hospitality Industry Campaign Restaurants, Café's and Catering (Wave 2)
FWO Wave 3 Report	National Hospitality Industry Campaign 2012–15 Takeaway Foods (Wave 3)
HERRC industries	hospitality, entertainment, retail, restaurants and cafes

HILDA	Household, Income and Labour Dynamics in Australia
<i>Hospitality Award</i>	<i>Hospitality Industry (General) Award 2010</i>
Hospitality Employers	Australian Hotels Association and the Accommodation Association of Australia
<i>Hospitality and Retail Awards</i>	<i>Hospitality, Restaurant, Retail, Fast Food and Pharmacy Awards</i> (see [1915])
IPART	NSW Independent Pricing and Regulatory Tribunal
Jetty survey	survey by Jetty Research
KPMG Clubs Report	<i>KPMG 'National Club Census 2011'</i>
MGA	Master Grocers Australia Limited
NES	National Employment Standards
NRA	National Retailers Association
PC Final Report	<i>Productivity Commission Inquiry Report: Workplace Relations Framework</i>
PGA	The Pharmacy Guild of Australia
<i>Pharmacy Award</i>	<i>Pharmacy Industry Award 2010</i>
QSR	Quick Service Restaurants
RCI	Restaurant & Catering Industrial
Request	Request by Minister for Employment and Workplace Relations to modernise awards in accordance with s.576C(1) of the WR Act
<i>Restaurant Award</i>	<i>Restaurant Industry Award 2010</i>
<i>Retail Award</i>	<i>General Retail Industry Award 2010</i>
Retail employers	Australian Retailers Association, National Retail Association and Master Grocers Association
Review	4 yearly review of modern awards
SDA	Shop, Distributive and Allied Employees Association
Taskforce Report	<i>Final Report of the Visitor Economy Taskforce: A Plan to Double Overnight Visitor Expenditure to NSW by 2020</i>
TPCA Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
Transitional Review	Transitional (or 2 year) review of modern awards under Item 6 of Schedule 5 to the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
<i>Victorian Shops Interim Award</i>	<i>Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000</i>
WAD	Workplace Agreements Database
WR Act	<i>Workplace Relations Act 1996</i>

1. Introduction

4 yearly review

[1] Section 156 of the *Fair Work Act 2009* (the FW Act) provides that the Fair Work Commission (the Commission) must conduct a review of all modern awards every four years (the Review).

[2] As detailed in a statement issued on 6 February 2014,² the Review consists of an Initial stage (dealing with jurisdictional issues), a Common issues stage and an Award stage (which would review all modern awards in four groups).³

[3] As part of the Review, various employer bodies have made application to vary penalty rate provisions in a number of modern awards. These applications have been heard together.

[4] In an Issues Paper dated 24 February 2014, the Commission indicated its preliminary view that proposals to vary penalty rates would not be dealt with as a common issue, but would be dealt with in the Award stage of the Review.⁴ This preliminary view was confirmed in a Statement and Directions issued on 17 March 2014 and it was noted that the penalty rates matter would be dealt with by a separately constituted Full Bench.⁵

[5] The modern awards subject to claims are:

Award title	Award code	Matter No.
<i>Fast Food Industry Award 2010</i>	MA000003	AM2014/267
<i>General Retail Industry Award 2010</i>	MA000004	AM2014/270
<i>Hospitality Industry (General) Award 2010</i>	MA000009	AM2014/272
<i>Pharmacy Industry Award 2010</i>	MA000012	AM2014/209
<i>Registered and Licensed Clubs Award 2010</i>	MA000058	AM2014/283
<i>Restaurant Industry Award 2010</i>	MA000119	AM2014/284

[6] This decision deals with those claims.

[7] Table 1 below sets out claims employer parties have made to reduce weekend penalty rates in respect of each award that is the subject of this decision. Table 1 sets out the current penalty rates for work performed on a Saturday and Sunday in each award, and the proposed change for each award is highlighted in red text.

**Table 1
Weekend Penalty Rates**

	<i>Full-time</i>		<i>Part-time</i>		<i>Casual (inclusive of casual loading)</i>	
	<i>% of permanent base rate</i>		<i>% of permanent base rate</i>		<i>% of permanent base rate</i>	
	Sat	Sun	Sat	Sun	Sat	Sun
<i>Restaurant Industry Award 2010</i>	125	150	125	150	150	150 (175) ¹
<i>Restaurant Industry Award 2010</i> ² (proposed by RCI)	125	125	125	125	150	150
<i>Registered and Licensed Clubs Award 2010</i>	150	175	150	175	150	175
<i>Registered and Licensed Clubs Award 2010</i> (proposed by CAI)	125	150	125	150	150	150
<i>General Retail Industry Award 2010</i>	125	200	125	200	135	200
<i>General Retail Industry Award 2010</i> (proposed by the Retail Employers and ABI ³)	125	150	125	150	135	150
<i>Hospitality Industry (General) Award 2010</i>	125	175	125	175	150	175
<i>Hospitality Industry (General) Award 2010</i> (proposed by AHA and AAA)	125	150	125	150	150	150
<i>Fast Food Industry Award 2010</i>	125	150	125	150	150	175
<i>Fast Food Industry Award 2010</i> (proposed by RCI)	125	125	125	125	150	150
<i>Fast Food Industry Award 2010</i> (proposed by Ai Group)	125	125	125	125	150	150
<i>Pharmacy Industry Award 2010</i> ⁴	200, 125, 150, 175	200	200, 125, 150, 175	200	225, 150, 175, 200	225
<i>Pharmacy Industry Award 2010</i> (proposed by the Pharmacy Guild)	200, 125, 150	200, 150, 175	200, 125, 150	200, 150, 175	200, 125, 150	200, 150, 175

¹ Level 1–2 employees receive a penalty rate of 150% on Sundays, Level 3–6 casual employee receive 175%.

² ABI have made a claim in relation to the Restaurant Award to reduce the public holiday rate only.

³ The Retail employers are also seeking to reduce the penalty rate for shiftworkers on Sunday from 200% to 150%.

⁴ There are currently up to four penalty rates, based on the time of working

[8] The principal parties to the proceedings are identified in Chapter 5.1.

[9] In a statement on 8 September 2016 directions were issued in which we sought to clarify the status of the various claims before us in the penalty rates proceedings. A draft summary of the claims was issued along with the statement, requesting parties' comments.

[10] Australian Business Industrial and the New South Wales Business Chamber (ABI) confirmed that the variations to the *Hair and Beauty Industry Award 2010* which had been proposed by ABI and the Hair and Beauty Australia Industry Association, were no longer pressed. Correspondence was also received from Restaurant & Catering Industrial (RCI) confirming that its claim in respect of clauses 34.4(c) and 34.4(d) of the *Restaurant Industry Award 2010* was no longer pressed.

[11] No correspondence was received from other parties in relation to the draft summary.

[12] A finalised version of the summary was republished as a statement on 12 October 2016.⁶

[13] In addition to the claims set out in Table 1 above, a number of other claims have been made. These claims generally relate to the public holidays clause, for example the Hospitality Employers (the Australian Hotels Association and the Accommodation Association of Australia) seek to introduce a two-tiered regime into the *Hospitality Award* in respect of public holiday penalty rates under which higher penalty rates are prescribed for work performed on the public holidays specified under s.115(1) of the FW Act. Other claims seek to reduce the existing penalties paid for work on public holidays. We set out all these claims in more detail in Chapter 9. Claims have also been made seeking changes to the early/late night work penalties in a number of the awards.

[14] We deal with each claim in detail later in this decision.

[15] As noted in the Statement issued 17 December 2014, further proposals to alter penalty rates in other modern awards will be dealt with on an award-by-award basis in the award stage of the Review.⁷

1.1. The Process

[16] After a consultation process, a consensus emerged among interested parties that the modern awards and issues in relation to penalty rates would be dealt with jointly but sequenced into three 'groups', as follows:

(i) **Common evidence**—evidence relevant to the consideration of claims in all awards and industry sectors.

(ii) **Hospitality group**—includes the following awards:

Amusement, Events and Recreation Award 2010
Hospitality Industry (General) Award 2010
Registered and Licensed Clubs Award 2010
Restaurant Industry Award 2010

(iii) Retail group—includes the following awards:

Dry Cleaning and Laundry Industry Award 2010

Fast Food Industry Award 2010

General Retail Industry Award 2010

Hair and Beauty Industry Award 2010

Pharmacy Industry Award 2010

[17] Applications to vary the *Amusement, Events and Recreation Award 2010*, *Dry Cleaning and Laundry Industry Award 2010* and *Hair and Beauty Industry Award 2010* were withdrawn by the parties at various points in the proceedings.⁸

[18] A number of conferences were held and various procedural Statements issued by the Commission dealing with a range of programming and scheduling matters. There was general agreement that ‘common evidence’ would be heard first and separate to the particular evidence relating to the Hospitality group and the Retail group, followed by a submission process.

[19] Common evidence is evidence that is relevant to the consideration of claims in all of the relevant awards and industry sectors, and would generally be provided by an expert. Such evidence could include government reports and statistical or social commentary material. Award or industry-specific evidence would be presented during the Hospitality and Retail group stages.

[20] Final directions and a hearing timetable were issued in a Statement on 3 March 2015.⁹ The directions set out the process for the filing of evidence (including witness statements from expert witnesses and lay witnesses across the three streams), objections to any evidence, submissions, proposed findings and survey material.

[21] The directions and timetable were revised on 7 August 2015,¹⁰ after a number of parties sought variations to the 3 March 2015 directions.

[22] Parties were advised that issues in relation to the penalty rate payable on a public holiday in the awards referred to in paragraph [5] of this decision were to be dealt with during these proceedings, and not as part of the common issue public holiday proceedings.¹¹

[23] The Commission heard evidence on 8–25 September, 1 October, 12–28 October, 4–6 November, 15–16 and 21 December 2015. Evidence was given by 143 lay and expert witnesses of whom 128 were required for cross-examination. Witnesses included employers and employees from the relevant industry sectors, appearing either in person or from around Australia (including regional locations) via videolink. The expert evidence included academics with expertise in economics and workplace relations. A complete list of witnesses is attached to this decision at [Attachment A](#).

[24] A number of Mentions have been held concurrently while evidence is being heard, dealing with scheduling of witnesses, objections to evidence (both expert and lay), legal professional privilege claims and applications for confidentiality orders. As part of these

proceedings, the Commission has issued 38 Orders for the production of documents, and eight confidentiality orders.

[25] In total there have been 39 days of hearings and an additional 15 mentions and conferences.

[26] The dates for filing final submissions were revised following requests from the parties, and final hearings in the matter were held from 11–15 April 2016 and 28 September 2016. The final written submission was received on 4 February 2017.

[27] In addition to material received from parties, the Commission has published its own research material. Three reports have been prepared and published by the Workplace and Economic Research Section of the Commission to assist parties with their submissions in the matter:

- (i) Industry profile – Accommodation and food services
- (ii) Industry profile – Retail trade
- (iii) Changing work patterns

[28] These reports have been updated and republished a number of times to take into account new data. The most recent update to all three reports was on Friday 20 January 2017 to take into account the following:

- Australian Bureau of Statistics (ABS) Employee Earnings and Hours, May 2016; and
- Household, Income and Labour Dynamics in Australia (HILDA) survey, 2015.

[29] A Research Reference List was published on the Commission’s website on 15 January 2016 containing references that had been cited in the substantive evidence of expert witnesses and the submissions of the parties. Additional publications identified by staff of the Commission that may be of relevance were also included in the list. Interested persons were given an opportunity to comment on the list¹². The Research Reference List is contained in [Attachment B](#).

[30] The conduct of the Review has been open and transparent, in accordance with s.577 of the FW Act. The Commission’s website has been used extensively to provide information to any interested person in order to facilitate broad participation in the Review. Interested persons were encouraged to subscribe to the dedicated penalty rates subscription notification service to keep them informed about the penalty rates matter.

[31] On 15 January 2016¹³, revised directions were issued directing that:

‘Any interested person who is not a party to the proceedings may put forward a position (and file material in support of their position) in relation to varying the penalty rate provisions in the above awards by no later than 4.00pm Wednesday 17 February 2016.’

[32] This direction was publicly advertised in major newspapers nationally on 20 January 2016.¹⁴ Some 5845 public contributions from individual employees and employers were received and published on the Commission’s website¹⁵ and 55 additional confidential

contributions were forwarded to the Full Bench and provided to the principal parties, but not published.

[33] Throughout the process and in addition to the 5845 public contributions, 36 submissions have been received from organisations who are not principal parties to the proceedings. These organisations included Members of Parliament and State governments, unions, student organisations, community groups, small businesses, churches and industry groups. Of these submissions 14 supported a reduction to the current penalty rates regime and 22 did not support any change to the current system. These submissions are addressed in Chapter 5.3.

2. The Decision: An Overview

2.1 The Legislative context and proposed changes in penalty rates

[34] Section 156 of the FW Act provides that the Commission must conduct a 4 yearly review of modern awards (the Review). Subsection 156(2) deals with what must be done in the Review and provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards.

[35] This decision deals with the review of the weekend and public holiday penalty rates and some related matters, in a number of Hospitality and Retail awards.

[36] The Commission's task in the Review is to decide whether a particular modern award achieves the modern awards objective. If it does not then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138).

[37] The modern awards objective in s.134(1) of the FW Act is central to the Review. The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards (NES) provide a *fair* and *relevant* minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. 'Relevant' is intended to convey that a modern award should be suited to contemporary circumstances. We deal with the relevant legislative provisions in more detail in Chapter 3.

[38] Historically, industrial tribunals have expressed the rationale for penalty rates in terms of both the need to compensate employees for working outside 'normal hours' (the compensatory element) and to deter employers from scheduling work outside 'normal' hours (the deterrence element).¹⁶

[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.

[40] We note that the Productivity Commission has expressed a different view in respect of public holiday penalty rates:

'... by definition, genuine public holidays are intended to serve a special community role and, as such, there are strong grounds to limit the expectation that they are for working. In that sense, the original concept of deterrence continues to have relevance'.¹⁷

[41] We accept that public holidays, by their nature, are intended 'to serve a special community role' and that the expectation (and practice) is that the vast majority of employees

do not work on public holidays. But these features do not support the adoption of deterrence as an objective in setting public holiday penalty rates. However, these features are relevant to determining the amount of compensation to be provided to employees who work on public holidays, given the additional disutility associated with working on a day when the vast majority of other employees are enjoying a day of leisure.

[42] A central contention advanced by the Shop, Distributive and Allied Employees Association (SDA) and United Voice in these proceedings is that before the Commission can vary a modern award in the Review, it must first be satisfied that since the making of the modern award there has been a material change in circumstances pertaining to the operation or effect of the award such that the modern award is no longer meeting the modern awards objective (the ‘material change in circumstances test’). If adopted the proposed test would require the proponent of a variation to establish that there has been a material change in circumstances since the modern award was made. The proposed ‘material change in circumstances’ test seeks to place a constraint on the discretion conferred by s.156 which is not warranted by the terms of this section or the relevant statutory context and purpose. There is no such express or implied requirement in s.156.

[43] We reject the proposition advanced by the Unions. The adoption of the proposed ‘material change in circumstances test’ would obfuscate the Commission’s primary task in the Review, determining whether the modern award achieves the modern awards objective. To adopt such a test would add words into s.156 in circumstances where it is not necessary to do so in order to achieve the legislative purpose. For completeness we record our agreement with the point advanced by the Australian Industry Group (Ai Group) in its submission in reply¹⁸ that the variation of a modern award may be warranted if it was established that there was a ‘material change in circumstances’ since the modern award was made, but the establishment of such a change is not a condition precedent to the variation of a modern award in the Review.

[44] As mentioned, the modern awards objective is central to the Review. In determining whether an award achieves the modern awards objective the Commission must take into account a range of considerations, including those set out in s.134(1)(da). Relevantly, s.134(1)(da)(iii) requires that we take into account the ‘need to provide additional remuneration’ for ‘employees working on weekends or public holidays’.

[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.

[46] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.

[47] Section 134(1)(da) speaks of the ‘need to provide additional remuneration’ for employees performing work in the circumstances mentioned. We note that the minority in the *Restaurants 2014 Penalty Rates decision*¹⁹ made the following observation about s.134(1)(da): ‘...the objective requires additional remuneration for working on weekends’.²⁰

[48] To the extent that the above passage suggests that s.134(1)(da) ‘requires additional remuneration for working on weekends’, we respectfully disagree. We acknowledge that the provision speaks of ‘the need for additional remuneration’ and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression must be construed in context and the context tells against the proposition that s.134(1)(da) requires that each modern award must provide additional remuneration for working in the identified circumstances.

[49] The various employer parties have sought reductions in Sunday and public holiday penalty rates. These claims are summarised in Tables 1 and 74. There were also some claims to vary the penalty payments for early/late night work in some awards.

[50] Generally speaking, no changes are sought in relation to Saturday penalty rates.²¹

[51] We have reviewed the Saturday penalty rates in 4 of the 6 modern awards before us and (subject to the observations at [65] and [66]) we are satisfied that the existing Saturday penalty rates achieve the modern awards objective – they provide a fair and relevant minimum safety net. The review of Saturday penalty rates in the *Clubs* and *Pharmacy Awards* is to be the subject of further proceedings (see [994]–[1009] and [1872]–[1892]).

[52] Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

[53] We have decided that the existing Sunday penalty rates in 4 of the modern awards before us (the *Hospitality*, *Fast Food*, *Retail* and *Pharmacy Awards*) do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.

[54] Except in the *Fast Food Award* (for the reasons set out at [1394]–[1397]), we do not propose to reduce the Sunday penalty rates to the same level as the Saturday penalty rates. As we mention shortly, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past. In this regard we also note that it is implicit in the claims advanced by most of the employer interests that they accept the proposition that the disutility associated with Sunday work is *higher* than the disutility associated with Saturday work. If this was not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same, but they did not.

[55] The reductions in Sunday penalty rates we have determined are set out below:

Award	Sunday Penalty Rate
<i>Hospitality Award</i>	
full-time and part-time employees: (no change for casuals)	175 per cent → 150 per cent
<i>Fast Food Award</i>	
(Level 1 employees only)	
Full-time and part-time employees:	150 per cent → 125 per cent
Casual employees:	175 per cent → 150 per cent
<i>Retail Award</i>	
Full-time and part-time employees:	200 per cent → 150 per cent
Casual employees:	200 per cent → 175 per cent
<i>Pharmacy Award</i>	
(7.00 am – 9.00 pm only)	
Full-time and part-time employees:	200 per cent → 150 per cent
Casual employees:	225 per cent → 175 per cent

[56] In relation to the *Fast Food Industry Award 2010*, for reasons associated with the preferences of the relevant employees and the limited impact of Sunday work upon those employees (see Chapter 7.5), we have decided to reduce the Sunday penalty rate, for level 1 employees from 150 per cent to 125 per cent (for full-time and part-time employees) and from 175 per cent to 150 per cent (for casual employees). We do not propose to change the Sunday penalty rate for Level 2 and 3 employees.

[57] The differential treatment of Level 1 versus Level 2 and 3 employees is on the basis that Level 2 and 3 employees experience a higher level of disutility associated with Sunday work than that experienced by level 1 employees. The evidence supports the retention of the current Sunday penalty rate for level 2 and 3 employees. In this context we note that level 2 and 3 employees are, generally speaking, regarded as ‘career’ employees with the major chains whereas casual and part-time crew members (level 1 employees) are usually regarded as ‘non-career’ employees.

[58] We also note that in addition to the changes to Sunday penalty rates we have decided to vary some of the penalty provisions in relation to early/late night work in the *Restaurants* and *Fast Food Awards* (see [1126]–[1137], [1154], [1324]–[1334] and [1391])

[59] As to the *Pharmacy Industry Award 2010*, at this stage, we are not persuaded to make the changes proposed to the loadings for work before 7.00 am and between 9.00 pm and midnight, on weekends and Monday to Friday. We deal with the next steps in the review of this award in Chapter 12.

[60] On the material presently before us we are not satisfied that the variations proposed to the *Registered and Licensed Clubs Award 2010* and the *Restaurant Industry Award 2010* are necessary to ensure that these awards achieve the modern awards objective. In short, the employer organisations concerned have not established a merit case sufficient to warrant the granting of their claims. We deal with the deficiencies in the cases put and the next steps in relation to the review of these 2 awards in Chapter 11 at [2044]–[2050].

[61] We have also decided to reduce the public holiday penalty rates in the *Hospitality and Retail Awards* (except for the *Clubs Award*, for the reasons set out at [1915]).

[62] We also conclude that the two-tiered approach to public holiday penalty rates advanced by the Hospitality Employers lacks merit. The distinction sought to be drawn between those public holidays expressly mentioned in s.115(1)(a) and the other days declared or prescribed by or under a law of a State or Territory as a public holiday (s.115(1)(b)), is illusory. In that regard we concur with the views expressed in the *1994 Public Holidays Test Case decisions* and the *Modern Awards Review 2012 – Public Holidays decision*, that, in essence, the number and standardisation of public holidays across Australia is primarily an issue for the Commonwealth, State and Territory legislatures.

[63] The effect of our decision in respect of public holiday penalty rates is shown (in marked up format) in Table 2 below.

Table 2
Proposed public holiday penalty rates in the Hospitality and Retail awards

Award title	Public holiday penalty rates (%)	
	Full-time & part-time	Casual
<i>Hospitality Award</i> (cl. 32)	250 225	275 250
<i>Restaurant Award</i> (cl. 34)	250 225	250
<i>Clubs Award</i> (cl. 29)	250	250
<i>Retail Award</i> (cl. 29)	250 225	275/250 250
<i>Fast Food Award</i> (cl. 30)	250 225	275 250
<i>Pharmacy Award</i> (cl. 31)	250 225	275 250

[64] The changes we propose to make to Sunday and public holiday penalty rates will result in greater consistency in penalty rate settings in the *Hospitality and Retail Awards*.

[65] In each of the Sunday and public holiday penalty rates we have fixed we have adopted what the *Productivity Commission Inquiry Report: Workplace Relations Framework* (PC Final Report) describes as the ‘default approach’ to setting the appropriate rate for casual employees (see [333]–[338]). Under this approach the rate of pay for casual employees is always 25 percentage points above the rate of pay for non-casual employees. Hence if the Sunday penalty rate for full-time and part-time employees is 150 per cent, the Sunday rate for casuals will be $150 + 25 = 175$ per cent.

[66] We note that the approach we have adopted may have implications for the rate paid to casuals for Saturday work under the *Retail Award*. We refer to that issue at [1716]–[1720]. It may also result in a shift from casual to part-time employment in respect of those employed in the modern awards which we propose to vary.

[67] The decision to reduce Sunday and public holiday penalty rates in these awards is based on our conclusions with respect to the common evidence (see Chapter 6) and our assessment of the evidence in relation to each of these particular awards (see Chapters 7.2, 7.5, 8.2 and 8.3).

[68] In Chapter 6 we consider the ‘common evidence’ adduced in these proceedings and deal with the incidence and effects of weekend work and the employment effects of reducing penalty rates. The following propositions emerge from the common evidence before us:

1. There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.
2. We agree with the assessment in the PC Final Report that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise effect. Any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects.

[69] As to proposition 1 above, we are aware that our conclusion is different to that in the PC Final Report. However, in the proceedings before us we have had the opportunity to consider evidence not available to the Productivity Commission, such as the Pezzullo Weekend Work Report, the Rose Report and the Sands Report in addition to a substantial amount of lay employer and employee evidence. None of the above reports concluded that the activities conducted on, and attitudes towards, Saturdays and Sundays were identical.

[70] As to proposition 2, the Hospitality and Retail Employers’ lay evidence supports the proposition that the current level of Sunday penalty rates has led employers to reduce labour costs associated with Sunday trading by imposing a number of operational limitations, such as:

- restricting trading hours;
- lowering staff levels; and
- restrictions on the type and range of services provided.

[71] The Hospitality and Retail Employers’ lay evidence also supports the proposition that a reduction in penalty rates is likely to lead to:

- increased trading hours on Sundays and public holidays;
- a reduction in the hours worked by some owner operations;
- an increase in the level and range of services offered on Sundays and public holidays; and

- an increase in overall hours worked.

[72] We do not suggest that these changes will apply uniformly across all hospitality and retail businesses. The actual impact of a reduction in Sunday penalty rates will depend on the circumstances applying to individual businesses.

[73] As to public holiday penalty rates, we note that 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. 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).

[74] We also note that the disutility in relation to public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on such days, on reasonable grounds. Contrary to ABI's submission, we would not characterise s.114(3) of the FW Act as making public holiday work 'voluntary' (it is a limited right to refuse to work, on reasonable grounds), but it is still a significant contextual matter which was not taken into account when the existing 250 per cent penalty was set.

[75] In addition, public holiday work is more common in the Hospitality and Retail sectors and, on the evidence before us, reducing the public holiday penalty rate will increase employment and have a number of positive effects on business.

[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.

'... 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.'²² (footnotes omitted)

[78] The data on weekend work shows that workers in the Retail and Hospitality sectors are more likely to work on weekends than workers in other industries. As shown in Table 3A below (see [457]).

Table 3A²³
Proportion of employees who work on weekends, by industry

Industry	2002–2008	2009–2016
Accommodation and food services	58.6	60.8
Retail trade	44.4	47.6
All employees	25.9	27.5

[79] The sections that provide an overview of the Retail and Hospitality sectors (see Chapters 7.1 and 8.1) also highlight some differences between these two sectors and other industries. Both industries are much more likely to comprise small businesses (employing fewer than 20 persons) than across all industries and fewer businesses in both the Hospitality and Retail sectors operate on weekdays only, with a greater proportion working 6 or 7 days a week (an average of 6.2 to 6.7 days a week) than businesses across all industries (an average of 5.8 days) as shown in Table 3B below.

Table 3B²⁴
Structure and operations, 2014

	Retail trade (%)	Accommodation and food services (%)	All industries (%)
<i>Operating days</i>			
Weekdays only	18.9	8.6	48.8
Weekdays and Saturday	37.1	5.3	17.5
Some weekdays and weekend	2.8	5.4	2.3
Operating 7 days	40.6	80.5	31.1
Other	np	np	0.4
	100.0	100.0	100.0
Average number of operating days per week	6.2	6.7	5.8
Average years of operation under current ownership	18.9	15.6	18.5

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

[80] Data on the characteristics of employees in these industries presented in Chapters 7.1 and 8.1 show that they are more likely to be female, younger (under 25 years), work part-time hours, be employed on a casual basis and be award reliant than employees in other industries. Employees in these industries are also more likely to be low paid.

[81] Given the distinguishing characteristics of the Hospitality and Retail sectors, the decisions we have made in respect of the *Hospitality and Retail Awards* provide no warrant for the variation of penalty rates in other modern awards. Each case must be determined on its merits. We note the views expressed in the PC Final Report in this regard:

‘There is no case for common penalty rates across all industries. The Commission is not recommending a reduction in the Sunday penalty rates beyond HERRC. Regulated penalty rates as currently constructed for essential services and many other industries are justifiable. The original justifications have not altered materially: they align with working arrangements that often involve rotating shifts across the whole week, are not likely to reduce service availability meaningfully, are commensurate with the skills of the employees, and are unlikely to lead to job losses.’²⁵

[82] We deal with the implementation of our decision in Chapter 11: Transitional Arrangements.

[83] In the numerous submissions before us little attention was given to the implementation of any variations to Sunday penalty rates arising from these proceedings. One exception was in the PC Final Report which recommends that 12 months’ notice of any change be given, rather than an extended transition process involving staggered small changes to Sunday penalty rates. We also note that some submissions also alluded to the need to protect the take home pay of workers affected by any changes to penalty rates.

[84] A substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates we have determined are likely to reduce the earnings of those employees who currently work on Sundays. As observed in the *Productivity Commission Inquiry Report: Workplace Relations Framework* (PC Final Report), in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers’ hours on Sundays would rise sufficiently to offset the income effects of penalty rate reductions.

[85] The evidence of the SDA and United Voice lay witnesses puts a human face on the data and provides an eloquent individual perspective on the impact of the award variations. Many of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress. The immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. There is plainly a need for appropriate transitional arrangements to mitigate such hardship.

[86] We have concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays. We have not reached a concluded view as to the form of those transitional arrangements and we propose to seek submissions from interested parties as to that issue. For the assistance of those parties who wish to make submissions as to the form of the transitional arrangements we have expressed the following *provisional* views:

- (i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, as it would impose an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees at the end of the 12 month period.
- (ii) If ‘take home pay orders’ are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any

general ‘red circling’ term which would preserve the current Sunday penalty rates for all existing employees.

(iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.

(iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of ‘take home pay orders’ and the circumstances applying to each modern award.

[87] The changes to public holiday penalty rates will take effect on 1 July 2017.

[88] We deal with the next steps in these proceedings in Chapter 12. The matters addressed include:

- transitional arrangements having regard to the impact of the Sunday penalty reductions for some employees;
- the potential further review of the *Clubs Award*, the *Restaurants Award* and other retail modern awards;
- the terminology of penalty rates; and
- the potential for loaded rates in retail modern awards.

[89] As to the last matter, a ‘loaded rate’ in this context refers to a rate which is higher than the applicable minimum hourly rate specified in the modern award and is paid for all hours worked instead of certain penalty rates (such as the penalty rates for Saturday and Sunday work).

[90] It seems to us that, subject to appropriate safeguards, schedules of ‘loaded rates’ may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g). Schedules of ‘loaded rates’ would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.

[91] We also note that the Fair Work Ombudsman (FWO) has reported significant levels of non-compliance in the Hospitality and Retail awards which are before us. It appears from the various FWO reports we mention in Chapter 12 that some businesses in the Hospitality and Retail sectors already provide ‘flat’ (or loaded) rates of pay, in order to simplify their payroll process, but they underestimate the additional premium (or loading) required in order to compensate employees for the loss of penalty rates, resulting in non-compliance. The insertion of ‘loaded rates’ schedules in these modern awards may have a positive effect on award compliance.

[92] In raising this matter, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. It has to be borne in mind that any loaded

rate will remain part of the safety net and will have to be fair and relevant. Determining an appropriate loaded rate would not be straightforward. For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday.

[93] Any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees. Accordingly, there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries so that appropriate rates can be developed.

[94] We envisage that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.

3. The Legislative Framework

3.1 Statutory construction – general observations

[95] This part of our decision deals with the legislative provisions relevant to these proceedings. We begin by making some general observations about the task of statutory construction.

[96] The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy.²⁶ Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.²⁷

[97] Each provision of the FW Act must be read in context by reference to the language of the FW Act as a whole.²⁸ The relevant legislative context may operate to limit a word or expression of wide possible connotation.²⁹ The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:

‘... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.’³⁰

[98] The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.³¹

[99] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*³² (*Alcan*) the High Court described the task of legislative interpretation in the following terms:

‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.’

[100] We now turn to the specific provisions relevant to these proceedings.

3.2 The relevant statutory provisions

[101] Section 156 of the FW Act provides that the Commission must conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014. Subsection 156(2) deals with what must be done in the Review and provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards.

[102] The requirement in s.156(5) to review each modern award ‘in its own right’, is intended to ensure that the Review is conducted ‘by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations’.³³ However, while the review of each modern award must focus on the particular terms and operation of the particular award, this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms.³⁴ In these proceedings we are considering whether the relevant modern awards achieve the modern awards objective in relation to the penalty payments they prescribe for working at certain times.

[103] Subsection 156(5) provides that in the Review each modern award is reviewed in its own right, however, this does not prevent the Commission from reviewing 2 or more modern awards at the same time.

[104] The Commission must be constituted by a Full Bench to conduct the Review and to make determinations and modern awards in the Review (see ss.616(1), (2) and (3) of the FW Act). Section 582 of the FW Act provides that the President may give directions about the conduct of the Review.

[105] In addition to s.156 a range of other provisions in the FW Act are relevant to the Review: s.3 (objects of the Act); s.55 (interaction with the NES); Part 2-2 (the NES); s.134 (the modern awards objective); s.135 (special provisions relating to modern award minimum wages); Divisions 3 (terms of modern awards) and 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions and exercise of powers of the Commission); s.578 (matters the Commission must take into account in performing functions and exercising powers); and Division 3 of Part 5-1 (conduct of matters before the Commission).

[106] The general provisions relating to the performance of the Commission’s functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:

‘FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that FWC performs its functions and exercises its powers efficiently etc. (see section 581).’

[107] Section 578 states:

‘In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and

- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

[108] As stated in s.578(a), in performing functions and exercising powers under a part of the FW Act (including the Review function under Part 2-3 Modern Awards) the Commission must take into account the objects of the FW Act and any particular objects of the relevant part. The object of Part 2-3 is expressed in s.134, the modern awards objective. The object of the FW Act is set out in s.3, as follows:

‘3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.'

[109] In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).

[110] The Review is to be distinguished from *inter partes* proceedings. Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must

be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.³⁵ The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.

[111] The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*.³⁶ We adopt and apply that decision and in particular the following propositions:

- (i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.
- (ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award.
- (iii) The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made.
- (iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.

[112] We now turn to the relevance of the 'modern awards objective' to the Review.

3.3 The modern awards objective

(i) General observations

[113] The modern awards objective applies to the performance or exercise of the Commission's modern award powers, which are defined to include the Commission's functions or powers under Part 2-3 of the FW Act. The Review function is set out in s.156, which is in Part 2-3 and so will involve the performance or exercise of the Commission's modern award powers. It follows that the modern awards objective applies to the Review.

[114] The modern awards objective is set out in s.134 of the FW Act. It states:

'134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and

- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:
 - (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).⁷

[115] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.³⁷ The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process.³⁸ No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[116] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant

minimum safety net of terms and conditions. As to the proper construction of the expression ‘a fair and relevant minimum safety net of terms and conditions’ we would make three observations.

[117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In *Shop Distributive and Allied Employees Association v \$2 and Under (No. 2)*³⁹ Giudice J considered the meaning of the expression ‘a safety net of fair minimum wages and conditions of employment’ in s.88B(2) of the *Workplace Relations Act 1996* (Cth) (the WR Act). That section read as follows:

‘88B Performance of Commission’s functions under this Part ...

(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.’

[118] As to the assessment of fairness in this context his Honour said:

‘In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest.’⁴⁰

[119] While made in a different (albeit similar) statutory context the above observation is apposite to our consideration of what constitutes a ‘fair ... safety net’ in giving effect to the modern awards objective. We would also endorse the following observation by the Full Bench in the *Equal Remuneration Decision 2015*:

‘We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for ‘fair minimum wages’ is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.’⁴¹

[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 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] Finally, as to the expression ‘minimum safety net of terms and conditions’, the conception of awards as ‘safety net’ instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the 1993 Reform Act). The *August 1994 Review of Wage Fixing Principles decision*⁴² summarised the changes made to the legislative framework by the 1993 Reform Act. In particular, the Commission noted that:

‘The Act now clearly distinguishes between the arbitrated award safety net and the bargaining stream. It intends that the actual wages and conditions of employment of employees will be increasingly determined through bargaining at the workplace or enterprise.

Under the Act the Commission, while having proper regard to the interests of the parties and the wider community, is now required to ensure, so far as possible, that the award system provides for ‘secure, relevant and consistent wages and conditions of employment’ (s 90AA(2)) so that it is an effective safety net ‘underpinning direct bargaining’ (s 88A(b)).’

[122] Relevantly for present purposes, the 1993 Reform Act inserted s.88A into the *Industrial Relations Act 1988* (Cth) (the IR Act). Section 88A set out the objects to Part VI – Dispute Resolution and Settlement, in the following terms:

‘88A The objects of this Part are to ensure that:

- (a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and
- (b) awards act as a safety net of fair minimum wages and conditions of employment; and
- (c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and
- (d) the Commission’s functions and powers in relation to making and varying awards are performed and exercised in a way that encourages the making of agreements between employers and employees at the workplace or enterprise level.’ (emphasis added)

[123] The protective nature of the award safety net at that time is apparent from the language used in s.88A(a) and (b).⁴³

[124] The *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act) renamed the IR Act the WR Act and, among other things, restricted the range of matters that would be dealt with in federal awards (see s.89A WR Act) and repealed what had been Part VI C of the IR Act, which dealt with ‘Paid Rates Awards’. The objects of Part VI were amended but the characterisation of awards as a ‘safety net’ which ‘protected’ wages and conditions of employment, remained. It is not necessary to canvass the various legislative amendments from the WROLA Act to the FW Act.

[125] The objects of the FW Act are set out in s.3 (see [108]), relevantly s.3(b) speaks of:

‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and minimum wage orders.’

[126] It is apparent from the scheme of the FW Act that modern awards and the NES ‘underpin’ enterprise agreements, through the operation of s.55 and the ‘better off overall test’ (s.186(2)(d) and s.193).⁴⁴ Under s.57 a modern award does not apply to the extent that an enterprise agreement applies to a particular employment relationship, even where the award deals with matters not covered in the agreement.⁴⁵

[127] In their reply submission the Australian Chamber of Commerce and Industry, Australian Business Industrial and the New South Wales Business Chamber (the joint employer reply submission) submit that the reference to a ‘minimum safety net’ in s.134(1) means the ‘least ... possible’ to create a ‘minimum floor’:

‘The notion of a ‘safety’ ‘net’ is effectively the creation of a floor ensuring employees are ‘caught’ preventing them from being exposed to ‘hurt, injury, danger or risk’.

The addition of the term ‘minimum’ reinforces the level that this floor is calibrated to: namely, ‘... the least quantity or amount possible ...’

The creation of the minimum safety net by sections 134 and 284 of the FW Act illuminates what the phrase ‘only to the extent necessary’ in s 138 relates to.

That is, section 138 is dictating that the Commission may only include terms in a modern award to the extent necessary to create a minimum floor. Once this minimum floor is created, section 138 restrains the Commission from going any further irrespective of what historically would be called the ‘general industrial merits of the case’.⁴⁶

[128] The proposition advanced relies on dictionary definitions of *some* individual words within s.134(1). But the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be ‘fair and relevant’. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is ‘relative living standards and the needs of the low paid’ (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.

[129] We conclude our general observations about the modern awards objective by noting that the nature of modern awards under the FW Act is quite different from the awards made under previous legislative regimes.⁴⁷ In times past awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and legislative limits of the tribunal’s jurisdiction; the matters put in issue by the parties (i.e. the ‘ambit’ of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. An award generally only bound the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents. Modern awards are very different to awards of the past.

[130] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

[131] Nor are there named respondents to modern awards. Modern awards apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not ‘respondents’ to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for the making of a determination making, varying or revoking a modern award. Under previous legislative regimes the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.⁴⁸

[132] Under the FW Act modern awards form part of a minimum safety net which provides ‘fair, relevant and enforceable minimum terms and conditions’ of employment to national system employees. As such, modern awards, together with the NES and national minimum wage orders, provide a minimum set of terms and conditions that must be provided to the employees to whom a modern award applies. And, as we have mentioned, modern awards also underpin enterprise bargaining.

(ii) *Section 138 and the modern awards objective*

[133] Section 138 of the FW Act emphasises the importance of the modern awards objective in the following terms:

‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[134] To comply with s.138 the terms included in modern awards must be ‘necessary to achieve the modern awards objective’.

[135] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*⁴⁹ Tracey J considered the proper construction of the expression ‘the Commission is satisfied that making [a determination varying a modern award] ... is *necessary* to achieve the modern awards objective’, in s.157(1). His Honour held:

‘The statutory foundation for the exercise of FWA’s power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is “necessary” in order “to achieve the modern awards objective”. That objective is very broadly expressed: FWA must “provide a fair and relevant minimum safety net of terms and conditions” which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective ...

In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.⁵⁰

[136] The above observation – in particular the distinction between that which is ‘necessary’ and that which is merely desirable – is apposite to our consideration of s.138. Further, we agree with the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable. It seems to us that what is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.⁵¹

[137] The SDA and United Voice submit that the terms of s.138 require that the Commission be satisfied that the *variations proposed* by the various employer parties are *necessary* to achieve the modern awards objective.⁵² The submission put focuses attention on the particular variation proposed, rather than on the terms of the modern award, as varied.

[138] We do not think the Unions’ contention is correct. In the *Preliminary Jurisdictional Issues decision* the Full Bench considered what had to be demonstrated by the proponent of an award variation and concluded that:

‘To comply with s138 the formulation of terms which must be included in modern awards or terms which are permitted to be included in modern awards must be terms ‘necessary to achieve the modern awards objective’... In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.’⁵³

[139] The above proposition is supported by the terms of s.138 and the legislative context. Section 138 requires that ‘[A] modern award may include terms ... only to the extent necessary to achieve the modern awards objective’. The section focuses attention on the terms of a modern award, rather than on the terms of a proposed variation. Further, as we have mentioned, the jurisdictional basis for the Review is s.156. Section 157 deals with the variation of modern awards *outside* the system of 4 yearly reviews. Section 157(1) states, relevantly:

‘The FWC may:

(a) Make a determination varying a modern award ... if the FWC is satisfied that making the determination ... outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.’ (emphasis added)

[140] Section 157(1) makes express reference to the Commission being satisfied that the ‘determination varying a modern award’ is necessary to achieve the modern awards objective. There is no such express reference in either s.138 or s.156. The difference in the language used in ss.138, 156 and 157 tells against the proposition advanced by the SDA and United Voice.

[141] Contrary to the Unions’ contention the Commission’s task in the Review is to make a finding as to whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied. The approach outlined is supported by the terms of s.138 itself, the legislative context and the judgement of the Full Court of the Federal Court in *National Retail Association v Fair Work Commission*.⁵⁴

[142] We now turn to the application of the modern awards objective to the issues raised in these proceedings.

(iii) *The modern awards objective and weekend penalty rates*

[143] Historically industrial tribunals have expressed the rationale for weekend penalty payments in terms of both the need to compensate employees for working outside ‘normal hours’ (the compensatory element) and to deter employers from scheduling work outside ‘normal’ hours (the deterrence element).⁵⁵ For example, in the *1947 Weekend Penalty Rates* case Drake-Brockman ACJ and Sugarman J made the following observation about the expression ‘penalty rate’:

‘Penalty rate’ is not a term of art. It is used by those skilled in industrial law in widely divergent meanings. Usually an award provides for an ordinary rate of remuneration, payable for the ordinary work of a standard period performed under normal conditions, and for additional amounts to be paid where work is done under special conditions of time, place or circumstance. In one sense the use of the term ‘penalty’ as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional payment as, *inter alia*, a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made. Most, if not all, of such requirements combine the element of compensation with that of deterrence.’⁵⁶

[144] Similarly, in 1950 a Full Bench of the NSW Industrial Commission described the rationale for weekend penalty rates in the following terms:

‘In our opinion additional rates for weekend work are given to compensate the employee for having to work on days which are not regular working days for all employees in industry. The aim is to compensate for disturbance of social and family life and the full opportunity of

religious observance, and in some cases to discourage employers working employees on non-regular working days.’⁵⁷

[145] More recently industrial tribunals have eschewed any reliance on the historical ‘deterrence element’ in setting appropriate loadings for working ordinary hours on a weekend. For example, in setting weekend penalty rates in the hospitality industry, in 1993, Commissioner Gay said:

‘The rate to apply in the hotel industry for weekend work should have no element designed to deter an employer from requiring work to be performed on Saturdays and Sundays and no punitive element designed to punish when such work is actually required to be performed.’⁵⁸

[146] Similarly, in fixing the rate for Sunday work in the Victorian retail sector, the majority (Watson SDP and Raffaelli C) in *Re Shop, Distributive and Allied Employees’ Association and \$2 and Under and Ors*⁵⁹ said:

‘In our view, in the context of the reality that retailing in Victoria is a seven-day a week industry... the Sunday ordinary time penalty... should be directed to the compensation for the disabilities upon employees and should not be directed to deterring the working of Sunday ordinary hours’.

[147] Further, in the *2012 Transitional Review – Penalty Rates decision* the Full Bench said:

‘Although described in the modern awards as penalty rates, they are in reality a loading which compensate for disabilities.’⁶⁰

[148] It is apparent from these more recent decisions that the deterrence element is no longer a relevant consideration in setting the rate of pay for working ordinary hours on a weekend. Indeed, as submitted by the Australian Hotels Association (AHA) and Accommodation Association of Australia (AAA) in these proceedings,⁶¹ it is difficult to reconcile the notion of deterrence with the purpose of the FW Act.

[149] The object of the FW Act is ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’, by the means specified in s.3(a) to (g). Deterring the working of ordinary hours on a weekend is not one of the specified means of achieving the object of the FW Act.

[150] Nor does the notion of deterrence sit conformably with the modern awards objective and the considerations the Commission is required to take into account in giving effect to that objective.

[151] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a *fair* and relevant minimum safety net of terms and conditions’. As we have mentioned, fairness in this context is to be assessed from the perspective of the employees *and* employers covered by the modern award in question. It is difficult to conceive of the circumstances in which setting a rate of pay for work at particular times or on particular days with the *objective* of deterring the scheduling of work at that time or on those days can be said to be fair to the employers covered by the relevant modern award.

[152] Nor is the notion of deterring the scheduling of work at particular times or on particular days expressly mentioned as a s.134 consideration. Indeed the matters mentioned in s.134(1)(a) to (h) appear to be inconsistent with the concept of deterrence. In particular, the ‘need to promote flexible modern work practices and the efficient and productive performance of work’ (s.134(1)(d)) appears antithetical to the idea of *detering* the performance of work at specified times.

[153] Further, s.134(1)(da)(ii) and (iii) refer specifically to employees working ‘unsocial ... hours’ and ‘working on weekends or public holidays’ and ‘the need to provide additional remuneration’ for employees in such circumstances. We deal later with the proper construction of s.134(1)(da), but it suffices for present purposes to observe that the provision is focused on the compensatory element of the historical rationale for penalty rates – there is no express reference in s.134(1)(da) to the notion of deterrence.

[154] We also note that the FW Act directly addresses the adverse consequences associated with working excessive hours by providing a right to refuse to work unreasonable hours. Section 62(1) provides:

‘(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

(a) for a full-time employee--38 hours; or

(b) for an employee who is not a full-time employee--the lesser of:

(i) 38 hours; and

(ii) the employee’s ordinary hours of work in a week.’

[155] Section 62(2) gives an employee a right to refuse to work additional hours ‘if they are unreasonable’. The criteria for determining whether additional hours are reasonable or unreasonable are set out in s.62(3):

‘(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee’s personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.'

[156] The Explanatory Memorandum to what is now s.62(2) makes clear (at paragraph 250) that 'the relevance of each of these factors and the weight to be given to each of them will vary according to the particular circumstances', and that in some instances 'a single factor will be of great importance and outweigh all others', whilst in other instances it will be necessary to undertake 'a balancing exercise between factors'.

[157] The cases which have applied these provisions make it clear that an employer cannot simply require an employee to work additional hours without regard to the employee's personal circumstances.⁶² What is 'reasonable' is necessarily assessed on a case-by-case basis, by reference to the employee's circumstances and the employer's business in accordance with the terms of s.62(3).⁶³

[158] Having regard to recent arbitral authority, the terms of the modern awards objective, and the scheme of the FW Act, it seems to us that deterrence is no longer a relevant consideration in the setting of weekend 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 is a primary consideration in the setting of weekend penalty rates.

[159] We note that the Productivity Commission has expressed a different view in respect of public holiday penalty rates:

'... by definition, genuine public holidays are intended to serve a special community role and, as such, there are strong grounds to limit the expectation that they are for working. In that sense, the original concept of deterrence continues to have relevance'.⁶⁴

[160] We accept that public holidays, by their nature, are intended 'to serve a special community role' and that the expectation (and practice) is that the vast majority of employees do not work on public holidays. But these features do not support the adoption of deterrence as an objective in setting an appropriate penalty rate for working on public holidays. Rather, they are relevant considerations in determining the amount of compensation to be provided to employees who work on public holidays, given the additional disutility associated with working on a day when the vast majority of other employees (and, it may be inferred, a substantial proportion of their friends and family) are enjoying a day of leisure.

[161] We now turn to the s.134 considerations.

(iv) *The s.134 considerations*

[162] In order for the Commission to be satisfied that a modern award is *not* achieving the modern awards objective it is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations.⁶⁵ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*:

‘It is apparent from the terms of s.134(1) that the factors listed in (a)–(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s.134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor (“relative living standards and the needs of the low paid”)? Furthermore, it was common ground that some of the factors were inapplicable to the SDA’s claim.’⁶⁶

[163] There is a degree of tension between some of the s.134 considerations. The Commission’s task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. This balancing exercise and the diverse circumstances pertaining to particular modern awards may result in different outcomes in different modern awards. As the Full Bench observed in the *Preliminary Jurisdictional Issues decision*:

‘The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.’⁶⁷

[164] Some of the s.134 considerations have been the subject of comment in other proceedings and some were the subject of submissions in the present proceedings.

[165] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates two related, but different, concepts. As explained in the *2012–13 Annual Wage Review decision*:

‘The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.’⁶⁸

[166] In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a).⁶⁹ There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The surveys that provide the information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages (and, accordingly, what constitutes two-thirds of those values).⁷⁰ The two main Australian Bureau of Statistics (ABS) surveys of the distribution of earnings are the ‘*Employee Earnings, Benefits and Trade Unions Membership*’⁷¹ (the ‘EEBTUM’) and the survey of *Employee Earnings and Hours*⁷² (the ‘EEH’). We note that the EEBTUM is no longer published and the relevant data is now produced as part of the *Characteristics of Employment Survey*⁷³ (the ‘CoE’). Some data is also available from the HILDA survey.⁷⁴

[167] In the *2015–16 Annual Wage Review* decision the Expert Panel noted that the submissions provided different estimates of the ‘two-thirds of median (adult) ordinary time earnings’ threshold. The relevant extract from that decision, and the Expert Panel’s conclusion, are set out below:

‘In its submission, the Australian Government provided two estimates to identify low-paid workers:

- \$18.67 per hour (or about \$710.00 per week over a 38-hour week), using the May 2014 EEH data; and
- \$18.42 per hour (or about \$700.00 per week over a 38-hour week) using the 2014 HILDA survey data.

The Australian Government contended that there were about 1.3 million low-paid employees in 2014 (or 13.3 per cent of all employees), with around one-third of award-reliant workers being low paid in the EEH data. Their analysis took explicit account of the number and the level of pay of junior workers.

The ACTU used unpublished ABS EEH data on the distribution of award only workers by hourly earnings to estimate the number of employees at each award classification level. On the basis of the May 2014 data, the ACTU estimated that 43 per cent of award only employees had hourly earnings at or below the C10 rate of pay in May 2014 (\$724.50).

Research Report 6/2013 found that around 75 per cent of adult award-reliant employees in the non-public sector were earning below the C10 rate of \$18.60 per hour.

Whilst no specific conclusion is available, the information as a whole suggests that a sizeable proportion—probably a majority—of employees who are award reliant are also low paid by reference to the two-thirds of median weekly earnings benchmark.⁷⁵ (footnotes omitted)

[168] The most recent data for the ‘low paid’ threshold is set out below:

<i>Two-thirds of median full-time earnings</i>	<i>\$/week</i>
Characteristics of Employment survey (Aug. 2015) ⁷⁶	818.67
Employee Earnings and Hours survey (May 2016) ⁷⁷	917.33

[169] The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers.⁷⁸ As noted in the *2015–16 Annual Wage Review* decision:

‘There is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally over the past two decades, whether on the basis of wage income or household income.’⁷⁹

[170] Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee and not above that rate. Table 4.8 from the *2015–16 Annual Wage Review* decision sets out the extent of award reliance by industry.⁸⁰ Relevantly for present purposes, the most recent data identify the Accommodation and food services and Retail trade industries as among the most award reliant in that they are the industries in which the highest proportion of employees are award reliant (42.7 per cent and 34.5 per cent, respectively).

[171] The relative living standard of employees is affected by the level of wages they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.⁸¹ As a general proposition, around two-thirds of low-paid employees are found in low income households (i.e. in the bottom half of the distribution of employee households) and have lower living standards than other employees. Many low-paid employees live in households with low or very low disposable incomes.⁸²

[172] In taking into account ‘relative living standards’ in the context of Annual Wage Reviews, the Expert Panel has paid particular attention to changes in the earnings of all award-reliant employees compared to changes in measures of average and median earnings more generally.⁸³

[173] In the *2015–16 Annual Wage Review* decision the Expert Panel also observed that increases in modern award minimum wages have a *positive* impact on the relative living standards of the low paid and on their capacity to meet their needs.⁸⁴ It seems to us that the converse also applies, that is, the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs.

[174] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’.

[175] In the context of Annual Wage Review decisions the Expert Panel has consistently adopted the following propositions about the relationship between increases in minimum wages and enterprise bargaining:

- whilst the gap between award minimum wages and bargained wages is likely to increase the incentive for employees to bargain, a large gap may be a disincentive for employers to bargain;
- minimum wages are only one element of the incentive to bargain; and
- there is no evidence that the incentive to bargain has been adversely affected by the increases in minimum wages which have occurred over the last decade.⁸⁵

[176] Further, Research Report 7/2013, dealing with incentives to bargain, concluded as follows:

‘The study did not reveal a positive or negative relationship between AWR increases and the incentive to bargain, instead pointing to a complex mix of factors that may contribute to employee and employer decision-making about whether to not to bargain...

The workplace case studies, qualitative relativities analysis and Award Reliance Survey each suggest that there may be a link between minimum wages (and their associated instruments) themselves and over-award wage outcomes, but the extent of this link remains unclear and may require further investigation.’⁸⁶

[177] In the *Annual Wage Review 2013–14* decision the Expert Panel commented on the above research, noting that:

‘The research does not reveal any particular relationship between minimum award increases and the incentive to bargain. Instead it points to a complex mix of factors that may contribute to employee and employer decision-making about whether or not to bargain.’⁸⁷

[178] It seems to us that the observations made by the Expert Panel in the context of Annual Wage Reviews are also apposite to the present context. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[179] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. The use of the conjunctive ‘through’ makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively ‘*through* increased workforce participation’, that is obtaining employment is the focus of s.134(1)(c).

[180] However, we also accept that the level of penalty rates in a modern award may impact upon an employee’s remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in our consideration of the legislative requirement to ‘provide a fair and relevant minimum safety net of terms and conditions’ and to take into account ‘the needs of the low paid’ (s.134(1)(a)). Further, one of the objects of the FW Act is to promote ‘social inclusion for all Australians by’ (among other things) ‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through ... modern awards and national minimum wage orders’ (s.3(b)).⁸⁸

[181] The likely impact of any exercise of modern award powers on ‘employment growth’ is also one of the considerations we are required to take into account, by s.134(1)(h). It is these considerations (i.e. ss.134(1)(c) and (h)) which have led us to assess the likely impact of any proposed change to penalty rates on employment growth, that is the creation of new jobs or an increase in hours worked.

[182] Section 134(1)(d) requires that we take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’.

[183] We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

[184] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for:

- ‘(i) employees working overtime; or
- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts.’

[185] Section 134(1)(da) was inserted by the *Fair Work Amendment Act 2013* (Cth), with effect from 1 January 2014. The Explanatory Memorandum to the Fair Work Amendment Bill 2013 made the following observation about the addition of s.134(1)(da):

‘Under the FW Act, the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the FWC must take into account the modern awards objective (see subsection 134(1) of the FW Act).

Item 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.’

[186] In the second reading speech to the Fair Work Amendment Bill 2013 the then Minister for Employment and Workplace Relations said:

‘... as part of this Bill, the Government is seeking to ensure that work at hours which are not family friendly is fairly remunerated. This will be done by amending the modern awards objective to ensure that the Fair Work Commission, in carrying out its role, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends...’

[187] Section 134(1)(da) is a relatively new provision and one which did not exist at the time the modern awards under review were made. These provisions have not yet been the subject of substantive arbitral or judicial comment.

[188] Five observations may be made about s.134(1)(da).

[189] First, s.134(1)(da) speaks of the ‘need to provide additional remuneration’ for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).

[190] An assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health⁸⁹ and work-life balance, taking into account the preferences of the employees for working at those times.

[192] The expression ‘additional remuneration’ in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as ‘ordinary hours’, that is reasonably predictable hours worked Monday to Friday within the ‘spread of hours’ prescribed in the relevant modern award. Such ‘additional remuneration’ could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a ‘loaded hourly rate’.⁹⁰

[193] As mentioned, s.134(1)(da) speaks of the ‘need’ to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria*⁹¹ (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

‘This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.’⁹² (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) ‘requires additional remuneration for working on weekends’, we respectfully disagree. We acknowledge that the provision speaks of ‘the *need* for additional remuneration’ and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression ‘the need for additional remuneration’ must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[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’.⁹⁴

[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’.

[197] A further contextual consideration is that ‘overtime rates’ and ‘penalty rates’ (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

‘... s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards...’⁹⁵

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates.⁹⁶ If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working

arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

[200] Fourth, s.134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive ‘or’ makes it clear that the provision is dealing with separate circumstances: ‘unsocial, irregular or unpredictable hours’ (emphasis added).

[201] Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression ‘unsocial ... hours’ would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. ‘Irregular or unpredictable hours’ is apt to describe casual employment.

[202] Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working ‘unsocial ... hours’ is one such circumstance (s.134(1)(da)(i)) and working ‘on weekends or public holidays’ (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are ‘unsocial ... hours’. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working ‘unsocial ... hours’.⁹⁷ Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides ‘a fair and relevant minimum safety net.’ A central consideration in this regard is whether a particular penalty rate provides employees with ‘fair and relevant’ compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.

[203] For completeness we note that the Australian Chamber of Commerce and Industry (ACCI) and ABI drew attention to the fact that s.134(1)(da)(iii) speaks of ‘working on weekends’ and does not distinguish between Saturdays and Sundays and submit that:

‘It is noteworthy that the FW Act does not prescribe that Sundays are to receive an increased loading. Instead, section 134(1)(da)(iii) accords Saturdays and Sundays equal treatment by referring to both days as the “weekend”.

Unless there is an evidentiary basis that justifies providing employees working Sundays with increased remuneration, employees working weekends should all be treated in the same manner. There is nothing contained within the modern awards objective that would suggest a different approach.’⁹⁸

For our part we do not think that any particular significance attaches to the reference to ‘weekends’ in s.134(1)(da)(iii), rather than ‘Saturdays and Sundays.’ It cannot be reasonably inferred that the use of the word ‘weekends’ manifests a legislative intention that there be no distinction between the level of additional remuneration provided for Saturday and Sunday work. Any additional remuneration provided for Saturday or Sunday work in a particular modern award will depend on the circumstances and merits in each case.

[204] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’.

[205] The ‘Dictionary’ in s.12 of the FW Act states, relevantly:

‘In this Act:

equal remuneration for work of equal of comparable value: see subsection 302(2).’

[206] The expression ‘equal remuneration for work of equal or comparable value’ is defined in s.302(2) to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

[207] The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of ‘equal remuneration for men and women workers for work of equal or comparable value’.⁹⁹

[208] United Voice contends that women make up the majority of the hospitality workforce and a significant proportion of the workers who receive penalty rates. On this basis United Voice submits that:

‘Cuts to penalty rates will disproportionality affect women’.¹⁰⁰

[209] To make good the proposition advanced, it would have to be shown that more female hospitality workers usually work on Sundays, than males. But no data has been presented which shows the number of hospitality workers who usually work on Sundays, by gender. Further, the available data does not appear to support the proposition advanced.

[210] Dr Oliver’s expert report deals with the impact of penalty rates on the wages of hospitality workers. The report utilises unit record data from both the HILDA Survey and the Australian Workplace Relations Study (AWRS) to show that:

- of all hospitality workers who receive penalty rates, 50.7 per cent are male compared to 49.3 per cent who are female (AWRS data).¹⁰¹
- Of all hospitality workers who usually work on either Saturdays and/or Sundays, 57.4 per cent are male compared with 42.6 per cent who are female (HILDA data).¹⁰²

[211] The SDA advanced a similar submission¹⁰³ to that put by United Voice in relation to retail workers and submits that any cuts to penalty rates in the *General Retail Industry Award 2010* will ‘disproportionately affect women’.¹⁰⁴ There is no evidence before us which shows the number of retail workers who usually work on Sundays, by gender.

[212] Data drawn from the ABS Working Time Arrangements series shows that across surveys conducted in 2006, 2009 and 2012 the proportion of male employees who usually work on Sundays was greater than the proportion of female employees who usually work on Sundays.¹⁰⁵ But this is ‘all industries’ data. It is not confined to the retail industry.

[213] Using HILDA data, Dr Watson and Peetz conclude that females outnumbered males among young workers (i.e. aged 15–18 years) in the weekend retail workforce.¹⁰⁶ The SDA

acknowledges that this material does not directly deal with the question of whether more female retail workers work on Sundays than males, but submits that this data:

‘... does provide a strong basis to infer that women working in retail on Sundays outnumber men in some material proportion.’¹⁰⁷

[214] We disagree. The data relied on deals with weekend retail work, it is not confined to Sunday work and, further, it only relates to young workers not all retail workers. In this regard it is relevant to observe that over the past decade the proportion of 15–19 year olds in the retail workforce has gradually declined from 23.5 per cent in November 2004 to 18.3 per cent in November 2013.¹⁰⁸

[215] Further, even if it was shown that a reduction in Sunday penalty rates disproportionately impacted on women workers that fact would not necessarily enliven s.134(1)(e). Section 134(1)(e) requires that we take into account the principle of equal remuneration for men and women workers ‘for work of equal or comparable value’. Any reduction in Sunday penalty rates in these awards would apply equally to men and women workers.

[216] However, if it was shown that a reduction in penalty rates did disproportionately affect female workers then it is likely to have an adverse impact on the gender pay gap. Such an outcome may well be relevant to an assessment of whether such a change would provide a ‘fair and relevant minimum safety net’, but it does not necessarily enliven s.134(1)(e).

[217] Section 134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[218] We note at the outset that s.134(1)(f) is expressed in very broad terms. We are required to take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters mentioned, that is, ‘productivity, employment costs and the regulatory burden’.

[219] 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 on 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.

[220] The term ‘productivity’ appears in several Parts of the FW Act:

- Part 1-1 – Introduction: s.3 Object of the Act
- Part 2-3 – Modern Awards: s.134 The modern awards objective
- Part 2-4 – Enterprise agreements: s.171 Objective of the Part, ss.241 and 243 Low paid bargaining and authorisation
- Part 2-5 – Workplace determinations: ss.262 and 275

- Part 2-6 – Minimum wages: s.284 The minimum wages objective
- Part 2-8 – Transfer of business: ss.318–320 Making and variation of transferable instruments.

[221] ‘Productivity’ is not defined in the FW Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

[222] The Productivity Commission defines productivity as:

‘... a measure of the rate at which outputs of goods and services are produced per unit of input (labour, capital, raw materials, etc). It is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used’.¹⁰⁹

[223] Similarly, the Commonwealth Treasury also defines productivity by reference to volumes of inputs and output:

‘Productivity is a measure of the rate at which inputs, such as labour, capital and raw materials, are transformed into outputs. The level of productivity can be measured for firms, industries and economies. Productivity growth implies fewer inputs are used to produce a given output or, for a given set of inputs, more output is produced.’¹¹⁰

[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 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.’¹¹¹

[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).

[226] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’.

[227] We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

[228] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[229] We note that the requirement to take into account the likely impact of any exercise of modern award powers on ‘the sustainability, performance and competitiveness of the national economy’ (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers. We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

3.4 The proposed ‘material change in circumstances test’

[230] A central contention advanced by the SDA and United Voice in these proceedings is that in order to enliven its discretion in the Review to vary a modern award the Commission must first be satisfied that since the making of the modern award there has been a material change in circumstances pertaining to the operation or effect of the award such that the modern award is no longer meeting the modern awards objective (the ‘material change in circumstances test’). It is said to follow from this proposition that a sufficient merit argument and supporting probative evidence must be directed at establishing the existence of the requisite material change in the period since the making of the modern award. The material change in circumstances test is said to be consistent with the approach articulated in the *Preliminary Jurisdictional Issues* decision; more recent Full Bench decisions and the statutory context of the Review. The more recent Full Bench decisions referred to are: *Re Security Services Industry Award 2010*¹¹² and *Re Stevedoring Industry Award 2010*.¹¹³

[231] The Australian Council of Trade Unions (ACTU) puts the test somewhat differently:

‘... the safety net has evolved on the basis of whether particular conditions of employment are a necessary or desirable minimum for workers and whether such conditions are achievable given the impact on employers and the economy more generally. In this framework, it is unsurprising that the minimum conditions contained in awards are rarely eroded: to do so would effectively require proof that economic and social development had regressed to a point where it is no longer economically sustainable to continue to provide such minimums, notwithstanding their desirability.’¹¹⁴

[232] It is convenient to refer to the proposition advanced by the ACTU as the ‘economic unsustainability test’.

[233] We turn first to the relevant statutory context. The SDA advances this aspect of its argument in the following way:

‘... The critical aspect of the statutory context is the legislative acceptance (recognised by the Full Bench in the Preliminary Jurisdictional decision) that, at the time a modern award was made, it was meeting the modern award objectives. In this way, the award is in effect deemed to meet the modern award objective. Once this is understood, it necessarily follows that a material change in circumstances must be established in order to properly justify a proposed variation to a modern award - to do otherwise is to ignore the statutory mandate that modern awards, when made, achieved the modern award’s objective. The fact of the making of the modern awards and their legal character as meeting the modern award objective forms an essential part of the historical context of the Review recognised by the Full Bench in the Preliminary Jurisdictional decision.

The fact that particular minimum entitlements in a modern award might not have been the subject of detailed evidentiary consideration in award modernisation is irrelevant to a proper understanding of the Commission’s statutory function in the 4 yearly review. That function is

directed at ensuring instruments which, when made 6 years ago met the modern award's objective, continue to meet that objective.

Given the character of modern awards as being deemed to have met the modern award objective when made, it must necessarily follow that any variation of their terms requires the making of a finding by the Commission of some material change in the circumstances pertaining to the operation or effect of an award such that it no longer can be said to meet the modern awards objective. That task necessarily directs attention to the existence, or otherwise, of change in relevant circumstances since the making of a modern award.¹¹⁵

[234] Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. As we have mentioned, ascertaining the meaning of s.156 necessarily begins with the ordinary and grammatical meaning of the words used.¹¹⁶ These words must be read in context by reference to the language of the Act as a whole and to the legislative purpose.¹¹⁷ Section 578(a) of the FW Act also directs attention to the objects of the FW Act. Of course it must be borne in mind that the purpose or policy of the Act is to be gleaned from a consideration of all of the relevant provisions of the Act.¹¹⁸ Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the FW Act, in the light of its purpose, not to rewrite it.¹¹⁹

[235] Section 156(1) provides that the Commission *must* conduct a 4 yearly review of modern awards starting as soon as practicable after each 4th anniversary of the commencement of Part 2-3 of the FW Act. Part 2-3 commenced on 1 January 2010,¹²⁰ hence the first Review is to start as soon as practicable after 1 January 2014.

[236] Section 156(2) deals with what has to be done in a Review; it provides that the Commission:

- *must* review all modern awards (s.156(2)(a));
- *may* make one or more determinations varying or revoking modern awards (s.156(2)(b)(i) and (iii)) and may make one or more modern awards (s.156(2)(b)(ii)); and
- *must not* review, or make a determination to vary, a default fund term of a modern award (s.156(2)(c)).

[237] Section 156(3) deals with the variation of modern award minimum wages in a Review. 'Modern award minimum wages' are defined in s.284(3) as the rates of minimum wages in modern awards, including:

- (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
- (b) casual loadings; and
- (c) piece rates.

[238] Section 156(3) provides that the Commission may vary modern award minimum wages ‘only if’ the Commission is satisfied that the variation is justified by ‘work value reasons’. ‘Work value reasons’ is defined in s.156(4):

‘Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.’

[239] We note here that subsections 156(3) and (4) were the subject of some consideration in the *Equal Remuneration Decision 2015*¹²¹ in which the Full Bench said:

‘We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for ‘work value reasons’, which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or the application of an indicia approach, undervaluation has occurred because of gender inequity. *There is no datum point requirement in that definition* which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued.’¹²² (emphasis added)

[240] The absence of a datum point requirement in s.156(4) is a matter of some significance in the present context and we return to it later.

[241] Section 156(5) requires that each modern award *must* be reviewed in its own right, though this does not prevent the Commission from reviewing 2 or more modern awards at the same time.

[242] The mode of expression used in s.156 is a significant textual indicator of legislative purpose. As Spigelman CJ observed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*:

‘Substantial, indeed often, but not always, determinative weight must be given to language which is in mandatory form.’¹²³

[243] The words ‘must’ and ‘must not’ in ss.156(1), (2)(a), (2)(c) and (5) constitute language in mandatory form.¹²⁴ The use of these words may be contrasted with the use of ‘may’ in s.156(2)(b)(i), as in the Commission ‘may make one or more determinations varying modern awards’. The word ‘may’ usually connotes the conferral of a discretion.¹²⁵ That is plainly the intent of s.156(2)(b)(i) and no party contended otherwise.

[244] Section 156 clearly delineates what must be done in a Review, what must not be done and what may be done. Further, where the legislative intent is to qualify a discretion it is done expressly, as in s.156(3). The Commission *may* vary modern award minimum wages ‘only if’ it is satisfied that the variation is justified by work value reasons. This may be contrasted with the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review which is expressed in general, unqualified, terms.

[245] An unqualified discretion is confined only by the subject matter and the legislative context and purpose.¹²⁶ The apparent scope of a discretion such as that in s.156(2)(b)(i) may be limited by other sections of the FW Act.

[246] A number of provisions in the FW Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). As we have already mentioned, in exercising its powers in a Review the Commission is exercising ‘modern award powers’ (see s.134(2)(a)) and hence the modern awards objective and s.138 apply to the Review.

[247] Any variation of a modern award arising from the Review must also comply with the requirements of the FW Act which relate to the content of modern awards. Division 3 of Part 2-3 deals with the terms of modern awards, in particular terms that *may* or *must* be included in modern awards, and terms that *must not* be included in modern awards. This division also deals with the interaction between the NES and modern awards. These provisions are relevant to the Review and, in an appropriate case, may operate to constrain the power in s.156.¹²⁷

[248] Similarly, Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers – these provisions apply to the Review. If the Commission were to make a modern award, or change the coverage of an existing modern award in the Review, then the requirements set out in s.163 must be satisfied. Sections 165 and 166 deal with when variation determinations come into operation. Determinations varying modern awards arising from the Review will generally operate prospectively, unless the Commission is satisfied that the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors: see ss.165(2)(a) and 166(3)(a)) and there are exceptional circumstances that justify retrospectivity (ss.165(2)(b) and 166(3)(b)).

[249] As is apparent from their submissions, the Unions’ contention relies on ‘the legislative acceptance ... that at the time a modern award was made, it was meeting the modern awards objective’. It is said to necessarily follow from this ‘legislative acceptance’ that a ‘material change in circumstances’ must be established in order to justify the variation of a modern award in the Review because ‘to do otherwise is to ignore the statutory mandate that modern awards, when made, achieved the modern awards objective’.

[250] In support of this general proposition counsel for the SDA¹²⁸ relied on the observations of Kirby P (as he then was) in *Commissioner of Stamp Duties v Permanent Trustee Co Ltd (Trustee for Anzarena dal Bon and Silvanio dal Bon)*,¹²⁹ regarding the preferred construction of inter-related legislation. In particular, the SDA relied on the following paragraphs from his Honour’s judgment:

‘Upon the hypothesis (which is admittedly often sorely tried) that there is a rational integration of the legislation of the one Parliament, it is proper for courts to endeavour to so construe inter related statutes as to produce a sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation. This is the approach which I take to the task of statutory interpretation...

The result is that, in construing the legislation under consideration here, I will prefer that construction which is available in the language used and which facilitates the sensible operation together of the four statutes mentioned, avoiding inefficiency and the capricious operation of revenue law which would seriously impede or discourage the availability of beneficial statutory provisions for the sale or partition of property held by co-owners. In the case of ambiguity of the legislation I consider this to be the modern approach which this Court

should adopt in implementing the will of Parliament. We should presume that Parliament intended its legislation to operate rationally, efficiently and justly, together.’¹³⁰

[251] The above observation has been endorsed by other intermediate appellate courts¹³¹ and we have applied it to our consideration of s.156. But the adoption of such an approach does not warrant the importation of a condition on the exercise of the discretion in s.156(2)(b)(i).

[252] The terms of s.156 and the statutory context do not support the ‘material change in circumstances test’ advanced by the SDA and United Voice.

[253] The modern awards objective provides that the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the s.134 considerations. One of those considerations is the need to ensure a ‘stable’ modern award system (s.134(1)(g)). A ‘stable’ modern award system implies that the variation of a modern award be supported by a merit argument. The extent of the argument required will depend on the circumstances. This issue was the subject of some debate in the proceedings which led to the *Preliminary Jurisdictional Issues decision*. In that decision the Full Bench said:

‘The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act.¹³² In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

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*:

‘Where 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 per Aickin J at 620*.’¹³³

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.¹³⁴ As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*¹³⁵:

“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.”¹³⁶

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.¹³⁷

[254] It is apparent from the above extract that the adoption of the *prima facie* position that the modern award being reviewed achieved the modern awards objective at the time it was made is but an example of the general proposition that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

[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.

[256] It is convenient to deal now with the submission that the proposed ‘material change in circumstances test’ is consistent with the approach articulated in more recent Full Bench decisions. As mentioned earlier, the Full Bench decisions referred to are *Re Security Services Industry Award 2010*¹³⁸ and *Re Stevedoring Industry Award 2010*.¹³⁹

[257] The Unions rely upon the two Full Bench decisions mentioned to support the contention that there must be ‘some material change in circumstances’ from when the award was made before the Commission’s discretion to vary the award is enlivened. However, no such requirement is evident from either decision. The Full Bench’s comments in *Re Security Services Industry Award 2010* express no such requirement, rather the decision simply stands

for the proposition that the proponent of an award variation should present a persuasive evidentiary case. This is apparent from the following extract from the decision:

‘While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.’¹⁴⁰ (emphasis added)

[258] In that matter the Full Bench declined to vary the definition of ‘permanent night work’ for reason of the lack of an evidentiary case, not because of a failure to show ‘some material change in circumstance’. In declining that variation the Full Bench said:

‘In our view, a matter such as this should be considered in the light of other award provisions regarding permanent night shift penalties with appropriate adaptations for the nature of the industry. If an evidentiary case established that the current provisions were inappropriate and that the matter cannot be conveniently addressed by way of enterprise agreements or the award flexibility provision, then a case may exist for an appropriate award variation. However, the case presented fell well short of the detailed review of circumstances that might warrant a variation. In our view, the variation should not be made.’¹⁴¹ (emphasis added)

[259] In *Re Stevedoring Industry Award 2010* the majority applied the approach set out in *Re Security Services Industry Award 2010*¹⁴² and rejected an employer application to reduce penalty rates. The basis for the majority’s rejection of that application is set out at paragraphs [156] and [161] of their decision:

‘... the evidence led by the Applicants is inadequate to justify the significant variations to penalty rates sought, particularly in circumstances where the evidence supports a finding that there are factors unique to this industry which are relevant when considering the level of penalty rates in this Award necessary to meet the modern awards objective...

While it is not disputed that the level of penalty rates in this industry are above those in comparable industries, we are not satisfied that the Applicants have established the case for their proposed variation to penalty rates or that the variation is necessary to meet the modern awards objective. In our view, the evidence before us indicates that there are factors unique to this industry when compared to other industries that work on a 24/7 basis. However, the Applicants and other parties who appeared before us failed to go the next step and provide probative evidence which would have enabled us to determine whether the existing or some other level of penalty rates was appropriate. On such a significant issue, it is just too simplistic to argue that the level of penalty rates should be reduced in the absence of such probative evidence and on the basis that the existing level of penalty rates in the Award are above those applying in other modern awards. We acknowledge that there is an important issue to be tested here. However, simply showing that the existing level of penalty rates are above those applying in comparable awards and industries is in our view insufficient, in the absence of probative evidence, to satisfy us that the Award needs to be varied to meet the modern awards

objective. As discussed earlier, the Award achieved the modern awards objective at the time that it was made and the Applicants have not established that the Award no longer meets that objective.¹⁴³

[260] It is apparent from the above extract that it was the absence of probative evidence that led to the rejection of the employer claim, not the failure to establish a material change in circumstances since the award was made.

[261] For completeness we would note that a proposition similar to that advanced by the Unions in these proceedings was rejected by the majority in the *Restaurants 2014 Penalty Rates decision*. We will deal with this decision in more detail later in our consideration of the application to vary the *Restaurant Industry Award 2010*, but it suffices to note here that the majority concluded that the decision of the Member at first instance was attended by appealable error because the Deputy President adopted ‘a significant change of circumstances’ as the apparent criterion for variation. The majority held that the adoption of such a test was not derived from the relevant statutory provisions and accordingly the exercise of discretion was artificially confined and thereby miscarried.¹⁴⁴

[262] The SDA¹⁴⁵ and United Voice¹⁴⁶ submit that the *Restaurants 2014 Penalty Rates decision* was wrong and should not be followed. Those submissions are predicated upon our acceptance of the Unions’ argument in support of the ‘material change in circumstances test’. We do not accept the argument put in respect of the ‘material change in circumstances test’, nor are we persuaded that the views expressed by the majority in the *Restaurants 2014 Penalty Rates decision* were wrong.

[263] In our view there is no warrant in the text of the section for the importation of a material change in circumstances test. The Commission’s approach that *prima facie* modern awards achieved the modern awards objective at the time that they were made addresses the point made in the *Preliminary Jurisdictional Issues decision* that awards made under Part 10A of the WR Act were deemed to be modern awards for the purposes of the FW Act (and by implication, consistent with the modern awards objective at that time). The Unions’ proposition would place a constraint on the discretion conferred by s.156(2)(b)(i) which is not warranted by the terms of s.156 or the relevant statutory context and purpose. The Commission must assess the evidence and submissions in support of an award variation against the statutory tests, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variation is necessary in order for the award to achieve the modern awards objective. The proposition advanced by the Unions would preclude the Commission from varying a modern award where the Commission was satisfied that the award was not meeting the modern awards objective, unless there was a material change in circumstances. This would be inconsistent with s.138 of the FW Act and could not have been intended.

[264] The adoption of the proposed ‘material change in circumstances test’ would obfuscate the Commission’s primary task in the Review of determining whether the modern award achieves the modern awards objective. To adopt such a test would be to add words to the text of s.156 in circumstances where it is not necessary to do so in order to achieve the legislative purpose. As the plurality (French CJ, Crennan and Bell JJ) observed in *Taylor v Owners – Strata Plan No 11564*:¹⁴⁷

‘The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.’¹⁴⁸ (citations omitted)

[265] In the present case, there is no basis for the introduction of additional requirements or conditions on the exercise of the discretion in s.156(2)(b)(i) which might have been, but which have not been, enacted.¹⁴⁹

[266] The adoption of the proposed test would also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision. As Bowen LJ observed in *Gardner v Jay*¹⁵⁰:

‘When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Act or the Rules do not fetter the discretion of the Judge why should the court so do.’¹⁵¹

[267] For the same reasons we reject the ‘economic unsustainability test’ advanced by the ACTU. There is no proper legislative basis for such a test and to adopt it would be an unwarranted fetter on the discretion conferred by s.156(2)(b)(i).

[268] For completeness we record our agreement with the point advanced by the Australian Industry Group (Ai Group) in its submission in reply¹⁵² that the variation of a modern award may be warranted if it was established that there was a ‘material change in circumstances’ since the modern award was made, but the establishment of such a change is not a condition precedent to the variation of a modern award in the Review.

3.5 Summary

[269] The following general propositions apply to the Commission’s task in the Review:

1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.
2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.¹⁵³ Significant changes where merit is reasonably contestable should

be supported by an analysis of the relevant legislative provisions and, where feasible,¹⁵⁴ probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
4. 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 bear on 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.

[270] We note that the significance of historical context applicable to some of the modern awards which are the subject of these proceedings is a matter of contention between the parties. We deal with those disputes later in our decision.

4. Award Modernisation and the Transitional Review

4.1 Overview

[271] As mentioned in Chapter 3, the Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. In addressing that task, it is appropriate that we take into account previous decisions relevant to any contested issue. We proceed on the basis that *prima facie* the modern awards before us achieved the modern awards objective at the time they were made. It is in this context that the award modernisation process and the subsequent Transitional Review assume some significance.

[272] We use the term 'award modernisation' to refer to the processes under Part 10A of the *Workplace Relations Act 1996* (the WR Act). The current 122 modern awards were made during 2008–09 as a consequence of that process and came into operation on 1 January 2010. The awards were the subject of further variations (in some cases before they commenced operation) during the award modernisation process and were then reviewed in a 'Transitional Review' commencing in 2012, under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the TPCA Act).

[273] This chapter sets out some background material on the award modernisation process that led to the making of the current 122 modern awards, including the modern awards which are the subject of these proceedings. We also set out some material in relation to the Transitional Review which followed the award modernisation process. The background relevant to the particular awards that are the subject of this decision are summarised in the various chapters dealing with those awards.

4.2 Award modernisation

[274] The award modernisation process was initiated by a request by the Minister for Employment and Workplace Relations on 28 March 2008, pursuant to s.576C(1) of the WR Act). The Ministerial Request provided the framework and overarching timetable for the award modernisation process.

[275] Following the Ministerial Request, the then President issued a statement¹⁵⁵ which attached a 'Draft List of Priority Industries' and called for submissions as to which industries should be dealt with first in the process (the 'priority industries'). The Award Modernisation Full Bench comprising seven Members then dealt with all award modernisation matters between 2008–09. In determining the priority industries the Award Modernisation Full Bench took a number of factors into consideration, including the size and importance of the industry, an assessment of the dimensions of the modernisation exercise in each case, the views of the parties and the desire to include industries from across the spectrum of the economy.¹⁵⁶ The hospitality and retail industries were included in the list of priority industries.

[276] A further Statement issued on 22 July 2008¹⁵⁷ outlined the proposed approach and timeline for the award modernisation process which, in accordance with the Ministerial Request, had to be completed by 31 December 2009.

[277] Commission staff prepared lists of federal awards and Notional agreements preserving State awards (NAPSAs¹⁵⁸) (which were federal system instruments derived from awards

previously operating in State systems) to be considered by the Award Modernisation Full Bench in the making of the modern award(s) in each industry. A comparison was undertaken of the range of entitlements under the key federal awards and NAPSAs in each industry. This analysis was published on the Australian Industrial Relations Commission (AIRC) website¹⁵⁹ in a series of spreadsheets setting out provisions including wage rates, hours of work, penalty rates and overtime.

[278] After the determination of the priority industries, the remaining industries were divided into three further tranches and each generally followed a four step process:

- (i) parties were invited to make initial written submissions and/or file parties' draft awards, followed by oral hearings regarding the scope and content of proposed awards;
- (ii) exposure drafts were prepared by the Commission and published for comment;
- (iii) further written and oral submissions were made regarding the exposure drafts; and
- (iv) the awards were issued in 'final form'.

[279] The Ministerial Request stated that one of the objectives of the award modernisation process was to reduce the number of awards operating in the workplace relations system.¹⁶⁰ Consistent with that objective, the Full Bench initially proposed only one award in the hospitality industry covering accommodation, hotels, pubs, taverns and gaming (including casinos); restaurants and catering; and clubs. On 20 June 2008, in response to the parties' proposals to create four separate modern awards in the hospitality industry, the Award Modernisation Full Bench stated:

'... we think the proposals for a split into three or more awards have the potential for significant overlap and duplication. At the level of the safety net it may be difficult to justify the creation of four separate modern awards if the peculiar circumstances of each part of the industry could be dealt with satisfactorily by minor modifications to some of the terms of one industry award.'¹⁶¹

[280] A Statement was issued on 12 September 2008¹⁶² by the Award Modernisation Full Bench which confirmed its intention to create a single Retail award (covering general retail; fast food; community pharmacies; and hair and beauty), but decided that while the Hospitality award would cover restaurants it would no longer cover employers and employees in registered and licensed clubs. The Clubs sector was deferred to Stage 3.

[281] Further submissions were made regarding the exposure drafts for the priority industries. A decision was issued on 19 December 2008 with a single 'final' award for the hospitality industry (including restaurants), however a later amendment to the Ministerial Request led to the making of a separate *Restaurant Award* in Stage 4.

[282] In the 19 December 2008 decision the Award Modernisation Full Bench stated that it was difficult to address the disparate provisions across the various segments of the retail industry without significant changes to the safety net¹⁶³ (an earlier statement¹⁶⁴ had identified 118 awards operating in the Retail sector across Australia). Accordingly, 4 separate retail awards were made covering general retail; fast food; pharmacies and hair and beauty. As a result of the late disaggregation of the proposed general retail award, no exposure drafts were

published for comment for the separate modern awards covering the fast food and pharmacy industries. We deal with the background to these modern awards in Chapters 7.5.2 and 8.3.2.

[283] In determining the final provisions in each modern award the Full Bench generally adopted the terms and conditions in the preponderance of pre-reform instruments:

‘The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.

The creation of modern awards which will constitute the award elements of the safety net necessarily involves striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply. It is in that context that the formulation of appropriate transitional provisions arises.¹⁶⁵

[284] To mitigate the impact of modern awards on employers and employees the Award Modernisation Full Bench determined that modern awards should contain transitional provisions to phase in changes to minimum wage rates, loadings, penalties and shift allowances over a period of up to five years. These transitional provisions were outlined in the decision of 2 September 2009¹⁶⁶. Broadly speaking, variations to minimum wages, loadings penalties and allowances were implemented in equal increments between 1 July 2010 and 1 July 2014.

[285] It should be noted that while the introduction of modern awards increased penalty rates payable by employers in some jurisdictions, for many employers penalty rates remained constant, and for some the modern award provided lower penalty rates (e.g. *Cafes and Restaurants (South Australia) Award* provided a penalty of 200 per cent for working on a Sunday compared to 150 per cent under the modern award¹⁶⁷). Further, some modern awards restrict when penalty rates apply, relative to the position in pre modernisation instruments. For example, the *Cafes and Restaurants (South Australia) Award* provided that the 10 per cent penalty for working in the evening commenced at 6.00 pm rather than 10.00 pm under the modern award¹⁶⁸. A comparison of penalty rates in certain pre modernisation instruments with the terms of the relevant modern awards rates is set out at [Attachment C](#).

4.3 Transitional Review 2012

[286] The TPCA Act required Fair Work Australia (the predecessor tribunal to the Commission) to conduct a review of all modern awards¹⁶⁹ as soon as practicable after

1 January 2012 (the Transitional Review). The legislative context for the Transitional Review is principally set out in Item 6 of Schedule 5 of the TPCA 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.

(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.

(5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA’s powers under subitem (5)”.

[287] Item 6(1) of Schedule 5 to the TPCA Act provides a review must be conducted of all modern awards (other than modern enterprise awards and State reference public sector modern awards) as soon as practicable after 1 January 2012 (being the second anniversary of the Fair Work (Safety Net Provisions) commencement day). Item 6(2) provides that in conducting the Transitional Review the Tribunal must consider two questions:

(a) whether modern awards achieve the modern awards objective in s.134 of the Fair Work Act 2009 (the Act); and

(b) whether modern awards are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

[288] The Transitional Review commenced in early 2012 and the scope of that review was the subject of a Full Bench decision issued on 29 June 2012¹⁷⁰ (Re Modern Awards Review decision). The Full Bench concluded that the Transitional Review was quite separate from, and narrower in scope than, the 4 yearly review of modern awards provided for in s.156 of the FW Act:

‘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.’¹⁷¹

[289] Many of the applications made as part of the Transitional Review involved matters expressly dealt with by the Commission in the award modernisation process. In those circumstances the need to advance probative evidence in support of an application to vary a modern award was particularly important as the Transitional Review did not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions. The June 2012 decision stated, in the context of the Transitional 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.’¹⁷²

[290] It is important to recognise that the Transitional Review was dealing with a system in transition. Item 6 of Schedule 5 formed part of transitional legislation, intended to facilitate the movement from the WR Act to the FW Act. The Transitional Review was a “one off” process required by the transitional provisions and conducted a relatively short time after the completion of the award modernisation process. The fact that the transition to modern awards was taking place at the time of the Transitional Review militated against the adoption of broad changes to modern awards as part of that review.

[291] During the Transitional Review the Commission considered a number of applications to vary penalty rates in modern awards, including those that are the subject of the present proceeding. The decisions arising from those claims are summarised below.

Modern Awards Review 2012—Penalty Rates¹⁷³

[292] In March 2012, several parties lodged applications to vary penalty rate provisions contained in 5 awards. These applications were dealt with by a single Full Bench. The Full Bench had before it applications from employer organisations, individual employers and the SDA. The relevant variations sought were as follows¹⁷⁴:

Fast Food Industry Award 2010 (AM2014/240 and others)

- Alter the span of hours for penalty rates applying to evening work from Monday to Sunday
- Delete clauses which provide for penalty rates on the weekend
- Vary clause to specify time at which penalty rate ceases

General Retail Industry Award 2010 (AM2014/177)

- Reduce penalty for Sunday from 200% to 150%
- Remove the 25% penalty payment for evening work that presently applies to all non-casual hours

Hospitality Industry (General) Award 2010 (AM2014/204 and others)

- Reduce the Sunday penalty from 175% to 150%
- On a public holiday, reduce the penalty from 275% to 250%

[293] Although a number of penalty rate provisions were sought to be varied, the major focus of both the evidence and the submissions was on the penalty for Sunday work in the *Retail Award* and on the weekend and other penalties in the *Fast Food Award*.¹⁷⁵

[294] Other than the applications relating to the proposed reduction in existing penalty rates in the *Retail Award* and *Fast Food Award*, there was little or no probative evidence dealing with other aspects of the applications before the Commission.

[295] The essence of the employers' contentions, particularly in the retail sector, was that the existing penalty rate provisions resulted in employers engaging fewer employees than they would prefer to employ on a Sunday, and that the mix of employees engaged on a Sunday, in terms of age and experience, was less than optimal. It was submitted that if the Sunday penalty rate was reduced employers would be willing to offer more hours of work on Sundays and the mix of employees engaged would promote more efficient and productive performance of work.

[296] The Commission decided that while there was some evidence in support of these submissions, the evidence was far from compelling. In rejecting the substantive claims, the Full Bench commented that:

'There is a significant 'evidentiary gap' in the cases put. It is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice. This is a most unfortunate omission given that the transitional provisions, which rely upon the differing NAPSA entitlements, provide an opportunity for evidence to be led from employers operating in multiple States to provide these comparisons. There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.

We are not persuaded that a sufficient case has been made out to warrant varying the relevant awards in the manner proposed by the employers. While aspects of the applications before us are not without merit - particularly the proposals to reassess the Sunday penalty rate in light of the level applying on Saturdays - the evidentiary case in support of the claims was, at best, limited.

The 4 yearly review of these awards is to commence in 2014. That review will be broader in scope than the Transitional review and will provide an opportunity for the issues raised in these proceedings to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented. In the event that the claims before us

are pressed in the 4 yearly review we would expect them to be supported by cogent evidence. We would be particularly assisted by evidence regarding the matters referred to above and the likely impact upon employment levels, the organisation of work and employee welfare of any change in the penalty rates regimes.¹⁷⁶

[297] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The extent of the evidence and submissions put in the previous decision may be a factor in considering the weight to be accorded to that decision.

[298] As noted by the Full Bench in the *Modern Awards Review 2012 – Penalty Rates decision*, the evidentiary case presented in support of the various applications before it ‘was, at best, limited’. Further, the Full Bench expressly indicated that the 4 yearly review would provide an opportunity for the issues which had been raised in the Transitional Review proceedings to be considered ‘in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented’. In these circumstances the *Modern Awards Review 2012 – Penalty Rates decision* has limited relevance to the present proceedings.

[299] In addition to the *Modern Awards Review 2012 – Penalty Rates decision* an application by RCI to vary the *Restaurant Industry Award 2010* was also considered during the Transitional Review. RCI’s application was rejected at first instance.¹⁷⁷ Permission to appeal was granted and, by majority, the Appeal bench decided to reduce the Sunday penalty rates for casual employees engaged at classification levels 1 and 2, from 175 per cent to 150 per cent (including the 25 per cent casual loading). The essence of the majority’s reasons for providing for differential Sunday penalty rates is set out at paragraph 154 of the decision:

‘Although a 50% Sunday penalty rate is generally appropriate for employees under the Restaurant Award, for transient and lower-skilled casual employees working mainly on weekends, who are primarily younger workers, the superimposition of the casual loading of 25% in addition to the 50% penalty tends to overcompensate them for working on Sundays and is more than is required to attract them for work on that day. In that respect, the Restaurant Award is not meeting the modern awards objective in s.134 of the FW Act.’¹⁷⁸

[300] We deal with the *Restaurants 2014 Penalty Rates decision* in more detail in Chapter 7.4.5.

[301] The significance of the historical context applicable to some of the modern awards which are the subject of these proceedings is a matter of contention between the parties. We deal with the relevant background to the modern awards before us at Chapters 7.2.2, 7.3.2, 7.4.2, 7.5.2, 8.2.2 and 8.3.2.

5. Submissions: Overview

5.1 Principal parties

[302] This section briefly describes the principal parties in these proceedings. For this purpose we have characterised an employer association as a ‘principal party’ if they have made an application to vary one or of the more modern awards before us. Tables 1 and 74 set out the various claims before us. The principal employer parties were:

- the Australian Hotels Association and the Accommodation Association of Australia (the Hospitality Employers);
- Clubs Australia Industrial (CAI);
- Australian Business Industrial and the New South Wales Business Chamber (jointly, ABI);
- Restaurant and Catering Industry Australia (RCI);
- the Australian Industry Group (Ai Group);
- the Australian Retailers Association (ARA), the National Retail Association (NRA) and the Master Grocers Association (MGA) (collectively, the Retail Employers); and
- the Pharmacy Guild of Australia (PGA).

[303] The NRA was party to both a joint application with the other Retail Employers, to vary the *General Retail Industry Award 2010* and made a separate application to vary the *Fast Food Industry Award 2010*. We only refer to the NRA in instances where it was acting separately, rather than in concert with the other Retail Employers. Some uncertainty remains as to the exact nature of the NRA’s role in these proceedings. While the NRA filed a draft determination on 13 February 2015 outlining the changes it sought to the Fast Food Award,¹⁷⁹ its final written submissions noted that:

‘At the outset of these proceedings, the National Retail Association (“NRA”) sought to vary the weekend and public holiday penalty rates in relation to the Fast Food Industry Award 2010 (“Fast Food Award”). However, because of similar claims having also been filed by other employer parties and in order to avoid duplication, the NRA determined that it would be more practical for it to adopt a supporting role in relation to the claims for the reduction of Sunday penalties in the Fast Food Award and to act as an interested party in these proceedings.’¹⁸⁰

[304] The Commission published a draft summary of the claims before the Full Bench and directed that corrections or amendments to that summary be filed in the Commission’s registry.¹⁸¹ The draft summary included the NRA’s proposal, and the NRA did not advise the Commission that this was incorrect. A final version of the summary of claims was subsequently published by the Commission.¹⁸²

[305] As it is unclear exactly what the NRA means when it states that its role will be ‘to act as an interested party’ and, given the NRA did not dispute the accuracy of the Commission’s summary, we have proceeded on the basis that the NRA is still an active party to these proceedings and is seeking the variations outlined in the summary of claims published by the Commission.

[306] We also note that ACCI supported the applications advanced by ABI and joined in ABI’s submissions.

[307] The claims of the principal employer parties were opposed by the Shop, Distributive and Allied Employees Association (SDA) and United Voice. The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) and the Australian Council of Trade Unions (ACTU) made submissions in support of the positions put by the SDA and United Voice. APESMA called one lay witness in relation to the *Pharmacy Industry Award 2010*, and the ACTU called one expert witness, Professor Markey¹⁸³ to give evidence in response to the expert evidence by Ms Lynne Pezzullo.¹⁸⁴

5.2 Productivity Commission Inquiry Report: Workplace Relations Framework

5.2.1 Admissibility and Overview

[308] The *Productivity Commission Inquiry Report: Workplace Relations Framework* (the PC Final Report) was published by the Productivity Commission on 30 November 2015 following an inquiry into the 'Workplace Relations Framework' arising from a request made by the Commonwealth Government pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998* (Cth). The terms of reference for the Productivity Commission inquiry are set out at [Attachment D](#).

[309] Ai Group sought to tender the PC Final Report in totality, for completeness, but only sought to rely on Chapters 9, 10, 11, 12, 13, 14 and 15 and Appendix F of that report. These Chapters and the Appendix deal with, among other things, penalty rates for 'long hours and night work' and the 'level of weekend penalty rates'. They also include data and information about Australia's social, working and consumer demographics, as well as expressing views about the appropriate level of penalty rates in Australian workplaces. Ai Group's application was supported by a number of other employer parties (RCI, PGA, ARA, NRA, MGA and ABI) and opposed by the SDA and United Voice.

[310] In a decision¹⁸⁵ issued on 12 February 2016 we admitted Chapters 9, 10, 11, 12, 13, 14 and 15 and Appendix F of the PC Final Report as part of the common evidence in these proceedings, noting that:

'The PC Final Report contains information and discussion that is properly regarded as evidentiary in nature and some elements that should properly be considered as submissions. It contains considerable factual material based upon sources that are also set out in the report. These matters are relevant to the factual context for this Review. The report also contains the views of the Productivity Commission, including specific recommendations that it makes to the Commonwealth Government. To the extent that the Productivity Commission comments upon some of the evidence that has been presented us as part of this Review and expresses its views about what we should do as a result of this Review these observations are in the nature of submissions, rather than evidence, and will be considered as such by us. We note that to the extent that the PC Final Report considers the expert evidence given in these proceedings the employer parties place no reliance on such consideration.'¹⁸⁶

[311] Four points may be made about the basis upon which the PC Final Report has been admitted:

- (i) The Employer parties did not seek to have the PC Final Report treated as expert opinion evidence and accordingly it was not admitted on that basis.

- (ii) The Employer parties place no reliance on those aspects of the PC Final Report which considers the expert evidence given in these proceedings.
- (iii) The opinions expressed by the Productivity Commission as to the appropriateness of current penalty rates will be treated as submissions, not evidence.
- (iv) The PC Final Report contains factual material and data that is relevant to the review of penalty rates in the awards before us. We refer to this material in more detail in Chapter 6.

[312] Penalty rates for long hours and night work are considered in Chapter 9 and weekend penalty rates are considered in Chapters 10, 13, 14, 15 and Appendix F of the report. Chapters 11 and 12 dealt with the shift to a 7 day consumer economy and the social effects of weekend work.

[313] The consideration of penalty rates in the PC Final Report was limited to penalty rates that apply to the hospitality, entertainment, retail, restaurant and café industries, referred to as the HERRC industries in the report. While acknowledging that there are good reasons to take different approaches to different industries, the Productivity Commission report suggested that the HERRC industries have some distinctive features in terms of their business environments, labour market and employees. The Productivity Commission explains the rationale for focussing on the HERRC industries, as follows:

‘... 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.’¹⁸⁷ (footnotes omitted)

[314] The modern awards considered by the Productivity Commission to be applicable to the HERRC industries are:

- *Restaurant Industry Award 2010*;
- *Registered and Licensed Clubs Award 2010*;
- *General Retail Industry Award 2010*;
- *Hospitality Industry (General) Award 2010*;
- *Amusement, Events and Recreation Award 2010*;
- *Fast Food Industry Award 2010*;
- *Pharmacy Industry Award 2010*; and
- *Hair and Beauty Industry Award 2010*.¹⁸⁸

[315] In this part of our decision we consider those aspects of the PC Final Report dealing with weekend penalty rates, public holidays and penalty rates for night work. As mentioned,

Chapters 11 and 12 of the PC Final Report deal with the shift to a 7 day consumer economy and the social effects of weekend work. We refer to some of that material in Chapter 6 of this decision.

5.2.2 Weekend penalty rates

[316] In relation to weekend penalty rates the central recommendation in the PC Final Report (Recommendation 15.1) is that the Fair Work Commission should, as part of its current award review process:

- set Sunday penalty rates that are not part of overtime or shiftwork at the higher rate of 125 per cent and the existing Saturday award rate for permanent employees in the hospitality, entertainment, retail, restaurant and café industries;
- set weekend penalty rates to achieve greater consistency between the above industries, but without the expectation of a single rate across all of them; and
- 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.¹⁸⁹

[317] The PC Final Report concluded that penalty rates for weekend work that does not involve shift or overtime work are justified and ‘a legitimate and continuing feature of the safety net for all non-standard hours across all industries’.¹⁹⁰

[318] We deal with each of the proposed changes below.

(i) Reduced rates for Sunday work

[319] It is important to appreciate that the Productivity Commission’s recommendations in respect of the reduction of Sunday penalty rates are confined to the HERRC industries. In particular the PC Final Report states:

‘There is no case for common penalty rates across all industries. The Commission is not recommending a reduction in the Sunday penalty rates beyond HERRC. Regulated penalty rates as currently constructed for essential services and many other industries are justifiable. The original justifications have not altered materially: they align with working arrangements that often involve rotating shifts across the whole week, are not likely to reduce service availability meaningfully, are commensurate with the skills of the employees, and are unlikely to lead to job losses.’¹⁹¹

[320] The arguments advanced in the PC Final Report in support of the reduction of Sunday penalty rates in the HERRC industries fall into three broad categories:

- the social impacts of Sunday work are similar to working on Saturdays;
- consumer benefits; and
- employment effects.

[321] The Productivity Commission acknowledges that lower Sunday penalty rates will reduce the income of existing employees in the HERRC industries.¹⁹²

[322] We deal with each of these matters below.

(a) Sunday vs Saturday work

[323] In Chapter 13 of the PC Final Report, the Productivity Commission deals with the level of weekend penalty rates and observes that:

‘The present Sunday rates for these industries seem to be much less clearly justified either on economic grounds or according to community norms compared with other working times ... the social disabilities associated with weekend work — for which there is sound evidence (chapter 12) — does not strongly support the large gap between penalty rates on Saturdays and Sundays.’¹⁹³

[324] The social effects of weekend work are dealt with in Chapter 12 of the PC Final Report and we refer to some of that material in Chapter 6 of this decision.

(b) Consumer benefits¹⁹⁴

[325] The Productivity Commission contends that consumers (including tourists) would be major beneficiaries for the proposed reduction in Sunday penalty rates in the HERRC industries:

‘With lower Sunday penalty rates, consumers would gain access to more services for longer hours and with higher staffing ratios. Sunday surcharges would be likely to disappear, and average prices for consumer services throughout the week would be likely to be a little lower.’¹⁹⁵

[326] The Productivity Commission also notes that there would be potential productivity improvements from reform:

‘... as the fixed costs of running a business would be spread over greater opening times and demand ... [and that] [b]etter capital utilisation would put further downward pressure on average unit costs and prices. Moreover, the lower labour costs associated with reduced penalty rates may permit the payment of targeted incentive based payments that motivate staff and enhance productivity... All of these will benefit consumers.’¹⁹⁶

(c) Employment effects¹⁹⁷

[327] The Productivity Commission concludes that there would be significant employment effects associated with its proposed reduction in Sunday penalty rates:

‘Given the characteristics of the demand for HERRC goods and services, and the high labour shares in these industries (chapter 11 and table 15.1 in chapter 15), it seems very likely that there would be considerable growth in hours worked and, to a lesser extent, employment *on Sundays* from lowering penalty rates on these days. If a labour demand elasticity for Sunday of -0.6 (a hypothetical, but probably conservative estimate) were to apply, the anticipated increase in hours from say a 33 per cent reduction in wage rates would be around 27 per cent. The change would also be likely to reduce the trend towards capital substitution in the relevant industries (noting that the scope for automation and self-service is rising). A shift in total hours of this magnitude would take the form of greater hours for existing staff and hiring of new employees. The mix is unclear and would depend on the characteristics of labour supply and

demand for would-be employees and existing employees in each sub-market.¹⁹⁸ (footnotes omitted)

(d) The impact on the earnings of existing employees 199

[328] The Productivity Commission observes that the degree to which the labour earnings change for people currently employed on Sundays depends on the:

- new regulated Sunday penalty rate for each relevant award;
- extent to which some negotiated weekend wages might lie above a new lower penalty rate for Sundays;
- timing of new enterprise agreements, as any penalty rates in existing agreements would continue to apply;
- relative proportion of an employee's time spent working on Sundays; and
- extent to which lower wage rates induced greater demand for labour on Sundays.²⁰⁰

[329] As to the last point, the Productivity Commission concludes that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of penalty rate reductions.²⁰¹

[330] While acknowledging that lower Sunday penalty rates will reduce the income of existing employees in the HERRC industries, the Productivity Commission notes that:

- only the minority of HERRC employees work only on weekends, which reduces the importance of lower wage rates on Sundays;
- the reduction in wage rates for casual employees is less than for permanent employees because of existing anomalies in the interaction of casual loadings and premium rates for Sunday work;
- the net effect would be lower given offsets through the tax and transfer system; and
- many HERRC employees do not come from low paid households. Many are in households with two other income earners.²⁰²

(ii) Greater consistency in weekend penalty rates

[331] There is a wide disparity in the weekend penalty rates in the HERRC industries, as the Productivity Commission notes in Table 10.1 (reproduced below as Table 4).²⁰³

Table 4
Penalty rate arrangements for selected modern awards

Award applying in 2015	<i>Permanent</i>			<i>Casual</i>		
	<i>Percentage of permanent base rate</i>			<i>Percentage of permanent base rate</i>		
	Base rate	Sat	Sun	Base rate	Sat	Sun
	%	%	%	%	%	%
Restaurant Industry	100	125	150	125	150	150 (175)
Registered and Licensed Clubs	100	150	175	125	150	175
General Retail Industry	100	125	200	125	135	200
Hospitality Industry (General)	100	125	175	125	150	175
Amusement Events and Recreation	100	100	150	125	125	175
Fast Food Industry	100	125	150	125	150	175
Pharmacy Award	100	125, 150	200	125	150	225
		200			175, 225	
Hair and Beauty	100	133	200	125	133	200

[332] The Productivity Commission states that there are grounds for greater consistency (short of uniformity) between penalty rates across the HERRC industries, noting that ‘Differences in rates create compliance costs and uncertainty for employers and employees’.²⁰⁴

(iii) Weekend penalty rates for casuals

[333] The PC Final Report made reference to the interaction of penalty rates and casual loadings and concluded:

‘In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.’²⁰⁵

[334] The Productivity Commission recommended that modern awards be amended to ensure that casual loadings are applied to penalty rates in the same way across all awards. It 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. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee. It would also be consistent with the desirability of ‘equal pay for equal’ work.’²⁰⁶

[335] The PC Final Report sets out the three methods currently used for determining the rate of pay for casual employees in the modern awards relevant to the penalty rates case. Each method arrives at a different rate of pay for casual employees during times when weekend penalty rates apply. The methods are set out below.

- the ‘default’ approach where the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees;
- casual loading applies to the rate of pay once penalty rates are applied to the ordinary/base wage; and
- in some instances, casual employees do not receive a loading as well as the penalty rate, so their rate of pay on weekends is the same as permanent employees.

[336] The casual loading for weekend work for the modern awards relevant to the penalty rates case is determined using different methods across the modern awards and, in some cases, different methods within the same modern award. These are described below:

- *Fast Food Industry Award 2010*: the casual loading applies to the rate of pay once penalty rates are applied on Saturdays. The casual loading is applied as per the ‘default’ method on Sundays.
- *Restaurant Industry Award 2010*: the casual loading is applied as per the ‘default’ method on Saturdays and Levels 3 to 6 on both Saturdays and Sundays; there is no casual loading for Levels 1 and 2 on Sundays (the penalty rate is inclusive of casual loading).
- *General Retail Industry Award 2010*:²⁰⁷ a casual loading of 10 per cent is applied per the default approach on Saturdays. No casual loading applies on Sundays (the penalty rate is inclusive of casual loading).
- *Registered and Licensed Clubs Award 2010*: no casual loading applies on weekends (the penalty rate is inclusive of casual loading).
- *Hospitality Industry (General) Award 2010*: a casual loading is applied on Saturdays as per the ‘default’ approach. No casual loading applies on Sundays (the penalty rate is inclusive of casual loading).
- *Pharmacy Industry Award 2010*: the casual loading is applied as per the ‘default’ approach on both Saturdays and Sundays.

[337] The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee,²⁰⁸ the ‘default’ method should be preferred. As we observe later, the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer’s leave, notice of termination and redundancy benefits.

[338] For our part we would observe that the ‘default’ approach is also consistent with one of the considerations we are required to take into account in determining whether a modern award satisfies the modern awards objective, in that it provides a casual loading that is simple and easy to understand, consistent with s.134(1)(g) of the FW Act.

5.2.3 Penalty rates for long hours and night work

[339] Chapter 9 of the PC Final Report focuses on penalty rates for long hours and night (and associated shift) work. The Productivity Commission’s observations about night work penalties are relevant to the current proceedings as there are applications to vary the late night penalties in a number of the modern awards before us.

[340] In 2013–14 almost 1.2 million Australian employees (about 11 per cent of employees) reported working schedules likely to involve night work (including regular night shifts and rotating shifts).²⁰⁹ The incidence of night work varies substantially across industries ranging from 38.8 per cent in Accommodation and food services and 21.1 per cent in Retail trade to 5.3 per cent in Financial and insurance services.²¹⁰

[341] The Productivity Commission comments on the adverse health effects of night work,²¹¹ and concludes:

‘There is strong evidence that night work has adverse health costs. Moreover, these costs are unlikely to be factored into freely negotiated wages given the imbalance of market power between many employers and employees. Given that night shift loadings likely reduce the incidence of night work, and compensate employees for the additional costs associated with working these hours, there is a case for a regulated wage premium associated with night work.’²¹²

5.2.4 Public holiday penalty rates

[342] The Productivity Commission recommended that: ‘The Fair Work Commission should not reduce penalty rates for existing public holidays’,²¹³ noting that, by definition:

‘... genuine public holidays are intended to serve a special community role and, as such, there are strong grounds to limit the expectation that they are for working. In that sense, the original concept of deterrence continues to have relevance’.²¹⁴

5.2.5 Conclusion

[343] The PC Final Report contains useful references and research material that is of assistance to us in our present task.

[344] We observe that the Productivity Commission considered reports and materials authored by some of the expert witnesses who gave evidence in this matter. However, unlike the Productivity Commission, the Commission has had the benefit of having that material challenged through the process of expert witnesses giving evidence and being subject to cross-examination. Further, the expert witnesses have also given direct evidence in response to contrary views and this has permitted us to fully consider the competing assumptions and

approaches underpinning that material. We have also heard the direct evidence of many business proprietors and employees as part of this Review.

[345] Further, whilst the Productivity Commission assessed various considerations, it was not required to apply the particular statutory considerations which we are obliged to apply in the Review. The Productivity Commission's role in the present context was substantially to inquire and make policy recommendations to Government²¹⁵ and this is to be contrasted with the determinative role of this Commission. In that regard, in our earlier decision concerning this matter we noted that the PC Final Report was not advanced by the employer parties as expert evidence.²¹⁶ This does not mean that the Productivity Commission is not comprised of experts, rather, the authors of the PC Final Report were not called to give evidence in relation to the matters before us and the parties advancing the report as part of their respective cases did not do so on that basis.

[346] In sum, we have had regard to the relevant material and propositions published by the Productivity Commission as part of the PC Final Report in reaching our findings in these matters, subject to the evidence before the Commission and the statutory considerations bearing upon our present task.

[347] For reasons outlined in Chapter 9 of our decision, we do not consider that the observations of the Productivity Commission regarding public holidays take account of the impact of s.114 of the FW Act upon the operation of public holidays under the relevant modern awards.

[348] We also note that the Productivity Commission treated all of the industries under its HERRC grouping on a common basis. As would be clear from our decision, whilst we have grouped the modern awards in the hospitality and retail industries together for convenience, we have considered each of the awards in their own right, consistent with the statutory directive in s.156(5) of the FW Act,²¹⁷ and found that there are some differentiating factors that bear upon the current issues. These include the composition of the workforce and the context in which some of the modern awards operate.

5.3 Other Submissions

[349] Some 36 submissions were filed by a range of organisations, community groups, State and Territory Governments, and other entities. These submissions can be characterised as either supporting or opposing the claims advanced by the principal employer parties.

5.3.1 Submissions supporting Employer claims

[350] A number of state-based employer associations provided submissions in support of the claims advanced by the principal employer parties. These associations were: the Chamber of Commerce and Industry of Western Australia (CCIWA); Chamber of Commerce and Industry of Queensland (CCIQ) Victorian Chamber of Commerce and Industry (VECCI) and the South Australian Employers Chamber of Commerce and Industry Inc T/A Business SA (BSA).

[351] CCIWA supports the employer applications to reduce penalty rates in the modern awards before us. In summary terms CCIWA submits:

‘... the current penalty rates for Sunday work reflect out-dated cultural norms which contemplate Sunday as a day of rest and for religious observance, in which work was to be discouraged.

However, cultural norms have since changed across the bulk of Australian society. While for large parts of the workforce “Saturdays and Sundays remain a focal point for community and family interactions”, there is no longer any significant distinction between the way people treat and view Sundays as opposed to Saturdays.

The changing way in which people spend their leisure time has also increased the demand for retail and hospitality services on Sundays and public holidays...

the current regime of high penalties for work performed on Sundays and public holidays is limiting the number of jobs because of the impact it has on the operation of many retail and hospitality businesses...

For those businesses which do trade, it also impacts upon staffing levels: with many businesses rostering fewer staff; utilising cheaper less experienced junior staff; choosing to work the hours themselves; or enlisting the support of family members.

CCIWA members in the retail and hospitality industry have identified that a reduction in these penalty rates will have a positive impact on their employment decisions, both in term of how many people they employ and the number of hours offered to staff.²¹⁸ (footnotes omitted)

[352] In support of its submissions CCIWA relied extensively on the *Productivity Commission Inquiry Report: Workplace Relations Framework*. We deal with that report in Chapter 5.2.

[353] CCIWA also relies on a survey of its retail and hospitality members. The survey was undertaken for the purpose of establishing the views of businesses on the impact of penalty rates. An overview of the survey and the survey results are set out at Appendices A, B and C to the CCIWA submission. A summary of the survey results is set out at paragraphs 48–58 and 63 of the submission.

[354] As to the impact of a reduction in Sunday penalty rates, CCIWA submits that the survey results reveal that:

‘If Sunday penalty rates were reduced to the levels sought in these applications 10.5 per cent of respondents in the retail sector would choose open on Sunday and 31.5 per cent would open for more hours. In the case of hospitality employers, 15.8 per cent would choose to open and 26.3 per cent would open for more hours on a Sunday.

The respondents also identified that this would generally have a positive impact upon their employment decisions. Of the retail members, 36.8 per cent identified that they would employ more staff whilst 21 per cent would opt to roster a staff member instead of working themselves. Similar level of response was also recorded for hospitality members, with 37.9 per cent indicating that they would employ more staff, whilst 31 per cent would roster a staff member instead of themselves.²¹⁹

[355] We note that the figures quoted above in respect of the responses of the hospitality employers are incorrect. The references to 15.8 per cent and 26.3 per cent footnote the responses to questions 17, 21 and 25 from Appendix C. Survey Question 17 asks: ‘If penalty

rates were reduced to base rate + 25 % loading on Sundays, what impact would that have on your opening hours on that day?’ It will be recalled that the extract from CCIWA’s submissions set out above is prefaced with the words ‘If Sunday penalty rates were reduced to the levels sought in these applications...’. Contrary to what is suggested in Survey Question 17, in these proceedings the Hospitality Employers are seeking to reduce the Sunday penalty rate in the *Hospitality Industry (General) Award 2010* from 175 per cent to 150 per cent, for all employees.

[356] The relevant responses are those made to Survey Question 21, which asks: ‘If penalty rates were reduced to base rate + 50 % loading on Sundays, what impact would this have on your opening hours on that day?’. There were only 34 responses to this question, as set out below:

	Responses	
	No.	%
Would open Sunday	4	11.76
Would close Sunday	1	2.94
Open for more hours on Sunday	5	14.71
Open for less hours on Sunday	1	2.94
No influence	20	58.82
Other	5	14.71

[357] These results are somewhat curious. For example, 2 of the 34 employers who responded say that they would *close* or open for *less* hours on Sunday if penalty rates were *reduced*. Four of the respondents say they would open on Sundays if penalty rates were reduced. This too is curious, given that of the 49 Hospitality Employers who responded to the survey, 46 said that they currently regularly trade on Sunday.²²⁰

[358] Almost 60 per cent of the Hospitality Employers who responded to this question said that the reduction in Sunday penalty rates sought by the Hospitality Employers would have no influence on Sunday opening hours in their business.

[359] It is not apparent to us how CCIWA arrived at the figures in respect of the responses from hospitality employers which are in the extract from its submission set out at [354] above.

[360] The SDA submits that we should not consider the survey material contained in CCIWA’s submission, essentially on the basis that it had not been tendered as evidence and hence they have not had the opportunity to test it.²²¹

[361] We note from CCIWA’s written submission of 8 February 2016, and its reply submission of 1 May 2016, that the survey material was not submitted as evidence: ‘Rather, it is provided as indicative data on the views and experience of Western Australian employers in these industries’.²²²

[362] Contrary to the SDA’s submission, we propose to consider the CCIWA survey material, but for the reasons which follow, the survey data is of limited assistance.

[363] The CCIWA survey was conducted online through ‘Survey Monkey’ and sent to 8,500 WA businesses via CCIWA’s weekly e-newsletter. CCIWA only analysed complete responses from respondents who identified themselves as being in either the retail or

hospitality industry – there were only 50 such responses from retail businesses and 49 from hospitality businesses. No information is provided as to the survey response rate among retail and hospitality businesses.

[364] Given the small number of respondents to the relevant survey questions and the limited information provided in relation to the survey methodology, response rates and results, the CCIWA survey data is of limited assistance. It may be regarded as providing some indicative anecdotal data, rather than anything that can be said to be representative of the views of retail and hospitality businesses in WA.

[365] The Busselton Chamber of Commerce and Industry (BCCI) made a submission supporting the submission advanced by CCIWA regarding the impact of the current weekend and public holiday penalty rates on regional tourism. BCCI submits:

‘In many instances the significant costs associated with engaging staff on Sundays and public holidays makes it unviable for local businesses to operate on these days. In this situation the business simply closes. Not only does this negatively impact on the revenue for the business concerned, but it also translates to reduced employment opportunities for the local community...

Weekend and public holiday penalty rates currently act as a brake on the development of the local tourism industry, and in doing so limits employment opportunities for the local community.’²²³

[366] The BCCI submission also set out some comments by local businesses about the impact of the current Sunday and public holiday penalty rates.²²⁴ These businesses are only identified in a generic way, ‘a café restaurant’, ‘a clothing retailer’ etc., rather than identifying the specific business. BCCI submits that this material ‘is not intended as evidence, but is reflective of the general views of many of our members on the impact of weekend and public holiday penalty rates on local businesses, employees and the broader community’.

[367] We have had regard to this material but accord it little weight as the relevant businesses were not identified and hence there was no opportunity to test the views expressed.

[368] CCIQ filed 2 submissions, dated 29 June 2015 and 9 November 2015. The June 2015 submission is said to ‘provide high level commentary on the impact of penalty rates on the hospitality and retail sectors in Queensland’.²²⁵ CCIQ submits that ‘penalty rates need to be more pragmatic in order to effectively deal with emerging economic, social and demographic trends facing Australia’s working landscape’.²²⁶ In support of its submission, CCIQ relies on a survey of Queensland businesses conducted between 11 February and 13 March 2015, ‘to assess the impact of the FW Act, including penalty rates provisions’ (the CCIQ March 2015 Survey). In addition to the CCIQ March 2015 Survey, CCIQ hosted an ‘Industry Roundtable’ and several consultative forums across regional Queensland, though little detail was provided in respect of this qualitative material.

[369] CCIQ also relied on the CCIQ March 2015 Survey data in its final submission of 9 November 2015. We summarise that data below.

[370] Around 58 per cent of businesses who responded to the survey said that penalty rates and public holiday entitlements are a major or critical concern.²²⁷ A higher proportion of retail

businesses (17 per cent) reported that penalty rates and overtime increased substantially as a result of the creation of modern awards compared with businesses in other industries (6 per cent).²²⁸ The majority of responses in retail and other industries reported reduced employment or operating hours, particularly employment hours.²²⁹ This was more evident among small retail businesses, while a higher proportion of small hospitality businesses reduced both employment and opening hours.²³⁰

[371] When asked about reforms to penalty rates, 80 per cent of the responses from businesses in the hospitality sector and 70 per cent of businesses in retail sector supported the continued regulation of penalty rates but with reduced loadings.²³¹

[372] The CCIQ March 2015 Survey reports on the 1,038 responses received and provides a breakdown by business size and industry. But no information is provided about the number of businesses contacted to undertake the survey or how the survey sample was constructed. As a consequence, response rates cannot be calculated and nor can we reach any sensible conclusions about the representativeness of the survey results. We also note that small business respondents to the survey appear to have included non-employing businesses.

[373] CCIQ conducted another survey in September 2015 ‘to assess the adequacy of a number of the proposed recommendations, particularly regarding penalty rates in the retail and hospitality sectors’ from the Productivity Commission Draft Report. CCIQ reported that around 28 per cent of those who responded to that survey were from the HERRC industries.²³² Over one quarter of these businesses did not open on Sundays, with the majority (71 per cent) responding that it was due to the level of penalty rates.²³³

[374] Some 62 per cent of the responses from businesses in HERRC industries that already opened on Sundays said that they would increase their staffing levels if Sunday penalty rates were reduced to the Saturday rate.²³⁴

[375] The CCIQ September 2015 Survey has the same limitations as the CCIQ March 2015 Survey. Given these limitations, we propose to treat the results as indicative or anecdotal in character.

[376] We would also observe that the September 2015 survey poses questions predicated on the equalisation of Saturday and Sunday penalty rates, as proposed by the Productivity Commission. Yet the claims in respect of the *General Retail Industry Award 2010* and the *Hospitality Industry General Award 2010* propose a reduction in Sunday penalty rates, short of equalisation with the penalty rate for Saturday work.

[377] VECCI and BSA²³⁵ also made submissions supporting the claims filed by ABI in these proceedings. In addition, VECCI submits:

‘Furthermore, the Victorian Chamber has advocated strongly on behalf of Victorian business regarding the deleterious effect of State governments gazetting further public holidays which impose significant additional costs to Victorian business for negligible economic benefit or productivity gains. As we submitted to the Productivity Commission in the recent review of the Workplace Relations framework, the cost to pay many of Victoria’s almost 2 million full time employees not to come to work on the ‘Friday before Grand Final public holiday’ could reach \$543 million.’²³⁶

[378] A number of regional chambers of commerce and individual businesses also made submissions in support of ABI's claims in these proceedings: Bangalow Chamber of Commerce; Coffs Harbour Deep Sea Fishing Club; Coopers Surf Australia; eGoli Day Spa; Gosford City Chamber; Mayfield Business Association; the Moonee Beach Tavern & Bottle Shop and the Yamba District Chamber of Commerce. These submissions, and those made by VECCI and BSA, have a certain template character in that they all include the following statement:

'We have reviewed the written submissions filed on behalf of Australian Chamber of Commerce and Industry (ACCI), the New South Wales Business Chamber (NSWBC) and Australian Business Industrial (ABI) in the above proceedings on 2 February 2016.

We understand that ABI and NSWBC have filed claims seeking:

1. to reduce the public holiday penalty rate for full-time and part-time employees employed under the Restaurant Industry Award 2010 (Restaurant Award) and the General Retail Industry Award 2010 (Retail Award) from 250% to 200%;
2. to reduce the public holiday penalty rate for casual employees employed under the Restaurant Award and the Retail Award from 250% to 125% (including the casual loading);
3. to reduce the Sunday penalty rate for all employees employed under the Retail Award from 200% to 150% (inclusive of casual loading for casual employees); and
4. to vary the relevant pay rates for employees who receive time off in lieu when they work a public holiday under the Restaurant Award so that employees would receive 100% of their ordinary pay for working the public holiday, whilst also receiving time off in lieu.

We support all of these claims.

Based on feedback from our membership, [name of organisation making the submission] has become aware that the present regime of penalty rates is currently constraining:

- (a) the number of hours that our members open;
- (b) the number of trading days that our members operate;
- (c) the number of employees that our members can hire and keep employed;
- (d) the number of hours that our members can offer their employees to work; and
- (e) the revenue and profit generated by our members.

If the NSWBC and ABI claims are granted, we envisage that the adverse effects discussed above would be lessened.²³⁷

[379] The template character of these submissions reduces the weight we attach to them.

[380] The Federal Member for Durack, Ms Melissa Price MP, also made a short submissions in which she says:

'I met with some small business owners from Geraldton to discuss issues they face and a common concern was the complex penalty rate system for employees...

I found that many businesses in the retail and hospitality industries simply do not open on a Sunday or public holiday due to increased wage costs. This is a concern to me as I believe in Durack, Sunday and Public Holiday trading is desired by the constituents.²³⁸

[381] The submission refers to a proposal put by a small business owner in Geraldton involving ‘a change from the current multi-tiered penalty rate system to a two-tiered penalty rate system one rate for normal hours ... then a rate for non-standard hours, including public holidays’. Ms Price asks that we consider this proposal as part of these proceedings and submits that the proposal ‘has merit and would result in an increase in business opening hours and therefore employment in Durack’.²³⁹

[382] No details were provided as to the particular penalties that would operate in the proposed ‘two-tiered penalty rate system’. Further, to the extent that the proposal seeks a common penalty rate for all work performed on Saturdays, Sundays and public holidays, that is not a proposal being advanced by any of the principal employer parties in these proceedings.

[383] As to the expressed concern about the complexity of the current penalty rate system, that is a matter we deal with in Chapter 12: Next Steps.

5.3.2 Submissions opposing Employer claims

[384] Some 22 submissions were received in opposition to a reduction in Sunday penalty rates sought by the principal employer parties. These submissions may be categorised into the following broad groups:

- State and Territory governments;
- Church based organisations;
- Political entities;
- Women’s organisations; and
- Other organisations.

(i) *State and Territory Governments*

[385] The Governments of Victoria, Queensland, South Australia and the ACT all oppose the reduction of penalty rates.

[386] The Victorian Government submits that:

‘... a change to penalty rates, while providing some financial benefit to business, comes at too high a price. Many employees face the prospect of losing a significant proportion of their income. The businesses that will benefit from a lower wages bill may find that people have less discretionary income to spend on their products. A long-term implication is that further pressure may be placed on the social security system as low paid workers seek assistance from the government to make up for their lost wages.’²⁴⁰

[387] The Appendix to the Victorian Government’s submission contains material about the impact of the proposed reductions in penalty rates on employees covered by the *General Retail Industry Award 2010*; the *Restaurant Industry Award 2010*; the *Fast Food Industry Award 2010* and the *Hospitality Industry (General) Award 2010* (also see Figure 3 on p. 26 of the submission).

[388] The Queensland Government submits:

‘Workers in the Hospitality, Restaurant, Retail and related industries are some of the lowest paid in Australia. These workers rely upon penalty rates to provide the basics for their families and themselves. The hours they work on evenings, weekends and public holidays have a significant impact on them and their family. Existing penalty rates go some way to compensate these workers for giving up this valuable time with their family and friends. This is time the rest of the community accepts as the norm.

Reducing penalty rates may also have a negative impact on the economy with low income earners more likely to spend a far greater proportion of their income – including that derived from penalty rate – on local goods and services. Any reduction in spending in local Queensland economies – especially in regional communities where businesses are doing it tough – would have a negative impact.’²⁴¹

[389] The South Australian Government submits:

‘Penalty rates play a critical role in compensating employees working long or unsociable hours. Thousands of South Australians rely on penalty rates to make ends meet. Removing or reducing penalty rates will have a negative impact on South Australian workers and their families.

It is vitally important that penalty rates are upheld to maintain workers’ take home pay. Many of those paid penalty rates rely on them financially – to pay their bills, put food on their tables or pay for theirs or their children’s education. Reducing penalty rates will have the effect of increasing inequity in Australian society.

Further, reducing penalty rates is likely to have a negative impact on South Australia’s economy. Our economy is in a state of transition and we face challenges ahead. To reduce the pay of many South Australians will reduce consumption and serve to exacerbate those challenges.’²⁴²

[390] The ACT Government opposed changing the penalty rate arrangements in the modern awards under review:

‘Penalty rates have an important and legitimate role in compensating employees and should be maintained for those working long hours or at unsociable times...

A reduction in penalty rates is effectively asking some of the lowest paid and most vulnerable workers in our community to take a pay cut.’²⁴³

(ii) Church based organisations

[391] The Anglican Church Diocese of Melbourne expresses concern about the proposal to cut Sunday penalty rates to the level of those applying to Saturday work noting that weekend penalty rates are a significant part of the income of low paid workers and that Sundays remain days of special significance:

‘Sunday is a time when we can slow down to the pace of the very young, old, and disabled. Sunday is most often the day when these vulnerable people are paid attention or are visited or called. It is a day that resists today’s pervasive fragmentation and social erosion...

Sunday is not just a day for the devout – it’s a day for rest, families, friends, young and old.

Sunday penalty rates recognise the special nature of Sunday as a shared day of rest for what should be kept as a minority who miss out for emergency work or economic necessity.²⁴⁴

[392] A similar submission is made by the Social Issues Committee of the Anglican Church Diocese of Sydney.

[393] Baptist Churches NSW-ACT, said to represent over 100,000 people, also affirmed its support for the existing Sunday penalty rates regime:

‘In Australian culture, Sundays are a day for rest, worship, family and community...

Reductions in Sunday penalty rates will increase both time and financial pressure on low-paid households...

Sunday penalty rates in low-skilled industries such as hospitality and retail allow students, immigrants, low-paid workers, and people trying to escape poverty to accumulate some savings or make ends meet. Reducing Sunday penalty rates leaves marginal households more precarious and makes it harder for people to escape or stay out of poverty...

We do not support any action which increases Sunday trading beyond the current levels. Despite the employer group rhetoric, plenty of businesses currently open on Sunday. Reductions in penalty rates will simply transfer wealth from the have nots to the haves.²⁴⁵

[394] The Burwood-Croydon Uniting Church and the Leichardt Uniting Church also made submissions supporting the existing Sunday penalty rates regime.²⁴⁶

[395] The Uniting Church Synod of NSW & ACT calls on the Commission ‘to maintain the current Australian tradition of compensating workers for being available on Sundays’ and ‘do not support any action which increases Sunday trading beyond the current levels’.²⁴⁷

[396] The Justice and Peace Office of the Catholic Archdiocese of Sydney strongly oppose the Productivity Commission’s recommendation to reduce Sunday penalty rates in the retail and hospitality industries and submit:

‘We are concerned that the recommendation does not provide a proper balance between the rights of employers and the rights of employees in several respects. As Christians we are also troubled by the effort to encroach further on time with family and communities as well as time for rest, recreation and worship on Sundays...

Reducing penalty rates will punish some of Australia’s already most vulnerable and low-paid workers.²⁴⁸

[397] The Justice, Peace and Integrity Creation Commission of the Australia Timor Leste Carmelite Order, a religious order within the Catholic Church, opposes reduction in Sunday penalty rates, for similar reasons to those set out above and submits:

‘Sunday, a day of rest and recreation, does remain important for a wholesome social life and builds on community cohesion. The vast majority of the Australian community spends time with friends or in community groups. We believe that this day is a day made for the good of all people, not just a select few who do not enjoy higher economic comfort’²⁴⁹

[398] The Bosco Social Justice Group, mainly comprising of parishioners of St John Bosco Parish, Engadine NSW, also oppose the reduction of penalty rates for Sunday work for both social justice and religious reasons.²⁵⁰

(iii) *Political Entities*

[399] The Federal Opposition and the State Labor Oppositions in NSW, Tasmania and WA, oppose the employer applications before us.

[400] The Federal Opposition notes that changes to penalty rates:

‘... will represent significant changes to the total earnings and income of workers in hospitality and retail industries that have a higher prevalence of casualisation, and accordingly impact on fairness across our society and the performance of the Australian economy...

In short, there is clear and well-founded evidence that reducing the take home pay of low paid Australian workers will have a negative impact on domestic consumption. At the same time, it is highly unlikely that the benefits claimed by individual businesses will be seen across the aggregate economy.’²⁵¹

[401] The Federal Opposition also submits that:

‘Penalty rates continue to be a fundamental part of a strong safety net for Australia workers, enabling low income workers and workers in highly casualised industries to share in the nation’s economic prosperity...[and] in the context of current economic circumstances and in the interests of supporting inclusive and fair growth, any changes to the modern awards should not cut the take home pay of affected workers.’²⁵²

[402] We deal with the potential use of ‘take home pay orders’ in Chapter 11, Transitional Arrangements.

(iv) *Women’s organisations*

[403] Asian Women at Work Inc (AW@W) is a community organisation which provides assistance and support to over 2,000 low paid Asian women in precarious employment. AW@W supports the retention of weekend penalty rates and opposes the reduction or abolition of those rates. It submits:

‘Migrant women workers in low paid and precarious employment are already very vulnerable and are under considerable financial stress. They do not need more stresses that can worsen their situations in the workplaces, bring about more family tension, drive them into poverty, impact on their health.’²⁵³

[404] The National Foundation for Australian Women (NFAW) submits that there are no grounds for changing existing penalty rates in the modern awards before us.²⁵⁴ The NFAW advances a number of points in support of its central contention that the PC Final Report does not provide a sufficient basis for change, in particular it submits:

- the Productivity Commission is not bound to take into account the full range of considerations set out in the modern awards objective and it has not done so in reaching its recommendations;

- women would be disproportionately affected by a reduction in Sunday penalty rates in the HERRC industries; and
- the Productivity Commission contention that the negative impact of working on Sundays is no different to that associated with Saturday work is wrong (citing Skinner and Pocock²⁵⁵ and the Expert Report of Professor Sara Charlesworth and Dr Fiona Macdonald in these proceedings.²⁵⁶

(v) *Other organisations*

[405] The National Union of Students (NUS) supports the retention of the existing regulatory arrangements regarding penalty rates. The submission focuses on the impact of a reduction in penalty rates on students and provides information about the interaction between student employment income and various student income support programs. The NUS submits:

‘Hundreds of thousands of university students are juggling work and study commitments to the point where their academic performance is being adversely affected. A loss or reduction in penalty rates will mean that students will have to work longer hours to maintain current income levels [which]... will exacerbate existing problems with student academic performance and campus engagement. It is also likely to lead to an increase in student withdrawal/deferment from university study as the knife-edge juggle being paying bills and study gets too hard.’²⁵⁷

[406] The Curtin Student Guild raised similar concerns and contended that there was a relationship between the cost of living, income from employment and student attrition rates.²⁵⁸

[407] The Queensland Police Union of Employees (QPU) submits that:

‘... any proposal to reduce penalty rates is nothing more than an unfair and unjust money grab that will disadvantage the employees most deserving of just recompense for the impact shiftwork has on their health and lifestyle.’²⁵⁹

[408] The QPU expresses its concern that a reduction in penalty rates arising from these proceedings will flow on to police officers – ‘thereby affecting their income and negatively impacting on the efficient operation of the Queensland Police Service’.²⁶⁰

5.4 Public contributions

[409] On 15 January 2016²⁶¹ we issued directions which provided that:

‘Any interested person who is not a party to the proceedings may put forward a position (and file material in support of their position) in relation to varying the penalty rate provisions in the above awards by no later than 4.00pm Wednesday 17 February 2016.’

[410] The above direction was advertised in major newspapers nationally on 20 January 2016²⁶², as set out below:

4 yearly review of modern awards – Penalty rates

Since January 2014, the Fair Work Commission has been conducting a four yearly review of all modern awards in accordance with s.156 of the *Fair Work Act 2009*.

Following the publication of an Issues Paper in January 2014 and a public conference, any interested persons were invited to make submissions relating to the conduct of the review including any claims which affected multiple modern awards.

One of the common issues identified as a result of the consultation process involved applications by a number of organisations to vary penalty rates in certain awards.

As a result, the Commission is currently reviewing penalty rates in the following awards:

Hospitality group

- *Hospitality Industry (General) Award 2010*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*

Retail group

- *Fast Food Industry Award 2010*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Pharmacy Industry Award 2010*

All directions for filing and the schedule of hearings have been published on a dedicated Penalty Rates page on the Commission's website [www.fwc.gov.au]. Material filed by interested parties has also been made publically available on this webpage.

The Penalty Rates Review is nearing completion and directions have been issued for the filing of final submissions. There is a further opportunity for any interested person who is not a party to the proceedings to put forward a position (and file material in support of their position) in relation to varying the penalty rate provisions in the above awards in accordance with those directions.

Material is to be filed electronically by email to amod@fwc.gov.au

Those persons wishing to put forward a position are encouraged to view the Commission's website for further information.

[411] In response to the invitation to make submissions, some 5,960 public contributions from individual employees and employers were received and 5,845 published on the Commission's website. The remaining 115 contributions were confidential²⁶³ and were provided to the principal parties (in redacted form) but not published.

[412] ABI and a number of employer parties²⁶⁴ undertook a review of the public contributions and filed a joint submission.²⁶⁵ Attached to the submission was a spreadsheet outlining their analysis. The review assessed the public contributions available for review²⁶⁶ against the following questions:

- Is it impossible to identify what industry the contribution relates to?

- If it is possible to identify the relevant industry, what industry does the contribution relate to?
- Is the identified industry relevant to the present proceedings?
- Is the identified industry relevant to the restaurant and retail industries?
- Does the contribution seek to oppose the abolition of penalty rates?
- Does the contribution seek to oppose the reduction of penalty rates?
- Does the contribution differentiate between Saturdays and Sundays?
- Does the contribution refer to church or religious observance?
- Does the contribution identify that the author works Sundays?

[413] On the basis of their joint review, the employer parties submit:

- (i) The clear majority of contributions reviewed (3513 out of 5873 or just under 60 per cent) do not indicate the industry to which the contribution relates.
- (ii) Of those contributions that do indicate the industry referred to, approximately 45 per cent do not relate to the industries affected by these proceedings.
- (iii) Accordingly, in total, only 1291 of 5873 contributions reviewed (approximately 22 per cent) actually relate to the industries affected by the present proceedings.
- (iv) Of the 1291 contributions which actually relate to the industries affected by the present proceedings, 682 (approximately 53 per cent) appear to assume that the employer claims include a proposal to abolish penalty rates, rather than reducing penalty rates.
- (v) Once all contributions that are not identifiably relevant to the current proceedings are removed including those which misunderstand the employer party claims, only 823 of the 5873 contributions (approximately 14 per cent) have potential relevance to the proceedings.

[414] The employer parties also submit that none of the 823 contributions of potential relevance are supported by evidence.

[415] Ai Group (which was one of the employer groups who undertook the review of the public contributions) filed a separate submission in which it observed that the contributions were general in nature, lacked supporting evidence and ‘in some cases are quite emotive rather than considered’.²⁶⁷

[416] United Voice²⁶⁸ and the SDA²⁶⁹ conducted their own analysis of the public contributions and commented on the review undertaken by the employer parties.

[417] United Voice submit that the review conducted by the employer parties demonstrates systematic errors and mischaracterisations.²⁷⁰ It submits that the employer parties sought to artificially limit the number of contributions that are relevant (in particular by disregarding those where the industry of the individual had not been identified), inappropriately relied

upon redactions and mischaracterised the contributions on the basis of whether the contribution opposes the *abolition* or *reduction* of penalty rates. United Voice submits that the employer parties' adopted a systematically inaccurate approach to the characterisation of the public contributions such as to render the employer review 'unreliable and lacking credibility'.²⁷¹

[418] We accept that the approach adopted in employer review of the public contributions may have excluded some relevant contributions. The analysis appears to disregard those contributions which do not identify the industry in which the individual concerned works. While one cannot presume that all of these individuals are employed in the hospitality or retail sectors, it is reasonable to presume that at least some of them are. Such a presumption is reasonable having regard to both the size of these sectors (in terms of persons employed) and the fact that the contributions were made in response to an advertisement which specified the modern awards which are the subject of these proceedings.

[419] But it seems to us that undertaking a further review of these contributions for the purpose of determining the precise number which are of direct relevance to these proceedings would be an arid exercise. We accept the submission advanced by the SDA in this regard:

'... the SDA has endeavoured to ensure that the analysis undertaken reflects the contributions, the SDA accepts that its analysis will contain errors just as there are errors in the Joint Employers' submissions. The Commission should view the analysis of the Union parties and the Employer parties as providing a broad overview or impression of some of the sentiments expressed'.²⁷²

[420] In particular we accept that a broad, impressionistic, view of this material is appropriate. In that regard we note that the overwhelming majority of the contributions received opposed the reduction or abolition of penalty rates.²⁷³

[421] As acknowledged by all parties, the public contributions do not constitute evidence and, importantly, the views expressed have not been tested in cross-examination. These considerations are relevant to the weight we attach to this material and, plainly, we attach less weight to these contributions than we give to the evidence advanced in the proceedings. But we do not propose to simply disregard the views expressed.

[422] Those who responded to the public call for submissions provided various reasons for opposing cuts to penalty rates. In its submission the SDA summarises these views and in doing so limited its analysis to those contributions which can be attributed to one of the modern awards which are the subject of these proceedings. Based on its analysis the SDA submits:

'The broad themes which emerge from this material are that the contributors express that there are real disabilities associated with working on Sundays and the loss of opportunities to spend time with family, to socialise and to relax, and that there are real concerns about the financial impact upon them of cuts to penalty rate entitlements in their work'.²⁷⁴

[423] The themes identified by the SDA as emerging from the public contributions form part of the broad context of the proceedings and can be said to provide some support for the evidence before us about the disability of working at times when penalty rates apply and about the financial impact upon individual workers of reducing those penalty rates.

6. Weekend work

6.1 Overview of data and evidence

[424] Parties called a number of witnesses and referred to several reports when discussing social changes in Australia across, and in particular, the incidence and effects of weekend work. Data and evidence in this section are drawn from the following:

- Fair Work Commission, *Changing work patterns*, material to assist the AM2014/305 Penalty rates case (*Changing work patterns* Report).
- Exhibit ABI 3: Professor Lewis, *Penalty rates and the retail and café restaurant; and hairdressing and beauty industries*, a report prepared for ABI (Lewis Report).
- Exhibit UV 25: Professor Borland, *Report by Professor Jeff Borland*, (Borland Report).
- Exhibit ABI 1: Professor Rose, *Value of Time and Value of Work Time during Public Holidays* (Rose Report).
- Common Exhibit 1: *Productivity Commission Inquiry Report: Workplace Relations Framework* – Chapters 9, 10, 11, 12, 13, 14, 15 and Appendix F (PC Final Report).
- Exhibit Retail 2; Dr Sean Sands, *Retail award research report*, (Sands Report).
- Bittman M (2005), ‘Sunday working and family time’, *Labour & Industry*, Vol. 16, No. 1, pp. 59–81.
- Exhibit ABI 13; Craig L and Brown JE (2014), Weekend work and leisure time with family and friends: who misses out?, *Journal of Marriage and Family*, Vol. 76, pp. 710–727.
- Exhibit Ai Group 26: ABS, *Australian Social Trends, Nov 2013: Losing my religion*, Catalogue No. 4102.0.
- Exhibit SDA 36: Dr Ian Watson and Professor David Peetz, *Characteristics of the workforce in the national retail industry: with regard to age, weekend work and student status*.

[425] The Commission’s *Changing work patterns* Report²⁷⁵ was published to assist the parties and present data on changes in the labour market, work arrangements and preferences, and how people spend their time when not working. Data were sourced from the ABS and the Household, Income and Labour Dynamics in Australia (HILDA) survey.

[426] The HILDA Survey is a longitudinal household-based panel study that collects information on economic and subjective well-being, labour market dynamics and family dynamics. Interviews are conducted annually with all adult members of each household who are followed over time. The survey began in 2001 and includes 15 waves of data that cover the period from 2001 to 2015.

[427] The *Changing work patterns* Report²⁷⁶ was first published in December 2015 and updated with new data in January, March, September and October 2016. The Report was updated for the most recent wave of the HILDA survey in January 2017 and that update included additional data from the ABS. Parties were invited to make submissions on this

report in late October 2016 and were also given an opportunity to comment on additional data which was included in the report in January 2017.

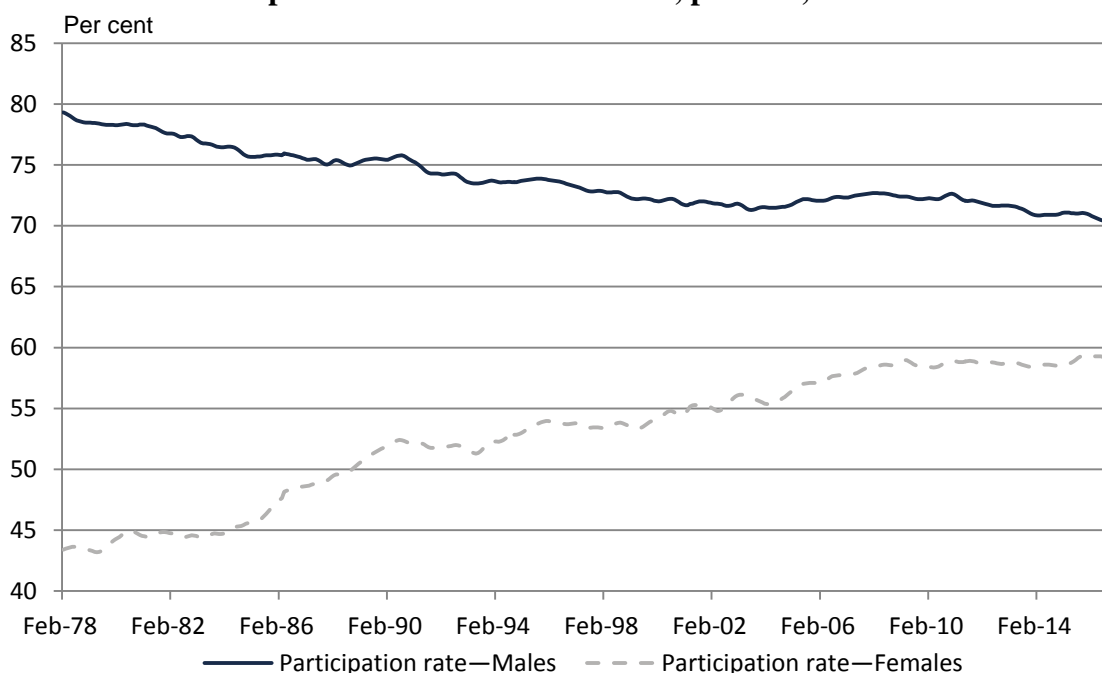
6.1.1 Trends in the labour market

[428] Labour market indicators were presented in the Commission’s *Changing work patterns* Report and in the Lewis Report. The first two parts of the Lewis Report provided an overview of the trends in the Australian labour market and the economic environment in which the retail, cafe and restaurant industries operate. This material is largely uncontentious. The contentious part of the Lewis Report is that part dealing with the employment effects of introducing penalty rates on Sundays and public holidays. We deal with that aspect of the Lewis Report in Chapter 6.3.1.

[429] The data from the Lewis Report is sourced from the ABS. In some instances, the data presented in the Lewis Report captured trends over a longer period to show how much the labour market has changed since the late 1970s.²⁷⁷

[430] The composition of the labour market has changed significantly over the last 25 years or so and this has contributed to the changing nature of weekend work. Between 1978 and 2016, the participation rate for females increased by around 15 percentage points, while the participation rate for males decreased by around 8 percentage points (Chart 1).

Chart 1²⁷⁸:
Participation rate—male and female, per cent, 1978–2016

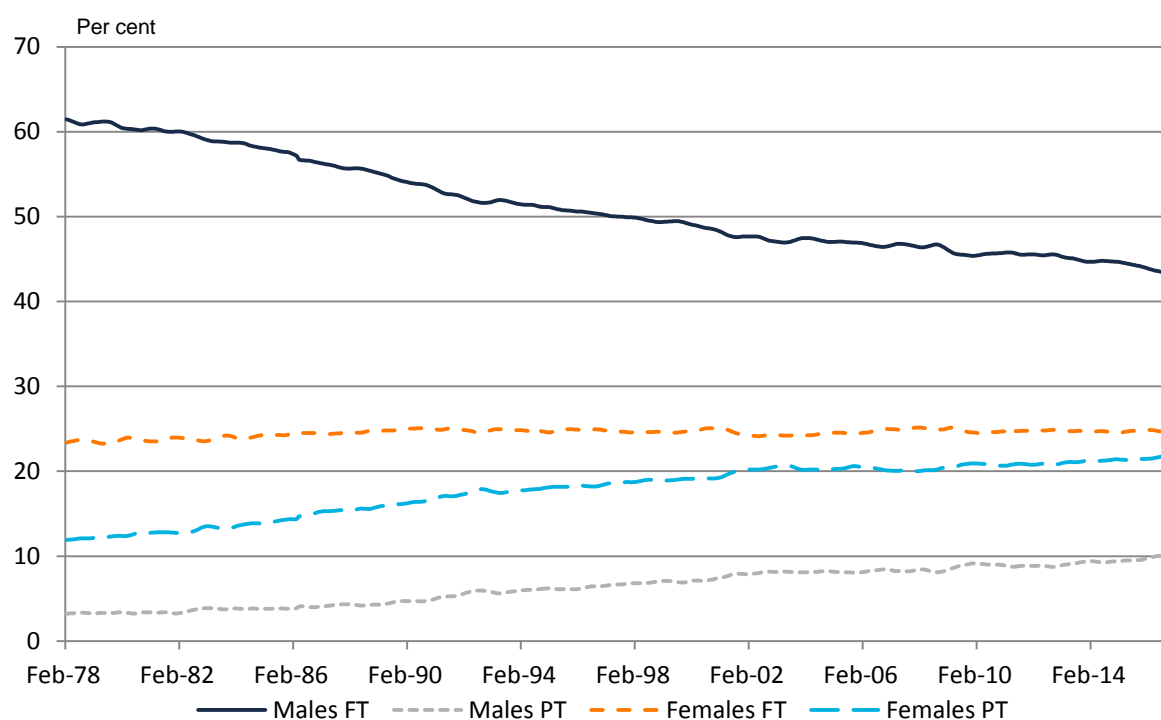


[431] The increase in the female participation rate has been associated with changes in the composition of employment and, in particular, a rise in part-time employment (Chart 2). The Lewis Report notes that there has been a substitution of female employment, particularly part-time, for male full-time employment.²⁷⁹ Lewis added that flexibility in hours worked is required to meet peaks in demand in the services sector which is facilitated by part-time employees.²⁸⁰

[432] Part-time employment is defined as those who usually worked less than 35 hours a week (in all jobs) and either did so during the reference week, or did not work in the reference week.²⁸¹ The ABS define full-time employment as those who usually work 35 hours or more a week (in all jobs) and those who, although usually working less than 35 hours a week, worked 35 hours or more during the reference week.

[433] Chart 2 shows that male full-time employment decreased from 61.5 per cent of total employment in February 1978 to 43.5 per cent in August 2016. This decrease was offset by an increase in male part-time employment (from 3.2 per cent to 10.1 per cent) and female part-time employment (from 11.9 per cent to 21.7 per cent). Female full-time employment remained relatively steady over the period at around 25 per cent of total employment.

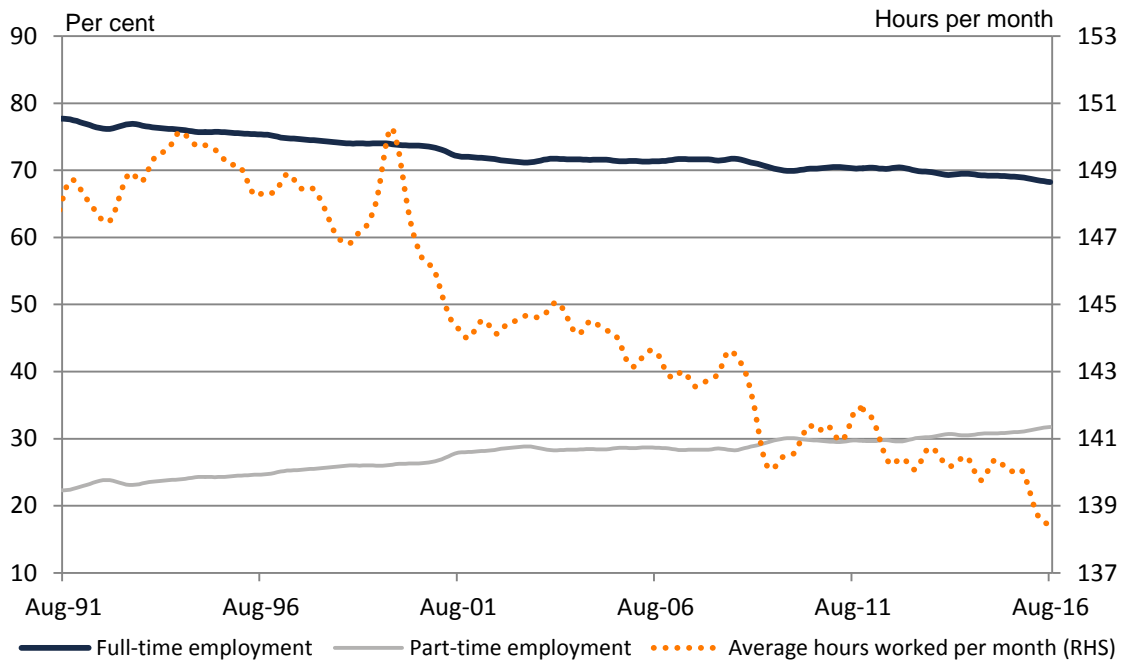
Chart 2²⁸²:
Composition of employment, per cent of total employed, 1978–2016



[434] The Lewis Report explains that the more recent increase in part-time employment for males is likely to be due to the effects of the global financial crisis, as businesses preferred to reduce hours worked rather than the number of employees.²⁸³ The increase in part-time employment has contributed to a fall in average hours worked per month from a peak of 150.3 hours in December 1999 to 138.5 hours worked per month in August 2016 (Chart 3).

[435] The most recent labour force data released by the ABS shows that strong growth in part-time work continues, increasing by 3.5 per cent over the year to January 2017, while full-time employment fell by 0.5 per cent.²⁸⁴

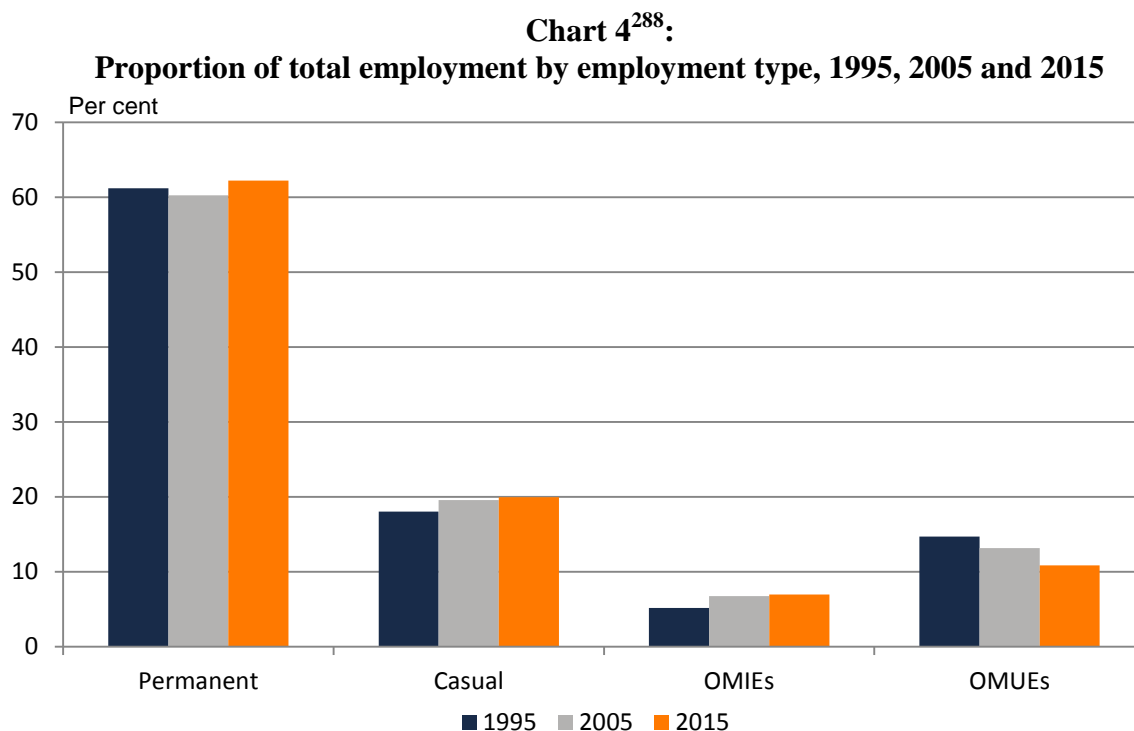
**Chart 3²⁸⁵:
Proportion of employment by full-time and part-time status and average monthly hours worked, August 1991 to August 2016**



[436] There have also been changes over time in the status of employment categories considered by the ABS and whether employees have paid sick and/or holiday leave entitlements.

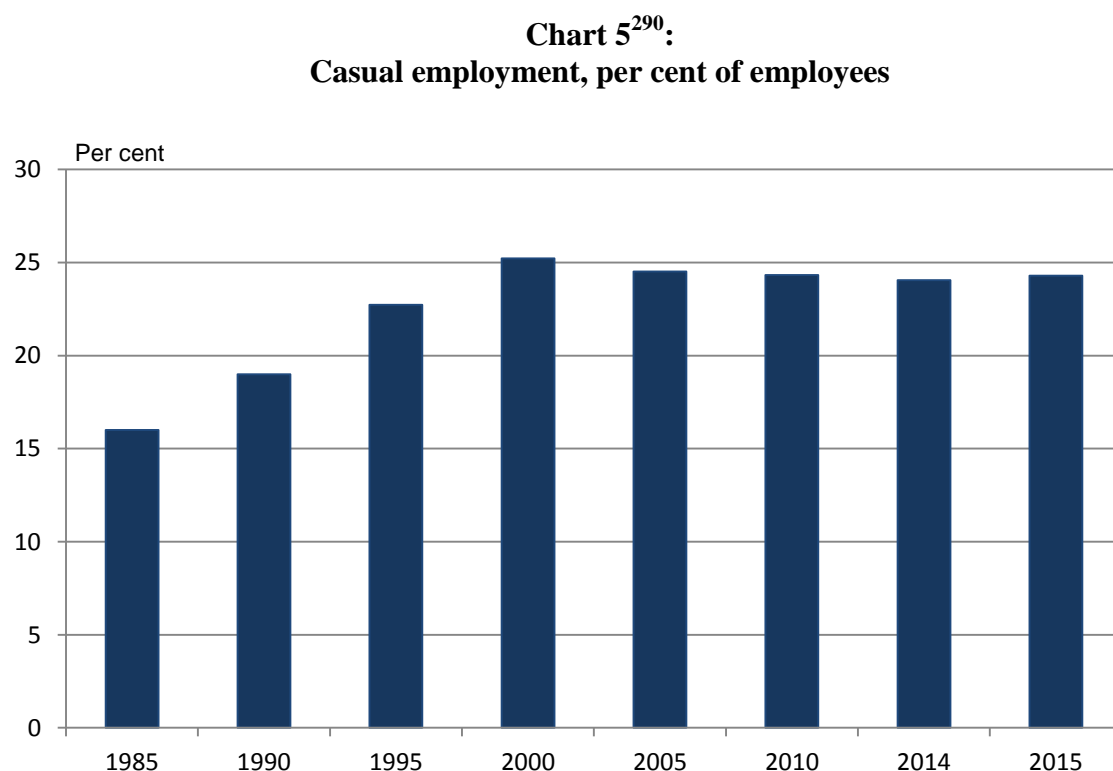
[437] The ABS categorises employed persons into employment types according to the reported employment relationship or contract. The categories separate employed people who operate their own business into owner managers of incorporated enterprises (OMIEs) or owner managers of unincorporated enterprises (OMUEs).²⁸⁶ OMIEs are people who operate an incorporated enterprise, which is a business entity registered as a separate legal entity to its members or owners. OMUEs are people who operate an unincorporated enterprise, which is a business entity in which the owner and the business are legally inseparable and includes those engaged independently in a profession or trade.²⁸⁷ The remaining workers are made up of employees who are grouped into whether they have sick and/or holiday leave entitlements (i.e. permanent employees) or not (i.e. casual employees). This group is reported separately to full-time and part-time employment.

[438] In 2015, over 60 per cent of employed persons were employed on a permanent basis, around 20 per cent were casual, 7 per cent were OMIEs and 11 per cent were OMUEs (Chart 4). Between August 1995 and August 2015 the proportion of casual employees had increased more than other employment types with most of the increase in the first half of the period.



Note: Estimates are for August of each year. OMIEs are people who work in their own incorporated enterprises, that is, a business entity which is registered as a separate legal entity to its members or owners. OMUEs are persons who operate their own unincorporated enterprise or engage independently in a profession or trade.

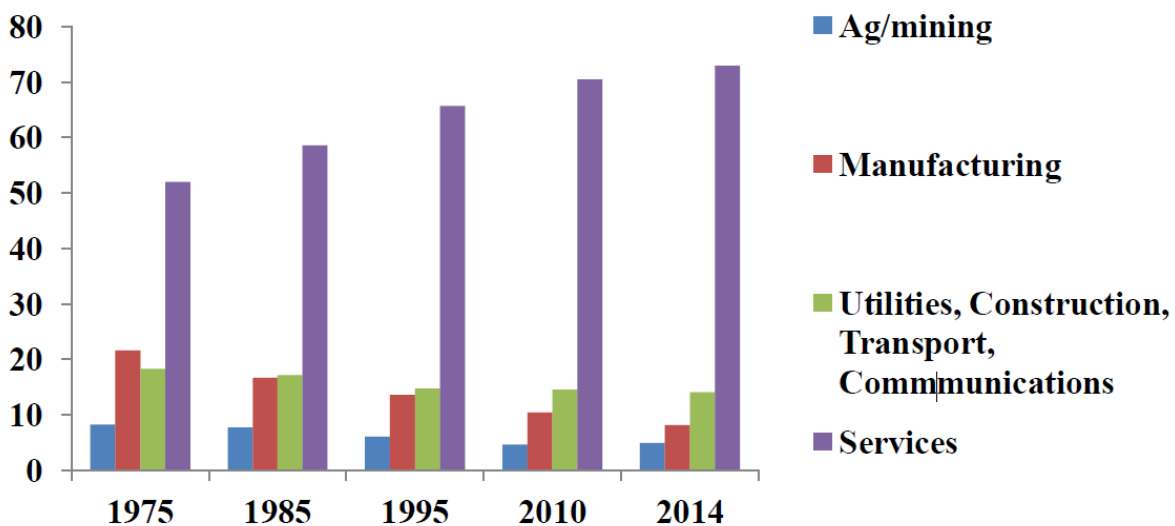
[439] Chart 5 reproduces and updates Figure 4 from the Lewis Report and shows the proportion of employees working on a casual basis from 1985 to 2015. It shows that casuals increased from over 15 per cent of all employees in 1985 to about 25 per cent in 2000 and has remained relatively stable since.²⁸⁹



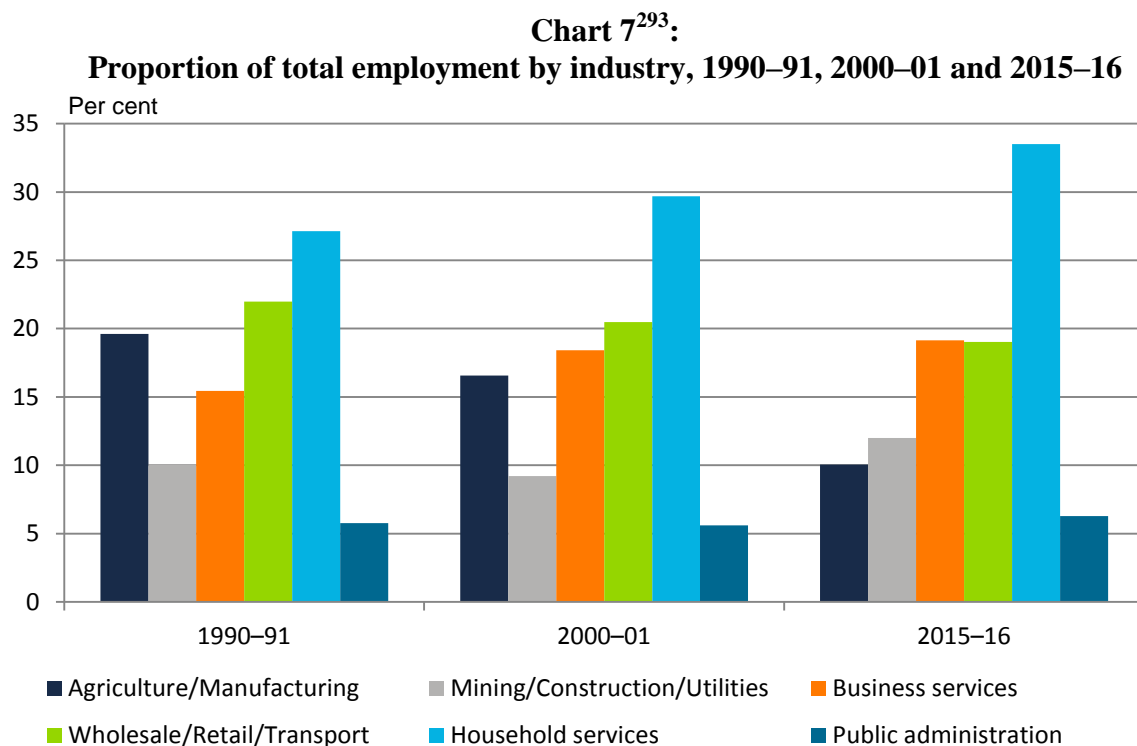
[440] Much of the demand for part-time and casual employment has come from the services sector. The services sector comprises the remaining industries not specifically identified in Chart 6: Wholesale trade; Retail trade; Accommodation and food services; Financial and insurance services; Rental, hiring and real estate services; Professional, scientific and technical services; Administrative and support services; Public administration and safety; Education and training; Health care and social assistance; Arts and recreation services; and Other services.

[441] The Lewis Report shows that employment in the services sector increased from around 50 per cent of total employment in 1975 to over 70 per cent of total employment in 2014 (Chart 6).²⁹¹

**Chart 6²⁹²:
Proportion of total employment by industry, 1975 to 2014**



[442] Chart 7 presents a separate breakdown of industries to show the growth in the services sector. It shows that Household services increased from around 27 per cent of total employment in 1990–91 to around one third of total employment in 2015–16, while Business services rose from over 15 per cent in 1990–91 to around 19 per cent in 2015–16 (Chart 7).



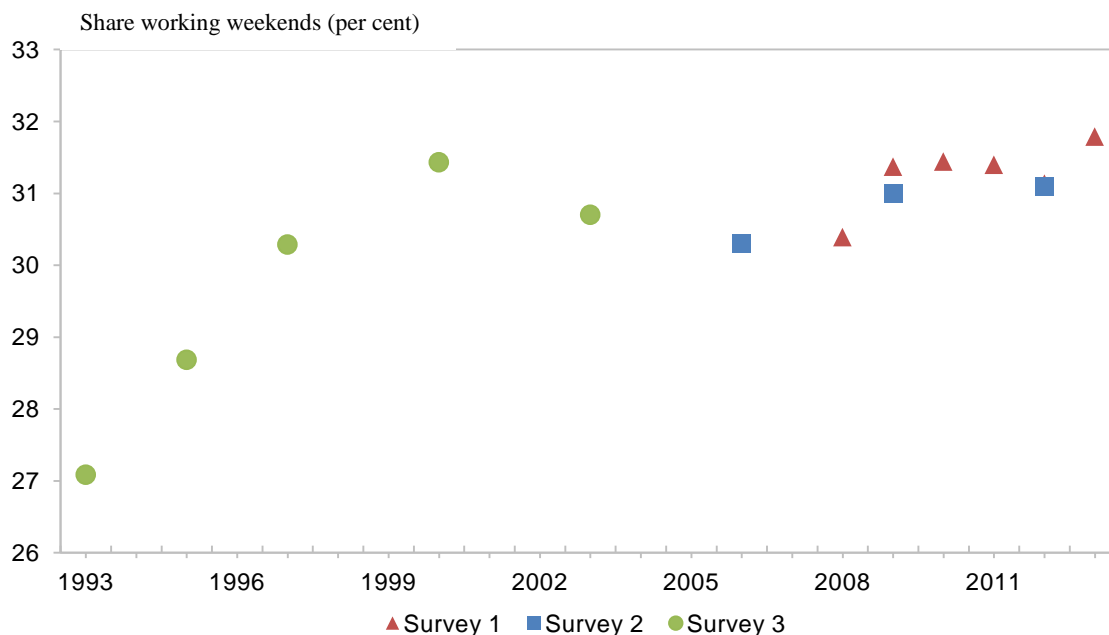
Note: Total employment and employment for each industry is calculated by taking the average of the four quarters over the year. Business services are Information media and telecommunications; Financial and insurance services; Rental, hiring and real estate services; Professional, scientific and technical services and Administrative and support services. Household services are Accommodation and food services; Education and training; Health care and social assistance; Arts and recreation services and Other services.

[443] The above data provides an indication of the extent of change in the Australian labour market. These changes have occurred in response to shifts in consumer demand and preferences for goods and services (largely confined to the hospitality and retail sectors), that are often accessed on weekends, as discussed in the overview of the hospitality sector at Chapter 7.1 and the retail sector at Chapter 8.1.

6.1.2 Changing nature of weekend work

[444] The PC Final Report presented data showing that the proportion of employees working weekends has increased over the period between 1993 and 2013 (Chart 8 below).²⁹⁴

**Chart 8²⁹⁵:
Patterns of working weekends over time, employees^a, 1993 to 2013**



Note: a) While substantially overlapping, the surveys employ different definitions for employees and jobs, which should be noted. Survey 1 is the ABS *Forms of Employment* survey and only covers people employed as wage and salary earners under a contract of service (an employment contract). The data relate to people categorised as such employees in their main job, but includes periods of work in all their jobs if they are multiple jobholders. Survey 2 is the *Working Time Arrangements* survey (WTA), and includes owner managers of incorporated enterprises as ‘employees’. As for survey 1, the data cover people working in single and multiple jobs. Survey 3 is the *Working Arrangements* survey, the predecessor to the WTA, and uses the same definition of employees, but only relates to periods of work in the employee’s main job.

[445] Similar data in the *Changing work patterns* Report analysed changes in work arrangements and the prevalence of weekend work. Analysis of ABS data on days of the week and number of days worked showed that the majority of employees worked Monday to Friday and that this had remained constant over recent times, as shown in Table 5 below.

**Table 5²⁹⁶:
Days of the week and number of days worked in all jobs, employees, November 2008,
November 2013, and August 2015**

	November 2008 (%)	November 2013 (%)	*August 2015 (%)
<i>Days of the week usually worked in all jobs[^]</i>			
Monday to Friday	64.8	63.2	61.7
Monday	9.6	13.5	10.1
Tuesday	10.9	14.7	11.3
Wednesday	11.3	15.0	11.6
Thursday	12.0	15.0	12.0
Friday	10.0	13.0	10.2
Saturday	15.3	15.3	15.4
Sunday	8.8	9.8	9.8
Days varied	14.7	16.0	17.1

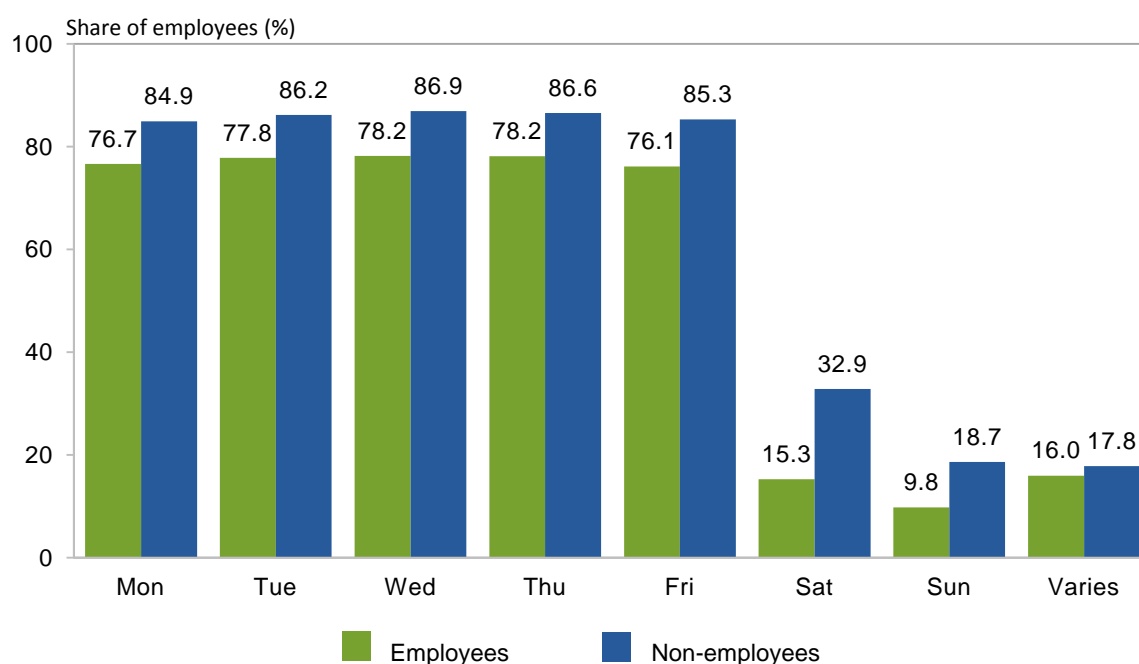
	November 2008 (%)	November 2013 (%)	*August 2015 (%)
<i>Whether worked weekdays and/or weekends in all jobs</i>			
Weekdays only	69.6	68.2	73.7
Weekends only	1.7	1.6	2.7
Both weekdays and weekends	28.7	30.2	23.5
Total	100	100	100

Note: For multiple jobholders, the responses refer to their total pattern of work in all their jobs. ^Refers to the days of the week people usually worked, therefore people may appear in more than one category. People who reported that they worked from Monday to Friday inclusive were categorised as working Monday to Friday. These people may have reported that they also worked on Saturday and Sunday in the job/s. People who reported that the usual days of the week worked varied were categorised only to days varied. A response of days varied could not be provided with any other response. For multiple jobholders, the responses refer to their total pattern of work in all their jobs. *The status of employment categories for August 2015 are different to the previous years.

[446] The PC Final Report also presented the same data from the ABS, but included and combined all other non-employee categories (independent contractors and other business operators) to compare the days of the week worked. This appears as Figure F.1 in the PC Final Report and is reproduced below as Chart 9.

[447] Chart 9 shows that the share of employed persons that work on weekends is far below the share of employed persons who work on weekdays, while the share that work on Saturdays is also higher than the share that work on Sundays. The figure also shows that, compared with non-employees, employees are less likely to work across each day, particularly on weekends.

Chart 9²⁹⁷:
Patterns of work by the day, share of the employed working on given days, per cent, November 2013



[448] Further evidence showing that employees are less likely to work on weekends compared with non-employees is provided in Table 6, which is reproduced from Table F.1 in the PC Final Report. The data from November 2013 shows that employees are more likely to work Monday to Friday only, while non-employees are more likely to work 5 weekdays and 1–2 weekend days than other periods.

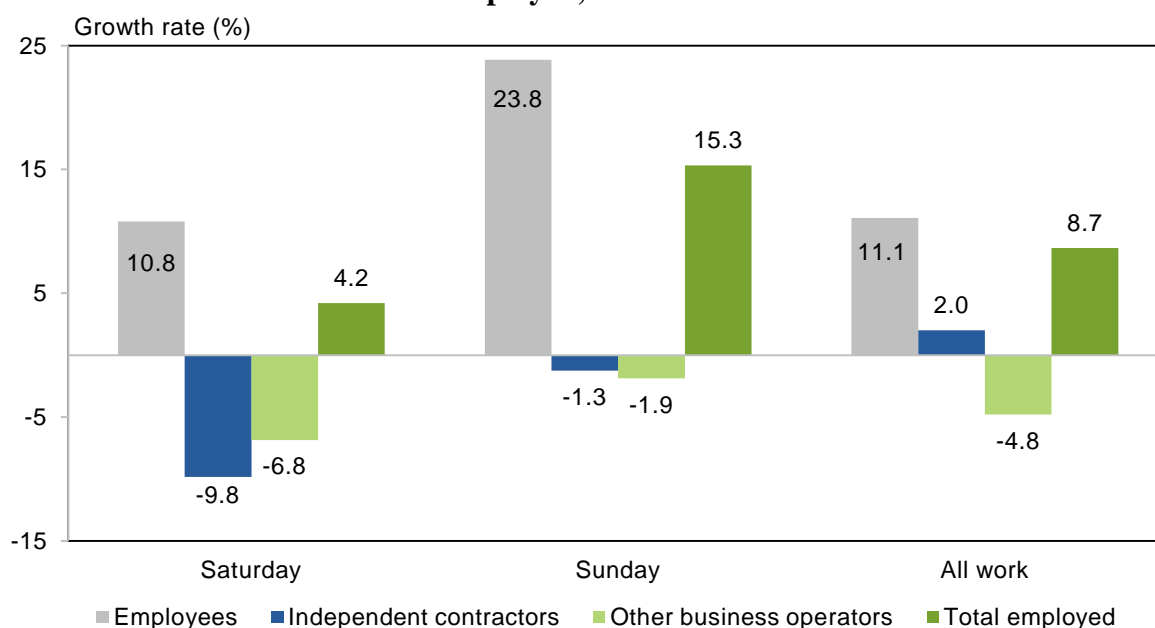
**Table 6²⁹⁸:
Who works on weekends?, November 2013**

Period working	Employees	Independent contractors	Other business operators
	Share of group in each working time arrangement		
	%	%	%
Worked Monday to Friday only	54.8	44.5	35.3
Worked between 1 and 4 days weekdays only	13.4	11.6	9.4
People who only worked weekends	1.6	0.4	0.7
People who worked 5 weekdays and 1–2 weekend days	8.3	22.6	35.2
People who worked 4 or less weekdays and 1–2 weekend days	21.9	20.9	19.4
Total	100.0	100.0	100.0
Worked Saturdays	15.3	25.3	40.3
Worked Sundays	9.8	12.7	24.4

Note: The data relate to the nature of working in a reference week.

[449] Providing a comparison between 2008 and 2013, the PC Final Report presented the change in the total numbers of employees on Saturdays and Sundays with all workers. Chart 10 shows that over the period, the number of employees increased by around 11 per cent, as did the increase in employees working on Saturdays. However, the percentage increase in the number of employees on Sundays was twice as much, at almost 24 per cent.

Chart 10²⁹⁹:
Relative growth in Saturday and Sunday work, percentage change in numbers employed, 2008 to 2013



Note: In some cases, people said that their days of work varied, in which case they could not be identified as usually working on Sundays, and are therefore excluded from the calculations for Sundays.

[450] In an ABS article, data from the Forms of Employment Survey 2008 showed that casual employees were more likely to work on weekends than other employees, who were more likely to work on weekdays.³⁰⁰ However, no more recent data has been published on casual employees working weekends by the ABS.

[451] The *Changing work patterns* Report also presented data from the HILDA survey on the nature of weekend work. From a series of questions asked in the survey, employed persons could be classified by whether they usually worked weekends or whether they worked weekdays only. Changes in the proportions of these two groups are presented in the following tables.

[452] Table 7 shows that around one in three employed persons usually worked weekends in both 2006 and 2015.

Table 7³⁰¹:
Whether usually worked weekends, all employed persons

	2006 (%)	2015 (%)
Worked weekdays only	66.5	66.8
Usually worked weekends	33.5	33.2
Total	100	100

Note: The data in this table are for all employed persons.

[453] Table 8 shows that, overall, around half of employed persons worked Monday to Friday, around one in three employed persons worked other regular days, and the remaining

employed persons working days varied. Between 2006 and 2015, the proportion of employed persons whose working days varied increased while the proportion who worked other regular days (that were not Monday to Friday) decreased.

[454] The data shows that around three-quarters of employed persons who worked weekdays only worked from Monday to Friday and, of the remaining employed persons, around three times as many worked other regular days than varied days.

[455] Most employed persons who usually worked weekends worked on regular days. However, this proportion decreased between 2006 and 2015 and the proportion for those whose working days varied increased. Employed persons who worked on weekends were relatively more likely to have their work days vary than those who worked weekdays only.

Table 8³⁰²:
Type of work schedule

	Worked weekdays only		Usually worked weekends		Total	
	2006 (%)	2015 (%)	2006 (%)	2015 (%)	2006 (%)	2015 (%)
Monday to Friday	76.6	76.3	–	–	50.9	51.0
Days vary	5.8	5.5	29.4	38.8	13.7	16.5
Other regular days	17.6	18.3	70.6	61.2	35.3	32.5
Total	100	100	100	100	100	100

Note: 'Days vary' refers to responses 'nine day fortnight', 'days vary from week to week' and 'day vary from month to month'.

[456] Table 9 shows the proportion of employees that work on weekends from 2002 to 2016 by industry, comparing the first half of the period with the second. The table ranks the industries by the proportion of employees that usually worked weekends in the second period. The table shows that across all industries at least one in four employees work on weekends, with a slight increase between the two periods.

[457] The highest proportion of employees that work on weekends was in Accommodation and food services and Retail trade, with a slight increase for both industries between the two periods.

Table 9³⁰³:
Proportion of employees who work on weekends, by industry

Industry	2002–2008	2009–2016
Accommodation and food services	58.6	60.8
Retail trade	44.4	47.6
Mining	34.9	46.9
Arts and recreation services	44.1	45.1
Agriculture, forestry and fishing	32.0	35.2
Other services	31.9	30.9

Industry	2002–2008	2009–2016
Rental, hiring and real estate services	35.5	30.7
Transport, postal and warehousing	28.0	30.1
Health care and social assistance	25.3	27.8
Construction	24.3	23.8
Administrative and support services	21.0	19.9
Information media and telecommunications	18.5	19.6
Manufacturing	19.2	18.4
Electricity, gas, water and waste services	18.5	18.1
Public administration and safety	13.4	16.9
Wholesale trade	16.2	15.6
Education and training	11.4	12.9
Professional, scientific and technical services	10.9	11.7
Financial and insurance services	7.5	8.6
All employees	25.9	27.5

[458] Using the HILDA survey, both the *Changing work patterns* Report and research undertaken by Dr Ian Watson in his report with Professor David Peetz (*Characteristics of the Workforce in the National Retail Industry with regard to age, weekend work and student status*) showed that at least 60 per cent of employees in Retail trade usually worked weekends.³⁰⁴

[459] A paper³⁰⁵ by Commission staff provides a framework for ‘mapping’ modern award coverage to the Australian and New Zealand Standard Industrial Classification (ANZSIC).

[460] More detailed data for some industries that have been mapped to the relevant modern awards are shown in Table 10. For most of these industries, over half of employees work on weekends and, for all of them, the proportion increased between the two periods.³⁰⁶

Table 10³⁰⁷:

Proportion of employees who work on weekends, by selected industry subdivisions and groups

Industry	2002–2008	2009–2016
<i>Industry subdivisions</i>		
Food retailing	50.6	54.3
Other store-based retailing	43.5	46.4
<i>Industry groups</i>		
Pharmaceuticals and other store-based retailing	39.5	42.1
Accommodation	52.8	53.8
Cafes, restaurants and take away food services	57.4	59.9
Pubs, taverns and bars	67.6	68.9
Clubs (hospitality)	63.7	67.1

[461] Overall, the data show that employees in the industries that align most with the hospitality and retail group of awards are more likely to work on weekends than other industries, suggesting that weekend work is more common in these industries. In many of these industries, more than half of employees work on weekends.

[462] Although weekend work has increased over recent times, the number of employees working on weekends is still far below the number of employees that work on weekdays, and working on Saturdays is still more common than working on Sundays.

6.1.3 Shifts in consumer demand and preferences

[463] We set out material on trends in consumer preferences in relation to the Retail sector in Chapter 8, which incorporates data from the PC Final Report and the Sands Report.

[464] The PC Final Report highlighted that employment on weekends has increased with the rise in consumer demand, with a greater share of the workforce working on weekends and a “non-trivial” share only working on weekends.³⁰⁸ The PC Final Report stated that employment patterns in the HERRC industries have developed with the shift in consumer demand, noting that:

“... the customer is buying convenience and variety as much as the good itself, and cost increases frustrate the extent to which those consumer preferences can be met by businesses.”³⁰⁹

[465] Data from the ABS presented in the PC Final Report compared the share of weekly retail sales by each day of the week (Chart 57 at [1589]) and which suggested that although consumer demand for shopping on Sundays has increased significantly since the early 1980s, the preference to shop still remains higher on Saturdays than Sundays.

[466] In further analysis, the PC Final Report showed that growth in average daily foot traffic in shopping centres between 2009 and 2014 was greatest for Sunday. Data on shopping by days of the week as measured by supermarket trips and transactions provided similar results to the ABS data in Chart 58. Although transaction values were greater on Sunday than Monday and Tuesday, they were lower than on Saturday³¹⁰ (see below at [1590]).

6.1.4 Changing role of weekends

[467] This section considers the time use surveys undertaken by the ABS and analysed in academic papers, the Lewis Report and the PC Final Report as well as additional evidence provided in the Rose Report. Fair Work Commission staff published a Research reference list of academic papers cited in the expert evidence and the submissions (set out in Attachment D).

[468] An important consideration is not just the days of the week that people work but also the differences in the activities that are performed on weekdays and weekends and how this has changed over time. This assists in determining the importance of weekends and is relevant to the assessment of the appropriate compensation for working on weekends.

[469] Time use surveys collect information on the daily activities of people to determine how they allocate time. They are able to provide data on the patterns of paid work, as well as unpaid household and community work, and the way people balance work and family obligations. Time use surveys rely on respondents completing diaries which record their activities in five-minute intervals (including the nature, timing and duration) over particular days. Other information collected include for whom the activity was done, who else was present and where the activity took place.³¹¹

[470] The ABS has conducted three time use surveys—in 1992, 1997 and 2006. Changes were made between the 1992 and 1997 surveys and the 1997 and 2006 surveys, although the ABS considered the 2006 survey to be highly comparable with the 1997 survey. Unfortunately these data have not been updated in the last ten years.

[471] Two Australian studies which utilised the Time Use Survey, Bittman³¹² and Craig and Brown,³¹³ found that more time was allocated to leisure and family on weekends than weekdays, demonstrating the continuing importance of weekends and how activities undertaken on weekends differ from those undertaken on weekdays.

[472] Bittman found that, over time, there was a gradual increase in the proportion of Sunday workers, although the chance of working on a Sunday was much lower than a weekday. Sunday was found to be the day on which the most time was allocated to personal care activities, recreation and leisure, and the most critical day for families to spend time together.³¹⁴ In the first model, Bittman found that those who worked at least 2 hours on Sundays had fewer opportunities for family time and social contacts than those who did not work on Sundays.³¹⁵ In the second model, Bittman tested whether those who worked on Sundays made up family time and social contacts relative to those who only worked on weekdays. After controlling for a number of factors, Bittman found that, compared with those that work on weekdays, ‘Sunday workers miss out on key types of social participation and have less opportunity to balance the demands of work and family’.³¹⁶

[473] Craig and Brown (2014)³¹⁷ incorporated the more recent 2006 Time Use Survey to assess total daily minutes spent on social and community interaction as well as recreation and leisure while in the company of others among different household types.

[474] Craig and Brown found that weekend work was negatively associated with shared leisure activities on weekdays across all household types. However, for couples and singles without children, no significant differences were found between Saturdays and Sundays in terms of displacing shared leisure time, while for couples with children, Sunday work was associated with more displaced leisure time than Saturdays:

‘For parents only, Sunday work had an extra negative association, beyond that of Saturday. The forms of shared leisure most displaced on Sundays were with spouse and children. We also found that, on average, less Sunday leisure time was spent with friends, so the results confirmed our expectation that the two days have a different flavor and that Sunday in particular is a day for sharing leisure time with family.’³¹⁸

[475] Overall, Craig and Brown did not find large differences in time allocation between Saturdays and Sundays. Craig and Brown concluded that making up shared leisure time is also contingent on other people’s schedules and there are limited opportunities to make up this time if others are not available on weekdays.

[476] United Voice called Dr Olav Muurlink to provide expert evidence on the impact of weekend and public holiday work. Dr Muurlink provided a report: *'The impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia'* ('the Muurlink Report'). Dr Muurlink claimed that the Craig and Brown paper:

'... strongly suggests that Saturday and Sunday work reduces the time spent with children and on social activities, and workers are not able to 'make up' the time during the working week in the way that those who work purely Monday to Friday 'make up' time with their children on the weekends'.³¹⁹

[477] However, as Dr Muurlink acknowledged in cross examination, in two of the three family types examined, Craig and Brown did not find differences between Saturdays and Sundays.³²⁰

[478] SDA and United Voice cautioned against relying on the Bittman and Craig and Brown papers. They argued that Dr Bittman did not focus on the overall equivalence between Saturdays and Sundays, while Craig and Brown provides commentary and not analysis of the disability experienced by weekend workers.³²¹

[479] Dr Bittman's study is of limited assistance as it refers to data from 1997. In addition, as noted by the SDA,³²² the main focus of the paper is on the impact of working on Sundays, not on a comparison between Saturdays and Sundays.

[480] Craig and Brown used more recent data and considered whether individuals worked on Saturday or Sunday. It is limited in that it considered only one aspect of weekend work, whether *shared* leisure time is made up during the week, for certain household types. While it did not find large differences between Saturday and Sunday work, this is only one aspect of time allocation for weekend workers.

[481] In his analysis of the 2006 Time Use Survey, Professor Lewis claimed that the amount of time spent on sport and outdoor activity increased by only 17 minutes per day on the weekend for men and by only five minutes per day for women³²³ compared with during the week. Professor Lewis argued that "for most working on weekends [it] would not significantly impose on their time spent on sport and outdoor activities."³²⁴

[482] Table 11 is reproduced from the Lewis Report.³²⁵ It shows that total free time spent on leisure activities increased by 133 minutes (49 per cent) on weekends for males and 87 minutes (34 per cent) for females. In fact, the time spent on all leisure activities, except for community participation, is higher on weekends compared with weekdays.

[483] Professor Jeff Borland from the Department of Economics, The University of Melbourne, provided a response to the Lewis Report: *'Report by Professor Jeff Borland'* ('the Borland Report').³²⁶ He claimed that expressing the differences in activities in minutes rather than percentages obscures the actual extent of differences in activities between weekdays and weekends.³²⁷ Professor Borland also suggested that any judgement about how extra work on weekends affects recreation and leisure activities requires individual-level data rather than averages.³²⁸

Table 11³²⁹:
Average time spent on leisure activities, 2006, minutes per day

	Males		Females	
	Weekday	Weekend	Weekday	Weekend
Socialising	6	20	7	19
Visiting entertainment venues (a)	2	8	4	8
Attendance at sports event	*1	6	–	4
Religious activities (b)	*2	8	4	10
Community participation	8	7	11	9
Associated travel	7	22	9	21
<i>Social and community interaction (c)</i>	27	71	35	73
Sport and outdoor activity	20	37	16	21
Games, hobbies, arts, crafts	13	18	11	15
Reading	19	25	23	29
Audio/visual media	144	181	117	134
Other free time	20	29	16	24
Talking and correspondence (d)	21	31	34	43
Associated travel	5	10	4	6
<i>Recreation and Leisure (c)</i>	243	332	223	273
Total free time	270	403	259	346

Note: *estimate has a relative standard error of 25 per cent to 50 per cent and should be used with caution. – nil or rounded to zero (including null cells). (a) includes cultural venues. (b) includes ritual ceremonies. (c) includes additional activities not separately included. (d) includes talking on phone or reading/writing own correspondence.

[484] The conclusions that Professor Lewis draws from this table are not unexpected as weekends are meant for social and leisure activities. Using an approach similar to that suggested by Professor Borland, the PC Final Report provided charts showing the difference in the number of hours spent on weekend days compared with average weekdays for time spent with different categories of people and different activities.³³⁰

[485] However, the tables in the Lewis Report and the charts from the PC Final Report both present data that refer to all people and not only those who work on weekends³³¹ and therefore should be considered as a guide to understanding the types of activities undertaken across the entire community rather than for weekend workers.

[486] Chart 11 shows that more time is spent with friends and family on weekends than weekdays, with more time spent with friends on Saturday. More time is spent with shop personnel and services providers on Saturdays and less on Sundays. Chart 12 shows that more time is spent on social and community interaction on weekends and less time on employment and education. More time is spent purchasing goods and services on Saturdays than weekdays, whereas less time is spent doing this on Sundays than weekdays.

Chart 11³³²:

Who do people spend time with, deviation of hours per day on weekend from the average weekday, per cent

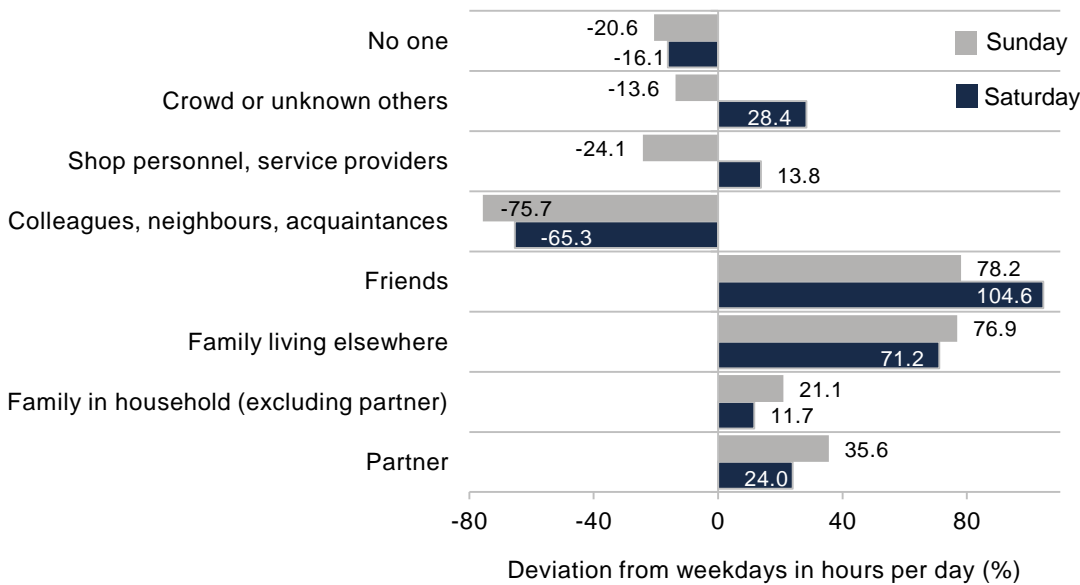
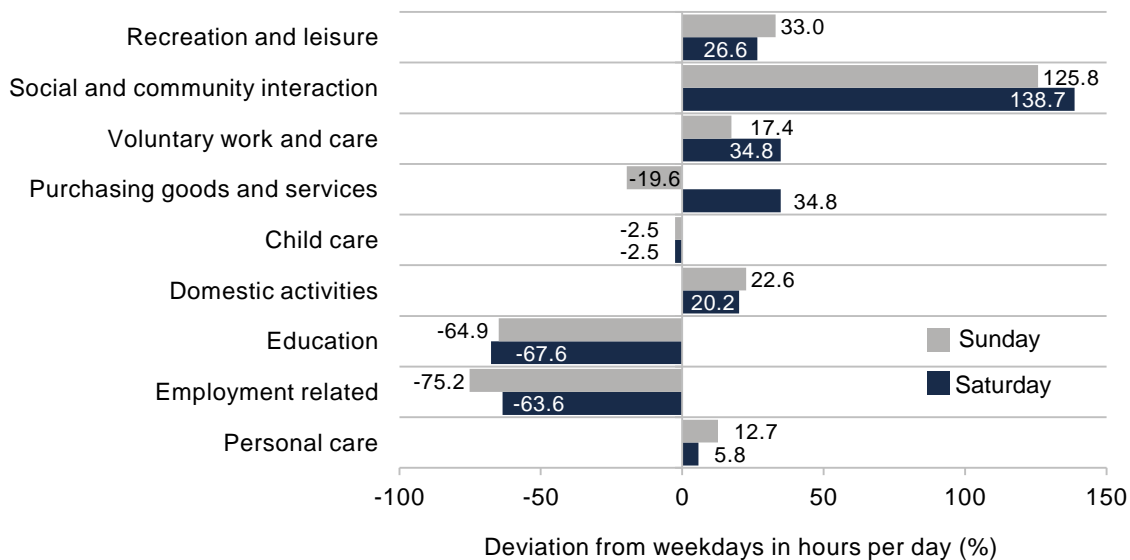


Chart 12³³³:

What do people do with their time, deviation of hours per day on weekend from the average weekday, per cent



[487] The SDA submits that the assertions made in the PC Final Report that ‘there is very little difference in the degree to which people engage in social activities between Saturdays and Sundays (compared to weekdays)’ and ‘the largest deviation in social activities between weekdays and weekends – “social and community interaction” – is actually higher on Saturdays’ say nothing ‘about the level of disamenity experienced by employees who work on Sundays’ and note, correctly, that the data in Chart 12 above ‘shows that the largest deviation in “recreation and leisure” between weekdays and weekends is higher on *Sundays* than Saturdays’.³³⁴

[488] We accept that this is so, but the differences are not large. The difference between Saturdays and Sundays is generally smaller than between weekends and the average weekday. In addition, as we have explained above, the usefulness of the data are limited as the sample is not restricted to people who work on weekends or even to employed persons, so the SDA is correct to highlight that Sunday workers are not identified in the data.

[489] ABI and the NSWBC called Professor John Rose, Institute for Choice, University of South Australia who provided a report *Value of Time and Value of Work Time during Public Holidays* (Rose Report).³³⁵ The first part of the Rose Report sought to determine the importance of times of the day and days of the week. Survey respondents filled in an activity diary that captured information related to the activities they undertook during the week prior to the survey and were required to indicate the importance of the activity. Importance was defined as “an ability or desire to change that activity should a conflicting event, such as a work shift, arise at the time of the activity”.³³⁶

[490] The Rose Report activity diary results showed little variation across days of the week and greater variation within days. Thursday was rated the most important day, while Sunday was found to be marginally less important than Saturday.³³⁷ In our view these data do not provide a basis for the fixation on penalty rates. Indeed if the data were used for that purpose then pay rates would vary for different times on each day. Nor does the diary data sit conformably with the choice experiment data in that report. The remaining part of the Rose Report is discussed in Chapter 6.2.2.

[491] As an explanation for the finding that weekend days are not the most important days, Bittman and Craig and Brown found that more time is spent with friends and family on weekends and hence such activities may be more amenable to change to suit work requirements. This may result in a lower importance being attributed to weekends than is actually the case. Whether an activity can be changed does not directly indicate the importance of an activity, although it is clearly a relevant consideration.

[492] While the evidence referred to in this section is not without limitations, it points to a clear difference of time use between weekdays and weekends. However, based on limited data before us, it is difficult to discern the differences in time use between Saturdays and Sundays for weekend workers compared with other workers.

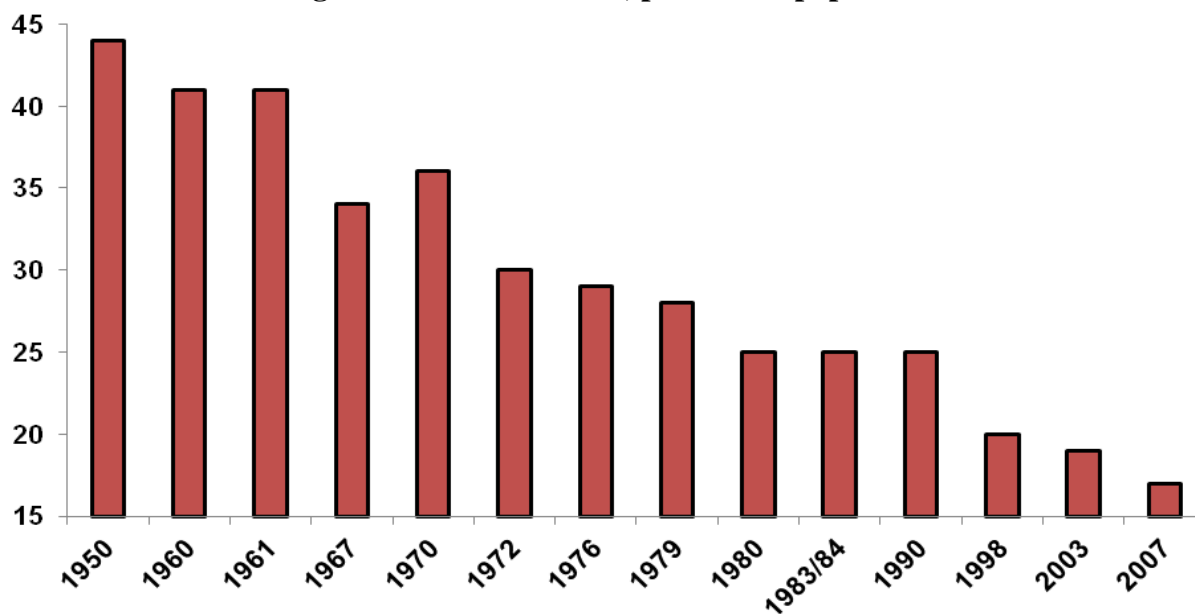
6.1.5 Religious observance

[493] This section uses data drawn from the ABS, the Lewis Report, the *Changing work patterns* Report and the National Church Life Survey to assess changes in religious observance over time.

[494] The ABS explains that the number of people reporting “no religion” has “increased substantially over the past hundred years, from one in 250 people to one in five.”³³⁸ Data from the ABS *Census of Population and Housing* (Census) shows that since the 1971 Census (which first included the specific instruction “no religion, write none”), the proportion of people reporting no religion increased from 6.7 per cent to 22 per cent in 2011. The greatest increase of 6.8 percentage points was reported between 2001 and 2011.

[495] Although a majority of people report a religious affiliation and most of them Christian, the ABS contend that “a religious affiliation is not the same as actively participating in religious activities.”³³⁹ Data from the National Church Life Survey (NCLS)³⁴⁰ shows that the proportion of the population attending “church regularly” has fallen over time, from 44 per cent in 1950 to 17 per cent in 2007 (Chart 13).³⁴¹

Chart 13³⁴²:
Regular church attenders, per cent of population



[496] Chart 13 is consistent with data presented in the *Changing work patterns* Report, using the HILDA survey, which demonstrates that a majority of Australians attended church as rarely as once a year or less,³⁴³ with almost half of respondents reporting “never” in 2014 (Table 12). However, we acknowledge the point made by United Voice that these data do not identify whether attendance is on Saturday, Sunday or another day.³⁴⁴

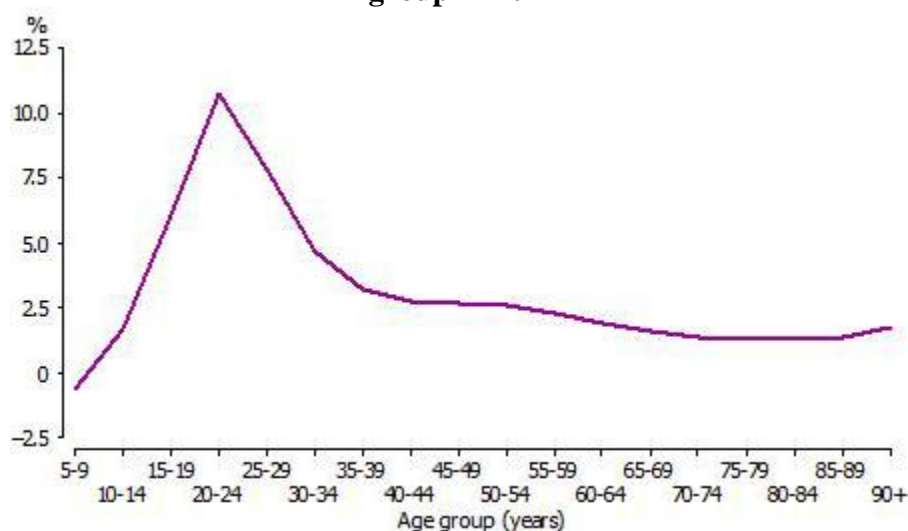
Table 12³⁴⁵:
Frequency of attendance at religious services

	2004 (%)	2014 (%)
Never	44.9	49.5
Less than once a year	13.0	12.4
About once a year	10.8	9.5
Several times a year	11.4	10.5
About once a month	3.1	3.0
2 or 3 times a month	3.0	3.2
About once a week	10.2	9.0
Several times a week	3.3	2.4
Every day	0.4	0.5
Total	100	100

[497] Analysis undertaken using the ABS Time Use Survey in the Lewis Report also showed that the average time spent on religious activities was minor compared with time spent on activities such as “Audio visual and media” and “Talking and correspondence”, which occupied most time spent on weekdays and weekends for both males and females.³⁴⁶

[498] Census data provides evidence that “the rising trend of reporting no religion is driven by younger people.”³⁴⁷ Chart 14 shows that people aged between 15 to 34 years reported a significant increase in “no religion” in 2011. The ABS note that the proportion of 20–24 year olds with no religion in 2011 was nearly 11 percentage points higher than the proportion of 15–19 year olds in 2006.³⁴⁸

Chart 14³⁴⁹:
Change in proportion of people reporting no religion between 2006 and 2011 by age group in 2011



Note: Percentage of people that reported no religion in 2006 compared with percentage of people with no religion in the age cohort they would be part of in 2011. Negative numbers mean a decrease of reporting no religion between 2006 and 2011, positive numbers mean an increase. Excludes people who were not residents in Australia in 2006.

[499] This was also evident in data obtained from the NCLS 2010 which found that a small percentage of young people aged 15–19 years and 20–29 attended church, less than 6 and 9 per cent, respectively.³⁵⁰

[500] The evidence suggests that there is a decline in religious observance. The cohort driving this trend are young people aged between 15 to 34 years, which comprise a significant proportion of those employed in the Retail trade and Accommodation and food services industries and covered by the modern awards which are the subject of these proceedings.

[501] While the data also show that a majority of the population continue to report a religious affiliation, most of them Christian, it is likely that only a minority of this group consider attending church an important activity. For this group, weekend work may interfere with their religious observance.

6.1.6 Summary

[502] The Australian labour market has changed markedly over the last 40 years. These changes have been dominated by an increase in female and part-time employment and an increase in employment in the services industries.

[503] The data has also shown that the number of employees working on weekends is still far below the number of employees that work on weekdays, and working on Saturdays is still more common than working on Sundays.

[504] Data from the ABS and the HILDA survey show that employees in the industries that align most with the Hospitality and Retail awards are more likely to work on weekends than employees in other industries. More than half of employees in Accommodation and food services usually work on weekends, the highest of all the industries, and almost half of Retail trade employees usually work on weekends, the second highest proportion of all the industries in recent time. Further, weekend work appears to have increased in these industries more than many other industries.

[505] In part, these changes have occurred in the context of shifts in consumer demand and preferences for goods and services (largely confined to the hospitality and retail sectors) that are often accessed on weekends, as presented in the PC Final Report and discussed in detail in Chapter 8. The share of weekly retail sales and supermarket trips and transactions on Sunday are comparable to that of Monday and Tuesday, although still below Saturday. The share of weekly retail sales on Sunday has more than doubled over the last few decades. This suggests that while consumer demand for retail shopping on Sundays has increased over time, there remains a preference to do so on Saturdays than Sundays. As a result, weekend work is more prevalent in these industries.

[506] In relation to religious activities, the data suggests that the decline in religious observance has been driven by young people aged between 15 to 34 years who are more likely to work in the retail and hospitality sectors and are amenable to working on weekends. Nonetheless, a majority of the population continue to report faith in a religion most of them Christian,³⁵¹ although it is likely that only a minority of this group attend church regularly, it is for this group that weekend work may interfere with their religious observance.

[507] The data and evidence on time use presented in the PC Final Report and the papers by Bittman and Craig and Brown indicate that work and leisure activities remain largely separated between weekdays and weekends. Further, while the differences between Saturdays and Sundays have converged over time, there remain significant differences in the activities performed on these days. Sunday is more reserved for family time than Saturdays, when spending time with friends and shopping is preferred to Sundays. The nature and role of Sundays therefore makes it a day that remains unique to Saturdays. However, the lack of information in regards to weekend workers means it is difficult to discern how they would use their time on Saturdays and Sundays differently to the remainder of the population.

6.2 Expert evidence

[508] Parties called a number of expert witnesses to provide reports on weekend work. This section discusses the following expert evidence and responses:

- Ms Margaret Lynne Pezzullo, Lead Partner and Director, Health Economic and Social Policy, Deloitte Access Economics, provided a report titled *The modern face of weekend work: survey results and analysis* (the Pezzullo Weekend Work Report).³⁵²
- Responses to the Pezzullo Weekend Work Report were received from:
 - Professor Raymond Markey, Director, Centre for Workforce Futures, Faculty of Business and Economics, Macquarie University, who provided a response called *The continuing importance of penalty rates for weekend work: a review of the evidence*.³⁵³
 - Ms Helen Bartley of Bartley Consulting (the Bartley Report)³⁵⁴
 - Professor Sara Charlesworth, Centre for Sustainable Organisations & Work, RMIT University. (Ms Pezzullo also responded to the expert reports which critiqued the Pezzullo Weekend Work Report).³⁵⁵
- Professor John Rose, Institute for Choice, University of South Australia who provided a report *Value of Time and Value of Work Time during Public Holidays* (Rose Report).³⁵⁶
- Responses to the Rose Report were received from:
 - Professor Morris Altman, Dean and Head, Newcastle Business School and Professor of Behavioural & Institutional Economics, University of Newcastle.³⁵⁷
- Professor Rose also provided a comment on Professor Altman's response.³⁵⁸
- Professor Sara Charlesworth and Dr Fiona Macdonald of RMIT University provided a report to the SDA.³⁵⁹
- Dr Olav Muurlink, senior research fellow (adjunct) at Griffith University and senior lecturer in organisational behaviour at Central Queensland University, provided a report *The impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia*.³⁶⁰

6.2.1 The Pezzullo Weekend Work Report

[509] In support of their applications to reduce Sunday penalty rates, ABI, the Retail Employers and others rely on the report by Ms Lynne Pezzullo : *The Modern Face of Weekend Work: Survey Results and Analysis* (the Pezzullo Weekend Work Report)³⁶¹. Ms Pezzullo is the Lead Partner, Health Economics and Social Policy with Deloitte Access Economics (Deloitte). Deloitte was engaged by the PGA to produce the Pezzullo Weekend Work Report for use in these proceedings.

[510] The Pezzullo Weekend Report is comprised of a literature review and the results of two surveys. On the basis of that material, the report draws various conclusions and expresses opinions about matters including time use patterns, preferences, characteristics and consumer behaviour of weekend and non-weekend workers.

[511] The literature review was limited and added little to the material already before us – either in primary sources or referred to in submissions.

[512] The first survey collected information from 1000 weekend workers to understand their time use patterns, the frequency and duration of their weekend work and their attitudes to working on weekends. The second survey used a sample of 1100, drawn from non-weekend workers and asked a series of questions related to their time use and their use of services undertaken by the relevant industries as well as their preferred time for accessing these services.³⁶² A sample of 500 weekend workers also participated in the second survey for comparative purposes.

[513] The survey sample was obtained from approximately 282,000 members of an online survey population. The report explains that the survey was emailed to 18,312 people, of whom 5375 (29 per cent) participated and 3154 completed the survey.³⁶³

[514] ABI, the Retail Employers and others rely extensively on the weekend worker survey, but place no reliance on the survey of non-weekend workers.

[515] The weekend worker survey found that around one-third of weekend workers had “no real problem” working on either Saturday or Sunday, with more responses having “no real problem” on Saturdays than Sundays. The respondent’s main concerns with working on weekends were that it “interferes with socialising or spending time with friends or family” and that “it makes it hard to maintain work/life balance”.³⁶⁴

[516] For those that had “some problem working on the weekend”, the following reasons were listed, in order of number of respondents:

- interferes with socialising or spending time with friends or family;
- interferes with responsibilities or activities outside of work (e.g. sport);
- makes it hard to maintain work/life balance;
- interferes with religious observance; and
- none of the above.

[517] The results were similar between Saturdays and Sundays for the number of respondents reporting a problem, although there was a higher number reporting that it interferes with religious observance on Sundays.

[518] Over half of casual workers reported “no real problem” with Saturday work and half reported “no real problem” with Sunday work, while over two in five part-time workers reported “no real problem” with Saturday or Sunday work.³⁶⁵

[519] The report concludes that a large percentage of weekend workers were untroubled by weekend work even when specifically prompted to list their difficulties with their work

schedules.³⁶⁶ When including responses of “minor”, this resulted in over half of weekend workers reporting either no or minor difficulties working on Saturdays or Sundays.

[520] Weekend workers were also asked their reasons for working on weekends. Over half of respondents answered that they were required to by their employer or there is an expectation of weekend work in their industry. The next most common responses were higher hourly pay (just over one quarter) and to earn additional disposable income (around one quarter). Fewer than one in five reported they worked weekends to cover expenses.³⁶⁷

[521] The report concludes that “most weekend workers do not choose to work weekends primarily on the basis of penalty rates” and that “casual workers were even less concerned about penalty rates than other weekend workers”.³⁶⁸

[522] Respondents were also asked which day of the weekend was more important to keep mostly free from work. These data are set out in Table 4.4 of the Pezzullo Weekend Work report, reproduced below as Table 13.

Table 13³⁶⁹
Most valuable weekend day – all weekend workers

Day	Total No.	%
Saturday	139	13.9%
Sunday	309	30.9%
Both equal	552	55.2%

[523] The report also found some evidence that the amount of staff on weekends did not align with workloads and concluded that penalty rates may have an impact on labour demand.³⁷⁰

[524] As to the proper process for survey data collection, and the conduct of surveys more generally, the SDA and United Voice relied upon the expert evidence of Ms Helen Bartley³⁷¹ (the Bartley Report). Ms Bartley contended that because the survey participants were required to be an internet user, individuals who did not have internet access were excluded, which could lead to biased results.³⁷² Ms Bartley also explained that registered members of the online survey are paid to complete surveys and can choose how often they participate in a survey, introducing sampling bias that could also affect the reliability of the results.³⁷³

[525] Ms Bartley concluded that she could not be confident that the weekend worker survey in the Pezzullo Weekend Work Report was a representative sample and considered the response rate to be low such that the responses by individuals who did not participate in the survey could potentially be different to those that did participate.³⁷⁴

[526] We deal later with the Bartley report in more detail ([1091]–[1097]) but it suffices to note here that the Productivity Commission characterises the reliability test proposed by Bartley as ‘overly stringent’. We agree with that observation and as we note in our

consideration of the RCI survey evidence in Chapter 7.4.4, most survey evidence has methodological limitations, the central issue is the extent to which those limitations impact on the reliability of the results and the weight to be attributed to the survey data.

[527] As mentioned above, United Voice called Dr Olav Muurlink to provide evidence on the impact of weekend work, in particular Sundays. Dr Muurlink was also asked to comment on the Pezzullo Weekend Work report.³⁷⁵

[528] Dr Muurlink considered the age demographic of the sample to be a “major limitation” as the dataset is not representative of 15–18 year olds who account for over one-fifth of the target population³⁷⁶ despite the sample size being “more than adequate”.³⁷⁷ We deal later with some other aspects of the Muurlink Report.

[529] The central problem with the weekend worker survey is that it is plainly not representative of the views of the employees covered by the modern awards which are the subject of these proceedings. This is made clear from Chart 4.2 on page 44 of Exhibit PG 34 – almost two thirds (64.3 per cent) of the employee respondents to the weekend worker survey work in ‘other’ industries, that is, industries which are not covered by the modern awards before us. Ms Pezzullo accepted that only 357 of the 1000 weekend workers were from the hotels, cafes, fast food, retail or pharmacy industries.³⁷⁸

[530] While the Pezzullo Weekend Work survey has its limitations, its findings support other studies which have found that while differences between Saturdays and Sundays are not as large as they once were, there are still differences in the activities undertaken on Sundays.

[531] The report also attempted to determine indirectly labour demand issues by assessing how staffing levels, workloads and operating hours on weekends compared with weekdays. However, the information obtained from workers is only about their perceptions of labour demand and should be interpreted with caution as the data are subjective and collected from a secondary source. This was highlighted in the Markey Report which noted the higher non-response rate for this question.³⁷⁹ Data on business operations are generally more reliable if obtained from employers.

[532] It is convenient to now return to the Muurlink Report.

[533] The Muurlink Report examined the impact, if any, on the physical, psychological and social well-being of a person who works on Saturdays, Sundays or public holidays and whether people are able to recover, mitigate or compensate for any negative impact identified.³⁸⁰ The report is an extensive but not exhaustive³⁸¹ literature review that contains numerous Australian and international studies.

[534] The Muurlink Report focused on six characteristics that relate to weekend work: consecutivity, overload, uncontrollability, unpredictability, synchronicity and arrhythmia and suggests that the impact of weekend work effects such workers through a range of factors including:

- working patterns being out of step with the majority of society;
- lower predictability in the working week;
- lower sense of control, or actual control, over working hours;

- increased chance of working more than five consecutive days in a row; and
- increased chance of working more than 40 hours a week.³⁸²

[535] United Voice relied on the Muurlink Report to support the following propositions:

- “(i) Working on weekends is associated with...negative health ...The presence of these factors also spill over into a negative impact on the wellbeing, social life, and relationships of the worker.
- (ii) Weekend work disrupts social patterns, because the majority of social and leisure activity takes place on weekends, and particularly on Sundays. Research shows that Sunday is traditionally reserved to a degree greater than Saturday to rest and family activities and there are elevated well-being consequences that are particular to Sunday. The negative impact of weekend work on the employee also has a secondary impact on the partner and/or the children of the worker.
- (iii) Weekend workers are not able to fully off-set or mitigate the negative effects of weekend work by reshuffling activities usually done on weekends done on other days. Sunday workers in particular lose even more recreation time relative to standard workers.”³⁸³

[536] Dr Muurlink was cross-examined about a number of the international studies referred to in his report and conceded that the following matters would be different in other countries to Australia:

- labour laws or employment conditions;
- cultural or societal values;
- wage rates;
- unemployment rates;
- social welfare systems; and
- occupational health and safety laws.³⁸⁴

[537] Dr Muurlink also agreed that the studies in his report do not separately identify the four industries in which he was asked to report on although, where possible, he included research related to industries that “heavily overlap” with the four industries³⁸⁵ and he was “very confident” that his conclusion is representative of the target populations and relevant industries.³⁸⁶

[538] SDA and United Voice submitted that the general principles in the Muurlink Report have broad application and that there is no evidence that the consequences of weekend work would be different across occupations or that only Australian studies are relevant.³⁸⁷

[539] In this context, United Voice submit that the choice to work weekends is illusory as it fails to recognise that many hospitality employees work on weekends because that is when they are available in light of their other commitments and because the weekends are when work is available.³⁸⁸ We have considered these submissions and agree that employees exercising a ‘choice’ to work on weekends are likely not doing so free of other considerations, including their availability. However, the fact that availability, or any other factor, is a consideration or a ‘fetter’ in exercising the choice to work on a weekend, does not alter the fact that employees are exercising a choice, albeit one that is constrained by other considerations.

[540] Ai Group made a number of submissions about the limitations of the Muurlink Report. These included that the information in the Muurlink Report:

- is not related to employees in an industry, particularly the fast food industry;
- focuses on association and does not establish causation between weekend work and adverse health consequences;
- assumes that weekend workers undertake long hours and work during abnormal hours;
- is premised on weekend workers being overworked or overloaded; and
- is premised on weekend workers being subject to night work.³⁸⁹

[541] The Hospitality Employers submit that the Muurlink Report is general in nature and does not address the claims proposed.³⁹⁰

[542] ABI submit that it is the six characteristics examined in the Muurlink Report that cause adverse health consequences, not Saturday or Sunday work, as these characteristics would affect all of their days of work and not only weekends.³⁹¹

[543] The issues canvassed by the papers in the Muurlink report do not focus on the effects of weekend work in the relevant industries. As conceded by Dr Muurlink:

“... to be quite clear weekends and public holidays do not magically cause negative effects. The body does not somehow sniff that it's Saturday.”³⁹²

[544] We therefore agree with the critique from ABI that all that we can take from the report is that it is the six characteristics examined that cause adverse health consequences, rather than Saturday or Sunday work of itself.³⁹³ The report's relevance to the matters before us is limited as it does not focus on weekend work in the relevant industries.

6.2.2 Rose Report

[545] In essence the Rose Report seeks to:

‘... examine the importance and value employees covered by the Restaurant Industry Award 2010 and the General Retail Industry Award 2010, place on time. Of particular interest is the importance and value employees covered by these two awards have for working ‘unsocial hours’, with particular emphasis on working on a public holiday.’³⁹⁴

[546] ABI, the Retail Employers and others rely on the Rose Report to support their claims for a reduction in the Sunday and public holiday penalty rates under, in particular, the *Pharmacy, Retail and Restaurants Awards*. In this section we focus on those aspects of the Rose Report relevant to Sunday penalty rates. In Chapter 9 we deal with those parts of the Rose Report which deal with public holidays.

[547] On the basis of the conclusions in the Rose Report, the various employer interests contend that employees do wish to be paid a premium to work Sundays, however the premiums sought by employees are lower than the premiums presently imposed by the *Retail Award* and that the disability associated with working on Saturdays is the same or substantially similar to the disability associated with working on Sundays.

[548] These contentions primarily rest on the following conclusion from the Rose Report:

‘The results of this modelling exercise suggest that the average threshold value of hourly pay at which they would elect to work is actually the average level of pay currently being paid to the sample. This suggests that the employees value their time at precisely their current wage rate. Also based on the model results, it was found that on average, respondents value working on Saturdays as being somewhere between 106 to 135 per cent of their current normal hourly pay, and for working on Sundays somewhere between 126 and 165 per cent of the average current normal hourly pay rate. The hourly rate for working on a public holiday was valued as being between 124 and 224 per cent of the average current normal hourly pay rate, with the later higher value being for working on a Public holiday that falls on a Sunday.’³⁹⁵

[549] The above conclusion is based on survey data from 443 respondents. The ‘centrepiece’³⁹⁶ of the survey data upon which the Rose Report conclusions rest consisted of two discrete choice experiments designed to recover the hourly pay rate for which employees were willing to work during both a normal work week and during a week in which one or more public holidays fall.³⁹⁷

[550] The Rose Report attempts to estimate, through a set of questions put to a sample of employees covered by the *Restaurants and Retail Awards*, the lowest wage that an individual is willing to accept for a job and the value that an individual attaches to the labour she or he supplies. The Rose Report assumes that the willingness to accept (WTA) is identical to the value that an individual places on work time.

[551] As noted above the average threshold value of hourly pay at which the respondents would be willing to work on Saturdays is ‘somewhere between 106 per cent to 135 per cent of the average current normal hourly pay rate’, and for working on Sundays, ‘somewhere between 126 and 165 per cent of the average current normal hourly pay rate’. The various employer interests latch onto this finding to support their contention that the existing Sunday penalty rates in the *Restaurants and Retail Awards* are too high. As ABI puts it:

‘The inference that arises from the above analysis is that employees do wish to be paid a premium for working on Sundays as compared to their weekday pay. However, the value of the premium sought by employees is substantially less than the premium presently applicable under the Retail Award, where the penalty for Sunday work amounts to 200 per cent of the normal weekly rate of pay.’³⁹⁸

[552] We note that ABI focuses on a comparison between the Rose Report results and the current Sunday penalty rate in the *Retail Award*. The same comparison in respect of the *Restaurants Award* does not yield the same conclusion. In fact, for Restaurant employees the value of the premium sought by the Rose Report sample closely equates to the current Sunday penalty rate in the *Restaurants Award* for most employees (that is, 150 per cent).³⁹⁹ Indeed if one were to mechanically apply the Rose Report results to the fixation of Sunday penalty rates then the Sunday rates for level 1 and 2 casuals in the *Restaurants Award* would need to increase.

[553] In any event there are a number of reasons for treating the conclusions in the Rose Report with caution.

[554] As mentioned above, the Rose Report was critiqued by Professor Altman (the Altman Report)⁴⁰⁰ and referred to by Professor Borland in the course of his reply evidence to that of Professor Lewis⁴⁰¹. The various criticisms are extensively canvassed in the SDA and United Voice written submissions. We only propose to mention two matters. The first concerns the survey sample and questions.

[555] The socio-demographic characteristics of the Rose Report survey sample are set out in Table 5 of the report. We note that just over 10 per cent of the survey respondents (45 out of the 437 who disclose their income) had an income in excess of \$52,000 which is not representative of the earnings distribution of Hospitality and Retail employees (see particularly (Charts 22 and 52 of this decision). On any view of it the sample in the Rose Report survey cannot be said to be representative of employees covered by the *Retail and Restaurants Awards*.

[556] In addition, the sample of respondents across the States and Territories does not appear to be representative. For example, there were more respondents from both Western Australia and Queensland, than from Victoria. Professor Rose considered that the survey was not representative of the States and Territories when the issue was put to him in cross-examination.⁴⁰² The gender characteristics also differed from employees covered by the *Restaurant and Retail Awards*, as presented later in Tables 41 and 67.

[557] There are also a number of issues which arise from how the survey questions were structured and contextualised. These issues are canvassed in the Altman Report, relevantly Professor Altman concludes:

‘The reference points used in the Rose report would be expected to generate relatively low WTA values’.⁴⁰³

[558] Survey responses are influenced by the reference points contained in the survey and how the survey questions are structured and framed. During the course of cross examination Professor Rose acknowledged that if survey participants were presented with a question that asked if they would work for a rate lower than the rate in the relevant modern award then their analysis ‘would have definitely generated different results’.⁴⁰⁴

[559] The second substantive limitation on the conclusions reached in the Rose Report is that it reports on the *average value* the respondent employees place on their time on, relevantly, Saturdays and Sundays. Importantly, the Rose Report does not report the *actual value* the respondents place on their time and, as such, the values reported are less than the actual range. As noted in the Altman Report:

‘...amongst the key findings of the Rose Report based on the survey population, Sunday work is valued between 126 and 165 per cent of the average current normal (normal weekday) hourly penalty rate... This range of values is not the actual range of values of work time across the sample population. It is rather the range of highly likely ‘averages’ across this sample population. But it is the range of actual values that is of critical importance here, where the upper band of this range would be much greater than the range of averages’.⁴⁰⁵

[560] Similarly, the Rose Report itself notes that the range of *actual* values differ from the *average* values:

‘The above discussion has been limited to an explanation of the average marginal rates of substitution (MRS) obtained from the models. It is noteworthy however that the standard derivation parameters associated with the various normally distributed MRS, are all statistically significant suggesting that there exists significant heterogeneity in the results. This suggests that not all employees share the same remuneration preferences, with some desiring more pay, whilst others would accept less’.⁴⁰⁶ (emphasis added)

[561] Further, evidence of this issue is that, while the average WTA presented in the results suggest a WTA of between 126 per cent to 165 per cent for Sunday, the range of responses, as measured by the 95 per cent confidence intervals, are likely to be much greater, highlighting the difficulties in interpreting these results with any precision.

[562] There are plainly limitations to the Rose Report and the modelling results should not be mechanically applied as a means of fixing an appropriate penalty rate. But the results do provide an insight into the *relative* disutility of Saturday, Sunday and public holiday work. Relevantly, the value the employee respondents place on their time on a Sunday (126 – 165 per cent) is significantly higher than the value attributed to Saturday (106 – 135 per cent). The Rose Report suggests differences in the disutility of Saturday and Sunday work, a point acknowledged in a number of employer submissions.

[563] The results of the Rose Report provide indicative evidence of the relative disutility of weekend work of Sundays compared to Saturdays.

6.2.3 Charlesworth and Macdonald reports (Australian Work and Life Index)

[564] The SDA called Professor Sara Charlesworth and Dr Fiona Macdonald of RMIT University who provided a report to the SDA⁴⁰⁷ (the Charlesworth/Macdonald Report). The report examines the relative impact of working on Sundays compared to Saturdays on the work-life interference experienced by employees.⁴⁰⁸

[565] The report is divided in two parts, both focusing on retail employees. The first part, undertaken by Professor Charlesworth, provides an analysis of the 2014 Australian Work and Life Index (AWALI) survey which uses a measure of work-life interference developed by Professor Barbara Pocock, Dr Philippa Williams and Dr Natalie Skinner at the Centre for Work & Life, University of South Australia.⁴⁰⁹ The second part, undertaken by Dr Macdonald, is a qualitative study that draws on follow-up telephone interviews with 25 employee respondents to the 2014 AWALI survey that reported working in the retail industry and indicated that they sometimes, often or always worked on Sundays.⁴¹⁰

[566] The AWALI is an annual survey that began in 2007 to provide a ‘snapshot’ of the major influences and consequences of work-life interaction. The AWALI defines ‘work’ as paid work and ‘life’ as the activities outside of paid work.⁴¹¹

[567] The survey is a nationally random stratified sample of Australian households for persons aged 18 years or older. Respondents to the AWALI survey are different each year. In 2014, the AWALI sample comprised 2690 workers, of which 2279 were employees and 411 self-employed persons, surveyed over four weekends in March. The survey was conducted using a computer-assisted telephone interview (CATI) whereby household telephone numbers were selected using random digit dialling and then a random selection of individuals in each

household were chosen to participate in the survey.⁴¹² During her oral evidence, Professor Charlesworth explained that the survey was run over Fridays, Saturdays and Sundays.⁴¹³

[568] In cross examination, Professor Charlesworth conceded that, being a telephone survey, the AWALI is biased against young people who are unlikely to have landlines and more likely to have mobile phones.⁴¹⁴

[569] The AWALI survey contains the perceptions of the following five measures of work-life interference that form the index:

- ‘general interference’ (i.e. the frequency that work interferes with responsibilities or activities outside of work);
- ‘time strain’ (i.e. the frequency that work restricts time with family or friends);
- ‘work-to-community interference’ (i.e. the frequency that work affects workers’ ability to develop or maintain connections and friendships in their local community);
- satisfaction with overall ‘work-life balance’; and
- frequency of ‘feeling rushed or pressed for time’.⁴¹⁵

[570] To create one score for the index, responses to the five measures were averaged and standardised. A score of 0 for the index indicates the lowest work-life interference and the maximum score of 100 indicates the highest work-life interference. The average score for the index in 2014 was 42.1 and the median was 40 (the middle score whereby half of respondents had higher scores and another half had lower scores).⁴¹⁶

[571] Analysis of the 2014 AWALI survey was also provided in a report by Dr Skinner and Professor Pocock of the Centre for Work + Life, University of South Australia.⁴¹⁷ The report found that 62 per cent of respondents worked standard hours (weekdays before 9pm), 30 per cent worked ‘often’ or ‘almost always’ on Saturdays and 18 per cent worked ‘often’ or ‘almost always’ on Sundays.⁴¹⁸

[572] Skinner and Pocock investigated if any particular day of the weekend was associated with greater work-life interference across all employees and found that regular (that is, ‘often’ or ‘almost always’) working on Sundays is “clearly associated” with greater work-life interference, whether employees also work on Saturdays or not. Work-life interference was lower for employees who work regular Saturdays and not regular Sundays and lowest for employees who do not work regular Saturdays or Sundays.⁴¹⁹

[573] Professor Charlesworth explained that weighted estimates of the 2014 AWALI survey contained 223 employees in the retail industry of which 127 worked ‘sometimes’, ‘often’ or ‘almost always’ on Saturdays and 103 worked ‘sometimes’, ‘often’ or ‘almost always’ on Sundays.⁴²⁰ Professor Charlesworth found that retail employees who ‘sometimes’, ‘often’ or ‘almost always’ worked on Sundays reported a higher average AWALI score than those who ‘rarely’ or ‘never’ worked on Sundays, and this difference was statistically significant.⁴²¹

[574] That is, retail employees that work on Sundays were found to have greater work-life interference than retail employees who ‘never’ or ‘rarely’ work on Sundays.

[575] While employees who ‘sometimes’, ‘often’ or ‘almost always’ worked on Saturdays also reported a higher average AWALI score than those who ‘rarely’ or ‘never’ worked on Saturdays, this difference was not found to be statistically significant.⁴²²

[576] Professor Charlesworth suggested that the number of hours worked can impact on work-life interference.⁴²³ After controlling for hours worked, working ‘sometimes’, ‘often’ or ‘almost always’ on either Saturdays or Sundays was found to be associated with higher AWALI scores, and therefore greater work-life interference, than ‘never’ or ‘rarely’ working on these days.⁴²⁴

[577] Professor Charlesworth found that the average AWALI scores for retail employees were not significantly different from the average AWALI scores for all employees and concluded that the influence of working on Saturdays or Sundays was not affected by working in the retail industry.⁴²⁵

[578] In summarising the data, Professor Charlesworth concluded that employees who ‘sometimes’, ‘often’ or ‘almost always’ worked on Saturdays or Sundays experienced greater work-life interference than employees who ‘rarely’ or ‘never’ worked on these days.⁴²⁶ The data for Sundays are presented in Table 14. Although data are presented on employees working in retail, it should be noted that the AWALI survey is not designed to be representative at the industry level.⁴²⁷ This means that the survey was not designed to be representative of employees working in the retail industry.⁴²⁸

Table 14⁴²⁹:
AWALI scores and Sunday work, all and retail employees

	All employees			Retail employees		
	Mean	Number	Std dev.	Mean	Number	Std dev.
Never/rarely	37.6908	1522	20.51435	34.4397	120	20.60154
Sometimes, often, almost always	50.0403	772	21.75977	45.2990	102	22.73461
Total	41.8474	2294	21.73544	39.4368	222	22.23156

[579] The SDA and United Voice submit that the Commission should consider the following findings from the 2014 AWALI survey:

- (a) Employees sometimes, often or almost always working on Saturdays or on Sundays experience worse work-life interference than employees who rarely or never work these hours.
- (b) Employees sometimes, often or almost always working Sundays alone or in combination with working Saturdays experience worse work-life interference than employees who sometimes, often, almost always work Saturdays alone.
- (c) There is no significant difference between retail and non-retail employees in the impact of working on Saturdays or on Sundays; retail employees have similar work-life interference patterns in respect of Saturday and Sunday work as non-retail employees.
- (d) There is no significant difference between work-life interference in 2008 and 2014 for employees working sometimes, often or almost always on the weekend.⁴³⁰

[580] In its final submission, the Retail Employers submit that the evidence provided by Professor Charlesworth shows that:

‘Significantly fewer retail industry employees who sometimes, often or almost always work on Sundays than employees generally who sometimes, often or almost always work on Sundays, report...

- (a) work interferes with activities outside work sometimes, often or almost always (56.8% for retail employees compared to 70% for all employees);
- (b) work keeps them from spending the amount of time they would like with family and friends sometimes, often or almost always (41.9% for retail employees compared to 69.9% for all employees);
- (c) work interferes with their ability to develop or maintain friendships in their community sometimes, often or almost always (47.1% compared to 56.9% for all employees); and
- (d) they feel rushed or pressed for time sometimes, often or almost always (82.3% compared to 85.6% for all employees).⁴³¹

[581] The Retail Employers submit that retail employees had lower AWALI scores in relation to weekend work when compared with all employees.⁴³² However, the SDA referred to Professor Charlesworth’s evidence that the influence of working on Saturdays or Sundays on work-life interference was not affected by working in the retail sector⁴³³ and that measuring each of the five measures of work-life interference was not possible for retail employees due to small sample sizes.⁴³⁴

[582] ABI identified the following issues with the AWALI survey:

- there was no information provided on the non-work activities being interfered with or the importance of these activities;
- there was no information on whether employees who worked weekends also worked during the week;
- no indication was provided on how much non-working time is interfered with, only how often work interfered with non-work activities; and
- no data was provided on the positive aspects of work.⁴³⁵

[583] The PGA submit that the analysis did not include relevant findings for the retail industry, particularly due to a small sample size.⁴³⁶ Further, that the regression analysis by Professor Charlesworth suggests there are other factors affecting work-life interference which are not reflected in the AWALI scores, such as caring responsibilities, commuting times, local economic and social conditions and combining education and work.⁴³⁷

[584] The PGA also commented on the survey design and composition of the AWALI and submitted that:

- it is biased against young people:
 - who use mobile telephones;
 - who may not be home on weekends, possibly because they are working;
 - as it excludes those under 18 years;
 - who are a key group that are more likely to work on weekends;
- it is biased against weekend workers who are likely to be busier or feel more stressed working on weekends;
- it is biased against unemployed people who are excluded;
- the questions had a tendency to elicit a negative response;⁴³⁸

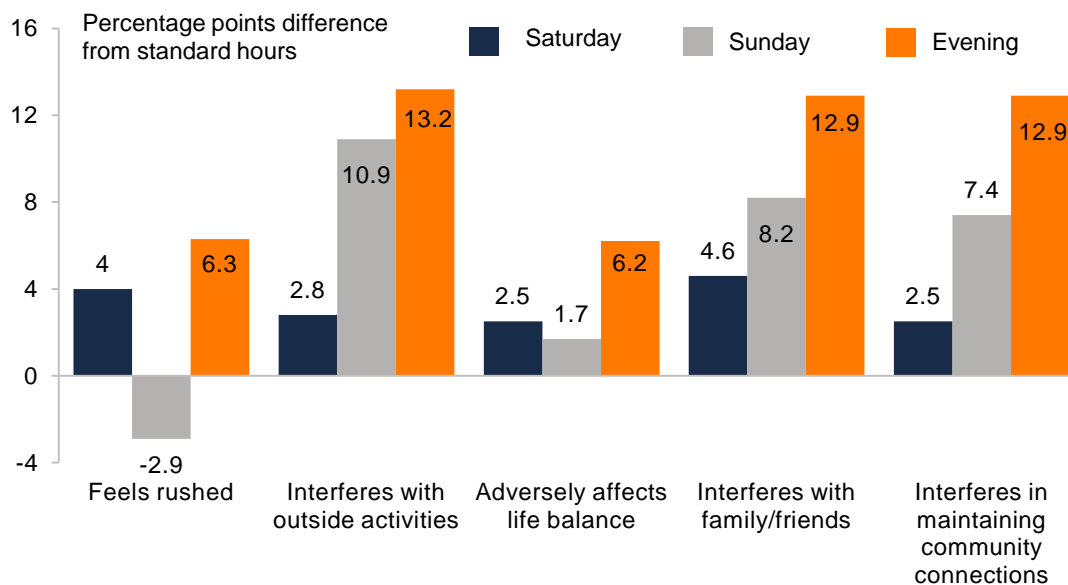
- the AWALI measures only negative outcomes associated with work when it is appropriate to balance both positive and negative impacts of weekend work, while positive impacts are not measured;⁴³⁹
- it does not take into account any compensatory strategies that weekend workers may adopt;⁴⁴⁰ and
- it does not measure work-life interference during different times of the day or relative to other days of the week.⁴⁴¹

[585] The 2014 AWALI survey and its findings were discussed in the PC Final Report.⁴⁴² In discussing the development of the index, the Productivity Commission noted that using an unweighted sum of the five measures is problematic as it was not clear that each would have an equal impact on work-life interference. However, the Productivity Commission did note that the index is less subjective than anecdotal evidence and conjecture.⁴⁴³

[586] The Productivity Commission undertook its own analysis of the 2014 AWALI survey. The results did not often accord with those of Professor Charlesworth and found that most people did not experience major problems with their work-life interactions except for feeling rushed. In this analysis, those who responded that they ‘sometimes’ experienced interference were grouped with those who ‘never’ or ‘rarely’ experienced interference.⁴⁴⁴

[587] The Productivity Commission modelled the outcomes ‘never’, ‘rarely’, ‘sometimes’, ‘often’ or ‘almost always’ while controlling for a series of factors including hours worked, industry, single status, gender, age, and the presence of young children. This was used to estimate the likelihood of an employee experiencing some impact for the five dimensions of the AWALI if they worked at unsocial times (Saturday, Sunday or evening) compared with standard times (Monday to Friday and not evenings). The PC Final Report highlighted that for two of the five dimensions, regular Sunday work had less impacts than regular Saturday work. In fact, higher dissatisfaction was found for working regularly on evenings.⁴⁴⁵ These results are presented in Chart 15.

**Chart 15⁴⁴⁶:
Degree to which employees ‘often’ or ‘almost always’ experience impacts work**



Note: Outcomes relative to standard hours. These results are estimates from an ordered logit of the various measures of work impacts against a series of independent variables, including whether a person works mostly (often or almost always) on Saturdays, on Sundays or on evenings. Other regressors included gender, age and whether an employee had young children. Each of the dependent variables were based on a Likert scale of never, rarely, sometimes, often or almost always (or in life balance terms, a satisfaction measure from very satisfied to not at all satisfied). The logit regression was used to estimate the likelihood that an employee was often or almost always experiencing some impact if they worked at a non-standard time compared with a standard time (Mondays to Fridays). For example, there was around a 4 percentage point difference between the share of people feeling often or almost always rushed for time if they worked on a Saturday (but not a Sunday or evening) compared with those working at standard times.

[588] The SDA contended that “the Commission should not place any weight on the Productivity Commission’s analysis of the AWALI data in making findings about the disability experienced by weekend workers in Australia”.⁴⁴⁷ The SDA argued that the most accurate approach is to use the comprehensive AWALI measure and to control for the number of hours worked,⁴⁴⁸ as undertaken by Professor Charlesworth. We note that even on the approach taken by the Productivity Commission, the relative disutility of Sunday work (compared to Saturday work) is still greater on 3 out of the 5 measures.

[589] The qualitative study by Dr Macdonald involved telephone interviews with 25 retail employees who regularly worked on Sundays to investigate the nature of any work-life interference experienced by retail employees. These employees were randomly selected from the 81 out of 102 retail employees who responded that they ‘sometimes’, ‘often’ or ‘almost always’ work on Sundays and provided contact details.⁴⁴⁹

[590] Dr Macdonald found that higher pay on Sundays is important to employees and was considered to be the most positive aspect of working on Sundays. Employees discussed that they worked on Sundays as it was a requirement of their employer to work weekends or because of study or family commitments during the week.⁴⁵⁰ Others preferred the higher pay to working on Saturdays, including some young people who were combining work and study who also reported less work-life interference from Sunday work than other employees.⁴⁵¹ Attitudes towards working on weekends were also dependent on whether employees had any

flexibility with their working time, their co-workers and how hard they were required to work.⁴⁵²

[591] Sunday was considered to be different to other days as employees felt excluded and missed out on socialising and relaxing with friends and family on a day when people get together. Dr Macdonald concluded that Sundays were viewed as not being a regular work day, were different to Saturdays, and had a more negative effect on work-life balance.⁴⁵³

[592] The SDA submit that Dr Macdonald's qualitative survey used a 'grounded' approach to obtaining themes to discuss with interviewees. The SDA explained that this process 'minimises the risk of selectivity or omission in reporting upon the key themes' and that the sample of 25 retail employees was large enough to reach "saturation" point whereby collecting further data would not add new information.⁴⁵⁴ The SDA also argue that the sampling framework was representative of retail employees in the AWALI survey who responded that they worked 'sometimes', 'often' or 'almost always' on weekends by way of sex, age and employment status.⁴⁵⁵

[593] According to the SDA, the main themes from the interviews of employees who work 'sometimes', 'often' or 'almost always' on weekends, were that:

- Sunday is different to other days and is not a regular work day;
- Sunday is different from Saturday;
- working on Sundays is more negative in its effect on work-life interaction than working on Saturdays because:
 - for most of the community, Sunday is a day off, a "free" day and/or a "family and friends" day;
 - Sunday work is perceived by retail employees as interfering with relaxation and as isolating or excluding them from "life"; and
- work-life interference experienced by retail and other employees from working on Sundays has ripple effects beyond the employee concerned, impacting adversely on families and on relationships with friends.⁴⁵⁶

[594] The Retail Employers commented that the findings in Dr Macdonald's Report showed that retail employees considered that working on Sunday does not 'often' interfere with family responsibilities; social interactions; or recreational and community activities.⁴⁵⁷ They also added that many retail employees choose, or are happy, to work on Sundays;⁴⁵⁸ that retail employees view Saturdays and Sundays as similar or in equal in terms of work-life interference;⁴⁵⁹ and that retail employees will continue to work on Sundays if the penalty rate is reduced to 50 per cent.⁴⁶⁰ In terms of the work, the Retail Employers commented that a number of retail employees view Sunday as more relaxed than Saturday⁴⁶¹ and that retail employees that work on Sundays experience difficulties due to a limited number of staff.⁴⁶²

[595] ABI and the PGA submit that the findings from Dr Macdonald are unreliable because:

- as it is a qualitative study, the findings cannot represent the whole population and the only conclusion is that the issues reported are the types of issues affecting employees in the retail industry⁴⁶³;

- respondents were asked leading questions, which were biased towards the premise that Sunday work interferes with other activities more than Saturdays;⁴⁶⁴
- the interview transcripts show there was no difference in the disability associated with Saturday and Sunday work;⁴⁶⁵
- comments which viewed Saturdays and Sundays as similar or equivalent were not reported by Dr Macdonald;⁴⁶⁶
- the order and number of questions about Sundays were likely to produce answers about the negative impact of Sunday work;⁴⁶⁷ and
- the evidence provided by Dr Macdonald is highly selective and not a true representation of the views of the interviewees.⁴⁶⁸

6.2.4 Conclusions on the Expert Evidence

[596] As shown in the overview of data, changes in the composition of employment have been dominated by an increase in female and part-time employment and an increase in employment in the services industries. These changes have in part occurred in response to shifts in consumer demand and preferences for goods and services that are often accessed on weekends, particularly in the retail and hospitality sectors. Together with the data showing that employees in these industries are more likely to work on weekends, it follows that weekend work is relatively important in these industries.

[597] With regard to the importance of spending time on work and leisure activities, the data and evidence presented before us which refer to time use surveys (the PC Final Report, the Lewis Report and the papers by Bittman and Craig and Brown) indicate that work and leisure activities remain largely separated between weekdays and weekends. Further, while the differences between Saturdays and Sundays have converged over time, there remain differences in the activities performed on each of these days. Sundays is more reserved for family time than Saturdays, when consumer preference to shop is still higher. However, based on the limitations with these data it is difficult to discern the differences in time use between Saturdays and Sundays for weekend workers compared with others.

[598] While Sunday was traditionally regarded as a day of rest and for attending church, the data shows that the proportion of the population that attend church regularly has significantly declined over time. The decline in religious observance has largely been driven by young people.

[599] However, the data also show that a majority of the population report faith in a religion, most of them Christian. Although it is likely that only a minority of this group attend church regularly, it is for this group that weekend work will likely interfere with religious practice.

[600] The expert evidence presented in the Pezzullo Weekend Work Report and Rose Reports, as well as the analysis of the AWALI survey, provided recent information on the attitudes towards Saturdays and Sundays. This evidence, together with the overview of the data in the first part of this chapter that provides information over a longer period, highlighted that employment on weekends has increased with the rise in consumer demand. However, most of the evidence before us shows that there continues to be greater relative disutility with work on Sundays than Saturdays.

[601] We also note the following findings from the Sands report online survey of retail employees:

- The ‘vast majority’ of employees that do not work on Sundays state that nothing will motivate them to work on a Sunday;⁴⁶⁹
- The main difficulty with Sunday work is the impact on the ability to spend time with family/friends;⁴⁷⁰
- 86 per cent of Sunday employees hardly ever or never are able to make up time to attend community, sporting or cultural events during the week;⁴⁷¹ and
- 29 per cent of Sunday employees with children believe that Sunday work has an adverse impact on the health and development of their children.⁴⁷²

[602] We now turn to our conclusions in respect of the Charlesworth/Macdonald Report.

[603] Using the AWALI survey, Charlesworth and Macdonald undertake an analysis on the effects of working on Sundays compared with Saturdays on the work-life interference experienced by employees.

[604] A number of issues have been raised with the methodology used to capture the experiences of employees working in retail. With just over 100 employees reporting that they ‘sometimes’, ‘often’ or ‘almost always’ work on Sundays, the sample of Sunday workers is relatively small and unlikely to be representative of employees working within the industry.

[605] Further, the survey may be omitting critical information related to the experience of those working on weekends, particularly in retail. This is because the survey is conducted on weekends when weekend workers are likely to be engaged at work and excludes workers aged below 18 years.

[606] However, as noted by SDA and United Voice, the AWALI survey is one of the few pieces of evidence put before us that examines the effect of unsociable working hours on work-life interference. Thus, while the results suggest that there is no significant difference on the impact of working on Saturdays or Sundays between retail and non-retail employees, the analysis put forward by Professor Charlesworth and also the analysis presented in the PC Final Report suggests that, for some measures of work-life interference, there may be some additional disutility associated with working on Sundays compared with Saturdays.

[607] The analysis in the PC Final Report of the likelihood that an employee experiences some impact from work at unsocial times controlled for a number of characteristics than just the number of hours worked as undertaken by Professor Charlesworth. This appears to be a sensible approach. However, this method still showed that for three of the five AWALI measures, the degree to which employees ‘often’ or ‘almost always’ experience impacts from work is higher on Sundays than Saturdays, and substantially so.

[608] As we note at [1599] and [1609], the Sands Report is also relevant in addressing the relative disutility of Sunday work compared with Saturday in the retail sector. The Sands Report found that the main difficulty with working on Sunday is the ability to spend time with

family/friends, while a majority hardly ever or never are able to make up time for outside activities such as community, sporting or cultural events.

[609] As to Dr Macdonald's qualitative study, although it was undertaken to provide greater context surrounding the experiences of retail employees working on weekends, the subjective nature of the study suggests it is not an accurate representation of weekend workers. As argued by the employer groups, the selective nature of the report did not provide a true representation of the survey participants, which would have showed relatively little difference in disutility between Saturdays and Sundays.

[610] An extensive amount of data, research and literature has been put before us describing the nature of work and non-week activities in relation to weekends. The evidence points towards a marked shift in the attitudes and nature of work on weekends, in particular Sundays.

6.3 Employment effects of changes to penalty rates

[611] A number of expert witnesses gave evidence in relation to the employment effects of penalty rates.

[612] ABI and others called Professor Phil Lewis, Director, Centre for Labour Market Research and Professor of Economics at the University of Canberra who provided a report on penalty rates in the retail, café and restaurant and hairdressing and beauty industries (the Lewis Report).⁴⁷³

[613] The SDA and United Voice called expert evidence in response to the Lewis Report, from Professor John Quiggin, University of Queensland⁴⁷⁴ (the Quiggin Report) and Professor Jeff Borland, Department of Economics, The University of Melbourne⁴⁷⁵ (the Borland Report). Professor Lewis also provided a report in response to these expert reports.⁴⁷⁶

[614] The replies and submissions responding to the Lewis Report focused on the studies cited by Lewis and the five assumptions which inform the modelling of the employment effects of penalty rates.

[615] SDA also called Dr Serena Yu, Senior Research Fellow, Centre for Health Economic Research and Evaluation at the University of Technology, Sydney, Business School, who provided a report *Evaluating the impact of Sunday penalty rates in the NSW Retail industry* (the Yu Report). The Retail Employers called Lynne Pezzullo, who provided a report *Four Yearly Review of Modern Awards Penalty Rates Review*⁴⁷⁷ in response to the Yu Report.

6.3.1 The Lewis Report

[616] This section deals with the final part of the Lewis Report, involving a simulation model of the effects of introducing penalty rates on Sundays and public holidays on the demand for labour. We have dealt earlier with the other, less contentious aspects of the Lewis Report.

[617] The model considered the impact of a 1 per cent increase in real wages on the demand for labour, that is the elasticity of demand for labour. This was reflected in the model by the degree to which labour can be replaced by other inputs (known as the elasticity of

substitution), labour's share of total costs and how responsive demand is to changes in prices (known as the elasticity of demand for goods and services).⁴⁷⁸ Professor Lewis estimated the long run elasticity of demand, whereby firms can vary all of their inputs, including capital, and the short run elasticity of demand, when capital is fixed, for both permanent and casual employees.

[618] Several assumptions underpin the model, including the degree of substitution between employees and the elasticity of demand for output. The model included a range of estimates on the elasticity of substitution of labour from previous Australian studies that examined labour's response to changes in minimum or aggregate wages.⁴⁷⁹

[619] The Lewis Report notes that there is little evidence for the magnitude of the elasticity of demand for output of the relevant industries (that is, the retail, café and restaurant, hairdressing and beauty industries). In discussing the different sub-sectors that form the retail sector—from areas such as groceries which is likely to be less responsive to price changes compared with demand for electronic goods, as well as the consideration that eating out is a “luxury good”—Professor Lewis considered a range of elasticities of demand for output which varied from -0.1 to -3.0 .⁴⁸⁰

[620] Tables 4a and 4b on pp. 29-30 of the Lewis Report present the range of assumptions and the results from the modelling in the Lewis Report. It shows that, with an elasticity of substitution of labour of 0.5 and an elasticity of output of -0.1 , penalty rates on Sunday would reduce demand for hired labour in retail of permanent employees to 87 per cent of the level without penalty rates in the short run, when capital is fixed, and 78 per cent in the long run, when firms have time to adjust capital. Under the same assumptions, the demand for permanent employees on public holidays in retail would be 80 per cent of the level without penalty rates in the short run and 66 per cent in the long run. The full range of estimates is not presented as Professor Lewis found that in some scenarios firms would not choose to employ hired labour.

[621] The Lewis Report concluded that the effect of penalty rates is that employment would be lower for both permanent and casual employees than if there were no penalty rates.⁴⁸¹

[622] Professors Quiggin⁴⁸² and Borland⁴⁸³ both responded that the studies cited in the Lewis Report were either misleading or of limited value.⁴⁸⁴ In reference to Professor Borland's arguments, SDA and United Voice submit that applying the elasticity of labour from minimum and aggregate wage studies to the analysis of penalty rates does not account for the differences between the two types of wage payments.⁴⁸⁵ This is said to be so because the population that receives penalty rates is different to the population that receives the minimum wage, and that penalty rates are payable at different times and days.⁴⁸⁶

[623] SDA and United Voice contend that the studies referred to by Professor Lewis provided ‘no useful insight into the appropriate elasticities to apply when performing penalty rate elasticity modelling’.⁴⁸⁷

[624] ABI relied on Professor Lewis' response, namely that he adopted the findings of the impact of minimum wages on employment ‘to simply establish the principle that there is substitution between hired labour and other inputs in response to wage rates’.⁴⁸⁸

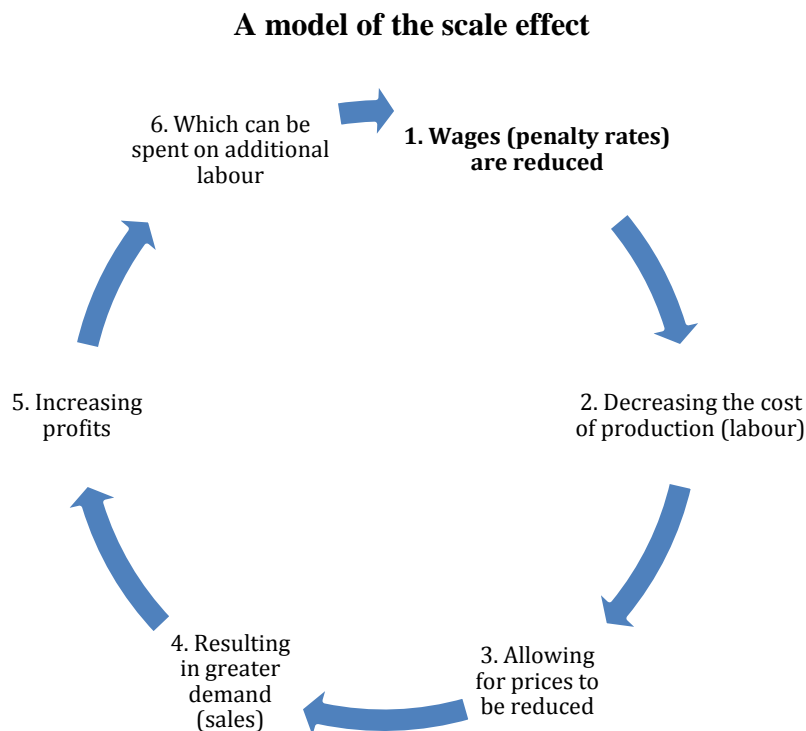
[625] The difficulty with the proposition advanced by ABI (and other employer organisations) is that during the course of his cross-examination Lewis agreed ‘the elasticity of employment with respect to the minimum wage ... [is clearly] not relevant to this penalty rate case’ and that he relies on ‘the elasticities of substitution, some of which are a by-product of the minimum wage studies’.⁴⁸⁹

[626] In reference to the elasticities of substitution used in the Lewis Report, ABI notes that Professor Lewis argued that the elasticities he adopted ‘fall within the range of estimates contained in the Australian literature’.⁴⁹⁰

[627] However, as the SDA and United Voice submit, some of the elasticities used by Professor Lewis were unconvincing and in the PC Final Report the Productivity Commission regarded a labour demand elasticity of -3 , as derived from a previous paper by Professor Lewis, to be “unrealistic”.⁴⁹¹

[628] SDA and United Voice criticised the five assumptions that “underpin” the modelling by Professor Lewis and which Professor Borland suggests ‘are so flawed as to render his modelling unreliable and not demonstrative of any negative effect on employment caused by penalty rates’.⁴⁹²

[629] During the course of his evidence Professor Lewis acknowledged⁴⁹³ that the conceptual basis for his conclusions is represented in the chart⁴⁹⁴ below.



[630] SDA and United Voice criticised Professor Lewis’ model for assuming perfect competition. This impacts the scale effect, or the size of the pass-through effect of a reduction in penalty rates on product prices.

[631] We note that during the course of cross examination Professor Lewis conceded that the markets for hospitality and retail are not perfectly competitive and but have a high degree of competition. On this basis it is reasonable to conclude that the projected decrease in prices will be less than claimed in the Lewis Report.⁴⁹⁵

[632] It is also relevant to observe that the conceptual basis for Professor Lewis' model (lower wage costs → lower prices → increased demand → increased labour) was not supported by *any* of the employer lay evidence in the proceedings. The lay witnesses spoke of responding to penalty rate reductions by improving the range and level of services but not one suggested that prices would fall if penalty rates were reduced.

[633] Professor Lewis stated that his simulation modelling contains a range of estimates that 'represent a very conservative scenario' and that whichever estimates are adopted, 'the employment effects of penalty rates are significant'.⁴⁹⁶ However, SDA and United Voice claimed that in cross-examination Professor Lewis accepted that the estimates were "probably unduly biased upward"⁴⁹⁷ and therefore likely to overstate any employment response. Professor Quiggin discussed a number of Australian and international studies on minimum wages which provided lower estimates of the elasticity of labour demand than those cited by Lewis. This also supports the argument that the Lewis model overstates any employment effects.⁴⁹⁸

[634] Professor Borland argued that Professor Lewis did not consider how a reduction in penalty rates would affect the demand for output (and employment) across other industries using a general equilibrium model.⁴⁹⁹ Professor Borland commented that a reduction in employment in other industries would occur if there was an increase in employment in the restaurant industry.⁵⁰⁰

[635] SDA and United Voice submit that a general equilibrium model is more appropriate as it 'says that if demand, and therefore employment, increases in one area, such as restaurants, then it must decrease in another, such as supermarkets'.⁵⁰¹

[636] Professor Lewis acknowledged that "some 'demand shifting' of output takes place to weekdays and away from Sundays and public holiday demand by consumers", although "there are little available data on this and so it is difficult to predict what the effect of 'demand shifting' is on employment."⁵⁰²

[637] We note that the minimum wage studies referred to estimate wage changes that are different to penalty rates and also to a group of workers not identical to those receiving penalty rates. Although workers receiving penalty rates or modern award minimum wages are more likely to be comparable as they tend to be employed in similar industries, minimum wage adjustments are very different to changes in penalty rates. Penalty rates are a form of extra payment received for working specific hours or days of the week, while minimum wages are not confined to these restrictions and must be paid on all days.

[638] The Lewis Report considered the effects of introducing penalty rates and thereby increasing wages. It is assumed that stemming from his results, Professor Lewis would conclude that any effects following a reduction in penalty rates would be of the same magnitude as his current findings, albeit in the opposite direction. However, as explained by Professors Borland and Professor Quiggin, and conceded by Professor Lewis, employers may

need to provide additional remuneration to attract weekend workers, so that the effects of a reduction in penalty rates may not result in the suggested findings.

[639] Finally, as noted in the PC Final Report, the demand for goods and services on any day are partial substitutes for goods and services on other days so that, for example, consumers who shift their shopping or dining patterns to Sundays may reduce this on other days.⁵⁰³

[640] SDA and United Voice referred to Professor Quiggin's evidence "that if there is an increase in the number of establishments opening on Sunday or public holidays, any increase in consumer spending on such days would likely come at the expense of other times".⁵⁰⁴

[641] Professor Borland also commented that the model does not allow for consumers who were not able to buy from the firm on a particular day to shift their demand to the same firm on another day or to an alternative firm open on that particular day. Professor Borland stated that "if ... a firm opens for an extra day, all of the consumers who now buy from it on that day previously bought from another firm on that day, then there is a zero net effect on employment."⁵⁰⁵

6.3.2 The Yu Report

[642] The Yu Report uses two empirical models to determine if there was any impact from the changes in Sunday penalty rates on employment and hours worked in the New South Wales (NSW) Retail trade industry.

[643] As a result of the award modernisation process, employees in Retail trade in NSW moved from the *Shop Employees Award* to the *General Retail Industry Award 2010*. Transitional arrangements were provided to employers in NSW so that the increase in the penalty rates could be phased in through five incremental annual instalments of 10 percentage points beginning 1 July 2010 and ending on 1 July 2014.

[644] Dr Yu examined the effect of an increase in penalty rates on employment by comparing outcomes in the NSW Retail trade industry (where Sunday penalty rates increased from 150 per cent to 200 per cent) with the Victorian Retail trade industry (where Sunday penalty rates remained unchanged). From this analysis, Dr Yu concluded that there was no systematic evidence of an adverse effect on employment following the transitional increases in the Sunday penalty rates in the NSW Retail trade industry.

[645] Using the ABS Labour Force Survey, the difference-in-difference method was applied to determine if there were any effects on aggregate employment or hours worked from the changes in Sunday penalty rates between two periods—February 2000 and June 2009 (pre penalty rate increase) and August 2010 and February 2015 (post penalty rate increase).

[646] This method compares the employment outcomes of a group of workers affected by the penalty rate increase (defined as the treatment group) with an otherwise comparable group of workers that are unaffected by the penalty rate increase (defined as the control group). The difference in outcomes between these two groups is used to determine the employment effect of an increase in penalty rates.

[647] The treatment group comprised Retail trade workers in NSW and the control group comprised Retail trade workers in Victoria. Victoria was selected as a control group because there was no change to penalty rates in this State for Sunday.

[648] To test the comparability of the treatment and control groups, Dr Yu used quarterly data from the ABS Labour Force Survey to compare trends in employment levels and both full-time and part-time hours worked between August 1991 and May 2010 (i.e. before the penalty rate increase). Dr Yu concluded that the two groups shared common trends and were therefore comparable.

[649] The model's key assumption is that employment trends would be the same for both groups of employees in the absence of an increase in penalty rates after controlling for a number of factors.⁵⁰⁶ Dr Yu also noted that "[w]hile the analysis is unable to isolate the effect of the Sunday penalty rates from other changes [in the award]... changes in other entitlements were relatively small or zero".⁵⁰⁷

[650] Dr Yu found a negative employment effect in the first year of transitioning to modern awards while the effects in subsequent years were found to be inconsistent, contradictory, and not statistically different from zero. The total effect of the five increases was statistically insignificant.⁵⁰⁸ Yu acknowledged that an employment effect may have occurred though it could be too small and therefore would not be statistically significant.⁵⁰⁹

[651] A second analysis was also performed using HILDA survey data to determine if employment shifted away from Sundays to other days of the week. If both analyses found an effect then that would be evidence that there were employment effects arising from the increases to Sunday penalty rates. If only one analysis found an effect then Dr Yu argued that this may be due to other factors or that any effects did not cause a net welfare loss.⁵¹⁰

[652] The second model used the HILDA Survey to take advantage of its longitudinal nature and also applied the difference-in-difference method to analyse the change in the probability of working on Sundays following each of the Sunday penalty rate increases between 2010 and 2013 arising from the transitional arrangements between NSW and Victorian retail employees. It also controlled for differences in demographic characteristics between the two states.

[653] In the second model, effects on employment were determined by analysing the period between 2008 – 2009 (pre penalty rate increase) and 2010-2013 (post penalty rate increase).

[654] Results were compared between different groups of employees: full-time and part-time employees, employees in large businesses and those in small to medium businesses, and adult and junior employees. Dr Yu did not find a shift away from employment on Sundays.⁵¹¹ Although Dr Yu found a 'large positive effect' for junior workers, this was only for 2012, and Dr Yu also found that "there was no commensurate decline in non-junior employees working on Sundays"⁵¹² and argued that "other factors are motivating these preferences for deploying junior employees on Sunday."⁵¹³

[655] Overall, Dr Yu concluded that "the research showed no systematic evidence of an adverse effect on employment following the transitional increases in the Sunday penalty rates in the NSW retail industry".⁵¹⁴

[656] The main contention among parties was the issue of comparability between the treatment and control groups.

[657] In reply, Ms Pezzullo argued that the two groups did not share common trends and that Victoria was not an appropriate control group.⁵¹⁵ Ms Pezzullo presented data on employment and hours worked from February 2000 to February 2015 and instead argued that employment trends between Victoria and NSW were “diverging”.⁵¹⁶ Ms Pezzullo also found that her analysis of the employment trends “strongly” suggested that there was “a break in the trend, at around the end of 2007” to provide further evidence that employment trends were not comparable.⁵¹⁷

[658] In response to Ms Pezzullo, Dr Yu revised her first model⁵¹⁸ and found a larger statistically significant negative effect of an increase in penalty rates on employment outcomes in NSW in the first year, and a “weakly significant positive effect” in the second year.⁵¹⁹ Other than these differences, Dr Yu noted that the revised estimates were consistent with the original analysis.⁵²⁰

[659] ABI submits that using Retail trade employment in Victoria as a control group was “fundamentally flawed”⁵²¹ as the analysis demonstrated marked differences in employment trends before 2010”.⁵²² Ai Group referred to evidence from Ms Pezzullo on the “diverging trend” between the two states between February 2009 and May 2010, and that there were two structural changes in 2008 and 2010 in Victoria that were not replicated in New South Wales.⁵²³

[660] ABI also submits that even if employment trends between NSW and Victoria were comparable before 2010, differences remained between the two states after 2010 that were not controlled for in the analysis⁵²⁴ and that “any number of factors could have influenced employment in New South Wales post-2010 and countered some of the dis-employment affect associated with the increasing penalty rates during the same period”.⁵²⁵

[661] Ai Group also argued that Dr Yu did not consider other factors relevant to assessing whether Victoria was an appropriate control group, such as demand-side factors, the location of employees between metropolitan and regional areas, profit margins and operating profits of businesses, and employee productivity.⁵²⁶

[662] In contrast, SDA argued that the various differences referred to were “not relevant to the methodology” as the model requires only comparable or similar trends and not precisely the same trends.⁵²⁷ However, Dr Yu conceded that factors raised by the employer parties may have affected employment trends post this period.⁵²⁸

[663] SDA argued that ABI failed to show any evidence of differences in economic conditions or in relation to differences in workers’ compensation premiums and changes in payroll tax arrangements between the two states. SDA contended that “[i]t is entirely speculative that any of these changes would have affected employment outcomes in the NSW retail industry.”⁵²⁹

[664] Ms Pezzullo undertakes her own difference-in-difference model designed to address the issues with Dr Yu’s first model and contended that her analysis revealed “a statistically

significant and enduring reduction in both employment and hours worked resulting from the Award changes”.⁵³⁰ However, SDA submitted Dr Yu’s argument that Ms Pezzullo’s model was “unable to establish a statistically significant difference between retail employment in NSW and Victoria post-2010”.⁵³¹

[665] Ai Group submitted that the ANZSIC Retail trade division reflects different businesses covered by the General Retail Industry Award, and argued that “conclusions in the Yu Report are based on non-consistent data groups”.⁵³² Ai Group further commented that conclusions stemming from the Yu Report were “industry specific, State specific and time specific” and that there was “no evidence that the same conclusions would be reached if the experiment was applied to the fast food industry”.

[666] Identifying an appropriate control group that is comparable to the treatment group is important as it is the basis for the counterfactual—what would have happened in the absence of the policy change.

[667] In our view the divergent employment trends between NSW and Victorian Retail trade make it challenging to use a difference-in-difference methodology in such a context, as the methodology requires both groups to be comparable.

[668] Another limitation to Dr Yu’s model is that it uses the ABS Labour Force Survey, which cannot identify those award-reliant workers in the NSW retail industry that are affected by the increase in penalty rates or work on Sundays and their Victorian counterparts.⁵³³

[669] Therefore, Dr Yu’s analysis would also capture workers not affected by the penalty rate increase. Despite her argument that all employees should be included—as she notes that changes in awards may flow on to collective and individual agreements⁵³⁴—not identifying award-reliant workers would result in people allocated to the treatment group who are not affected by penalty rate changes. For example, these people may not be paid penalty rates, and/or work on Sundays.

6.3.3 Conclusion on Employment Effects

[670] At the outset it is important to note that both the Lewis and Yu Reports examine the employment effects from an *increase* in penalty rates, whereas the claims before us are for a *decrease* in penalty rates.

[671] As Professor Borland explained, for large changes in wages, the same *absolute* change can produce different *percentage* changes in employment when modelling an increase or decrease in wages.⁵³⁵ This led Professor Borland to conclude that the approach by Professor Lewis provides an upper bound estimate of changes to employment due to penalty rates.⁵³⁶

[672] Professor Borland added that “[e]ven critics of penalty rates acknowledge that some part of penalty rates is a compensating differential for the disutility of working on weekends or public holidays which is necessary in order to induce sufficient labour supply on those days.”⁵³⁷ That is, “prior to the imposition of penalty rates, the wage rate on weekends and public holidays would already need to be above the base weekday wage rate”⁵³⁸ and therefore “labour costs would not increase by the whole amount of the difference between the regulated

penalty rate and the base weekday wage rate” which would overestimate the effect of penalty rates on labour costs from Professor Lewis’ model.⁵³⁹

[673] Professor Lewis acknowledged the point made by Professor Borland and responded that “[t]o the extent that the actual market rates of pay, as determined by supply and demand, for work on Sundays and public holidays might be somewhat greater than the market rate for work in non-penalty time then the estimates are biased upwards”.⁵⁴⁰

[674] As to the Lewis Report more generally, it seems to us that there is limited utility in applying aggregate elasticities to an assessment of the employment effects of reducing penalty rates which only apply to a segment of the workforce.

[675] The Lewis Report referred to estimates of the elasticity of labour demand with respect to aggregate wages and minimum wages which are in themselves drawn from two different populations and likely to cover industries that may not be relevant to this case. Further, the types of workers that receive penalty rates are different to the types of workers considered in the studies of aggregate wages and minimum wages, as penalty rates are payable at different times and days.

[676] Professor Quiggin argued that the studies relied upon by Professor Lewis produced relatively high estimates of the elasticity of labour demand with respect to wages and that the studies selected represented “a minority view and should not be regarded as an appropriate basis for wages policy”. The Productivity Commission agreed that a labour demand elasticity of -3 , as assumed by Professor Lewis, would imply a very substantial and “unrealistic” increase in weekend employment.

[677] We also note that under cross-examination Professor Quiggin agreed that his criticism of Professor Lewis was that he had overstated the impact of minimum wages on labour demand and said that the dominant view is that there is a small impact and some mainstream studies maintain that there is no impact.⁵⁴¹ Professor Quiggin also agreed that the setting of wages levels can give different effects with respect to the impact on employment and there is a level of minimum wages at which increases have a substantial effect.⁵⁴²

[678] Professor Quiggin also agreed that there is a substantial difference in the penalty rates prescribed for Saturday and Sunday work in the *Retail and Hairdressing Awards* respectively and in response to the proposition that such a difference may have a substantial dis-employment effect said that there would be substantial lower employment on Sunday consistent with the intention of penalty rates to set aside Sunday in particular as a day when people are not expected to work. However, Professor Quiggin maintained that nearly all of this employment loss would be made up on other days of the week.⁵⁴³

[679] In response to the proposition that if there is a substantial increase in the wage then it is likely that there would be a dis-employment effect that would be more than small, Professor Borland said that this depended on the wage elasticity. If there is a bigger wage change there will be a bigger change in employment and whether that is substantial or not depends on the elasticity.⁵⁴⁴

[680] The Lewis Report is further limited due to several of the assumptions that underpin the model, each of which are likely to overstate any employment effects. Further, the employer

lay evidence before us suggests that past penalty rate adjustments (up or down) have not had significant employment effects.

[681] As we note at [773]–[775] a number of the lay witnesses called by the Hospitality Employers were cross examined about the transitional provisions in respect of loadings and penalty rates for casual employees in South Australia (the effect of the S.A. transitional arrangements was that employers employing casuals may have had reduced labour costs as a result of the implementation of the modern award). As we observe at [775], that evidence may cast some doubt on the proposition that a reduction in weekend penalty rates will have a positive impact on employment.

[682] Indeed, some of the employer lay evidence suggests that, in the past, factors other than changes in weekend penalty rates must have had a greater impact on the demand for labour. For example, Mr Barron points to the fact that the allocated labour hours to Sundays for Sussan and Sportsgirl stores in NSW and Victoria fell between 2010/11 and 2014/15. The percentage fall in Sunday hours was higher in Victoria than in the NSW despite the fact that Sunday penalty rates have *increased* in NSW and had remained unchanged in Victoria. No satisfactory explanation is provided for this evident anomaly (see [1508]–[1509]).

[683] However the employer lay evidence also supports the general proposition that the current level of Sunday penalty rates has led employers to take measures to reduce the labour costs associated with trading on Sunday and that a lower Sunday penalty rate would increase service levels with a subsequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees).

[684] In its consideration of changes to employment from reducing Sunday penalty rates to Saturday penalty rates, the PC Final Report concluded that there “are likely [to] be some positive employment impacts, though less than those sometimes claimed by the proponents of reduced penalty rates”.⁵⁴⁵ We agree with that assessment, though it is difficult to quantify the precise effect.

[685] Further, as we have mentioned, in the context of minimum wages Professors Borland and Quiggin both conceded that there is greater potential of an employment effect from a larger or more substantive increase.⁵⁴⁶ These conclusions support the view of the Expert Panel, stated in the *Annual Wage Review 2015–16* decision, that “modest and regular increases in minimum wages have a small or even zero impact on employment”.⁵⁴⁷

[686] While we believe that the relevance of the Lewis Report to the matters before us is limited, due to, among other things the nature of the assumptions that underpin the model used, each of which are likely to overstate any employment effects, we are of the view that overall, there may be some modest gains in employment as a consequence of a reduction in penalty rates. Although as noted in the PC Final Report, the employment effects are likely to be less than estimates such as those suggested in the Lewis Report. However the magnitude of the employment effect is difficult to quantify as a result of the competing substitution effects described in the PC Final Report.

[687] Further, we agree with the view expressed by Professor Quiggin that many other factors affect employment, such as economic conditions.⁵⁴⁸ Professor Lewis accepted that “[i]solating the impacts of changes in award wages are fraught with difficulty and is largely

responsible for the lack of consensus on the employment impacts of changes to imposed wages such as awards, including minimum wages”⁵⁴⁹.

[688] On the basis of the evidence before us, we have concluded that reducing penalty rates may have a modest positive effect on employment.

6.4 Summary

[689] The following propositions emerge from the evidence before us:

1. There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.
2. We agree with the assessment in the PC Final Report that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise effect. Any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects.

[690] As to proposition 1, we are aware that our conclusion is different to that in the PC Final Report. However, in the proceedings before us we have had the opportunity to consider evidence not available to the Productivity Commission, such as the Pezzullo Weekend Work Report, the Rose Report and the Sands Report, in addition to a substantial amount of lay employer and employee evidence. None of the above Reports concluded that the activities conducted on, and attitudes towards, Saturdays and Sundays were identical.

7. The Hospitality Sector

7.1 Overview

[691] This section presents data on the Hospitality group of modern awards, that is:

- *Hospitality Industry (General) Award 2010;*
- *Registered and Licensed Clubs Award 2010;*
- *Restaurant Industry Award 2010;* and
- *Fast Food Industry Award 2010.*⁵⁵⁰

[692] The data are collected from five sources: the ABS, the Fair Work Commission's AWRS and the Fair Work Commission's Award Reliance Survey (ARS), the HILDA Survey and the Department of Employment's Workplace Agreements Database (WAD). The ABS contains a number of surveys on the performance, structure and characteristics of industries. The AWRS, ARS and HILDA are large-scale quantitative surveys that collectively provide information on enterprises, employees and households. HILDA has the added advantage of presenting information over time. The WAD is a database that contains information of all Australian enterprise agreements. Further information on the Commission's data sources is located on its website.⁵⁵¹

[693] A paper⁵⁵² by Commission staff provides a framework for 'mapping' modern award coverage to the Australian and New Zealand Standard Industrial Classification (ANZSIC).

[694] There are 4 levels within the ANZSIC structure: division, subdivision, group and class. The most detailed level is the class (or 4 digit level) but data at this level is limited. The most readily available data is at the division level (or 1 digit level). In this instance, the relevant division of ANZSIC is Division H: Accommodation and food services. For convenience we refer to this collection of industries as 'the Hospitality sector'. The subdivisions, groups and classes within Accommodation and food services are set out below:

- 44 Accommodation
 - 440 Accommodation
 - 4400 Accommodation
- 45 Food and beverage services
 - 451 Cafes, Restaurants and Takeaway Food Services
 - 4511 Cafes and restaurants
 - 4512 Takeaway food services
 - 4513 Catering services
 - 452 Pubs, Taverns and Bars
 - 4520 Pubs, Taverns and Bars
 - 453 Clubs (Hospitality)
 - 4530 Clubs (Hospitality)

[695] Table 15 shows how the modern awards in the Hospitality group ‘map’ with the relevant industry class.

Table 15⁵⁵³
Modern awards ‘mapped’ to ANZSIC class

Hospitality group modern award	ANZSIC class within accommodation and food services
Hospitality Industry (General)	4400 – Accommodation
	4511 – Cafes and restaurants
	4513 – Catering services
	4520 – Pubs, taverns and bars
Registered and Licensed Clubs	4530 – Clubs (Hospitality)
Restaurant Industry	4511 – Cafés and restaurants
Fast Food Industry	4512 – Takeaway food services

[696] We propose to first set out the data relating to the Hospitality sector and the employers who operate within it, before turning to the characteristics of employees in the sector. It should be noted that the data in some of the tables presented in this chapter may not add up to 100, due to rounding.

7.1.1 Features of the Hospitality Sector

(i) *General economic indicators*

[697] Key economic indicators of the Hospitality sector are presented in Table 16. The data show that the sector accounted for:

- over \$80 billion of sales and 2.5 per cent of value added to the economy;
- 7 per cent of employment, almost 6 per cent of actual hours worked per week in all jobs and over 4 per cent of wages;
- around 4 per cent of all businesses and 14 per cent of all award-reliant non-managerial employees;
- 1 per cent of investment;
- around 16 per cent of total underemployment; and
- around \$6.6 billion in company gross operating profit.

Table 16⁵⁵⁴
Economic indicators of Hospitality sector

	Hospitality sector	Percentage of all industries
Industry value added (\$m) (June 2016) ^a	39 006	2.5
Sales (\$m) (June 2016) ^{a,c}	84 799	3.3
Employment (‘000s) (August 2016) ^b	838	7.0
Actual hours worked per week in all jobs (‘000s) (August 2016) ^b	22 509	5.6
Company gross operating profit (\$m) (June 2016) ^{a,c}	6570	2.6

	Hospitality sector	Percentage of all industries
Wages (\$m) (June 2016) ^{a,d}	22 527	4.4
Gross fixed capital formation (\$m) (June 2015) ^a	3990	1.0
Businesses (June 2015) ^c	87 555	4.1
Award-reliant non-managerial employees ('000s) (May 2016) ^d	317	13.9
Underemployment ('000s) (August 2016) ^b	172	16.1

Note: (a) sum of four quarters; (b) average over the four quarters; (c) All industries excluding Agriculture, forestry and fishing, Education and training, Health care and social assistance and some subdivisions of Finance and insurance services; (d) all industries excluding Agriculture, forestry and fishing; (e) All industries excluding the public sector.

Industry value added and sales are seasonally adjusted and expressed in real terms from chain volume estimates. Employment is expressed in seasonally adjusted terms. Actual hours worked per week in all jobs and underemployment are expressed in original terms. Company gross operating profits and wages are seasonally adjusted from current price estimates. Gross fixed capital formation is expressed in original and real terms, from chain volume estimates.

(ii) *Business size*

[698] As shown in Table 17, businesses in the Hospitality sector were predominantly small and non-employing businesses and more likely to be employing businesses compared with businesses across all industries.

Table 17⁵⁵⁵
Percentage of businesses by business size, June 2015

	Hospitality sector (%)	All industries (%)
All businesses		
Non-employing	27.1	60.6
Small	64.5	36.9
Medium	8.0	2.4
Large	0.4	0.2
	100.0	100.0
Employing businesses		
Small	88.5	93.5
Medium	11.0	6.1
Large	0.5	0.4
	100.0	100.0

Note: Small businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. The publication only includes actively trading businesses in the market sector and hence excludes entities that are in the public sector.

[699] In June 2015, small businesses accounted for almost two-thirds of all businesses in the Hospitality sector. Small and medium businesses comprised a higher proportion of businesses in this sector than across all industries. Non-employing businesses comprised around 60 per cent of businesses across all industries and less than 30 per cent in the Hospitality sector.

(iii) Industry concentration and competition

[700] Industry concentration refers to the degree with which a small number of firms provide a major proportion of total production within an industry and provides a measure of competition within an industry.

[701] As shown in Table 18, in the Hospitality sector, small and medium businesses accounted for similar proportions of wages and salaries, sales and service income and industry value added, ranging between 36 to 40 per cent. Both small and non-employing businesses and medium businesses accounted for a higher proportion than large businesses across each of these measures.

[702] Relative to total selected industries (i.e. all industries except for Financial and insurance services), small and non-employing businesses and medium businesses in the Hospitality sector accounted for higher proportions across each of these measures, while large businesses accounted for lower proportions.

Table 18⁵⁵⁶**Wages and salaries, sales and service income, and industry value added by business size, 2014–15**

	Percentage of industry total		
	Wages and salaries (%)	Sales and service income (%)	Industry value added (%)
Hospitality sector			
Small and non-employing	36.1	39.8	37.8
Medium	37.6	37.3	36.7
Large	26.3	22.9	25.6
	100.0	100.0	100.0
Total selected industries			
Small and non-employing	28.2	35.3	35.6
Medium	26.8	22.3	21.5
Large	44.9	42.4	43.0
	100.0	100.0	100.0

Note: Small businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey. Small and non-employing businesses cannot be disaggregated.

[703] Table 19 provides information on the nature of the market and measures of competition for enterprises in the Hospitality sector and across all industries in 2014. Subjective measures of market and competition include the number of direct competitors and the degree of competition observed for their major products and/or services during the last financial year.

Table 19⁵⁵⁷
Market and competition, 2014

	Hospitality sector (%)	All industries (%)
<i>Nature of market</i>		
Domestic only	97.9	83.6
Domestic with some export	2.0	14.6
Export with some domestic	np	1.4
Export only	–	0.5
	100.0	100.0
<i>Market focus</i>		
Immediate local area only	76.1	44.0
Intrastate	9.2	19.5
Interstate	2.7	9.1
Australia wide	12.0	27.4
Other	–	np
	100.0	100.0
<i>Number of direct competitors</i>		
1–4	22.9	21.7
5–9	24.0	23.6
10–19	22.5	18.9
20–49	12.7	12.8
50 or more	15.0	16.4
None/captive market/no effective competition	2.8	6.6
	100.0	100.0
<i>Degree of competition</i>		
Intense competition	28.9	29.6
Strong competition	46.4	42.3
Moderate competition	22.2	21.6
Limited competition	2.5	6.5
	100.0	100.0

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

[704] Most enterprises in the Hospitality sector operated in a domestic market only and a lower proportion operated in a market with exports compared with all industries. The market focus for most enterprises in the Hospitality sector was the immediate local area only and a lower proportion focused outside this area compared with all industries.

[705] The highest proportion of enterprises in the Hospitality sector and across all industries reported that the number of direct competitors was five to nine, while enterprises in the Hospitality sector were less likely to report no direct competitors. Further, while most enterprises reported strong or intense competition, enterprises in the Hospitality sector were less likely to report limited competition.

(iv) *Award reliance*

[706] The most common method of setting pay in the Hospitality sector is awards. In the Hospitality sector, 42.7 per cent of non-managerial employees were reliant on award wages. In contrast, only 24.5 per cent of non-managerial employees were reliant on award wages in all industries.

[707] Relative to all industries, this sector has a significantly higher proportion of non-managerial employees paid at the award rate, offset by lower proportions of non-managerial employees on collective agreements and individual arrangements (Table 20).

Table 20⁵⁵⁸
Methods of setting pay, non-managerial employees, May 2016

	Hospitality sector (%)	All industries (%)
Award only	42.7	24.5
Collective agreement	35.7	38.9
Individual arrangement	21.7	36.6
	100.0	100.0

Note: Data may not sum to 100 due to rounding.

[708] The Commission's Award Reliance Survey collected data on the number of organisations that use each modern award. The most common modern award used by award-reliant organisations within the Hospitality sector in 2013 was the *Hospitality Industry (General) Award 2010* (Table 21). This was used by more than six in 10 award-reliant organisations. It was also the third most common modern award used by award-reliant organisations across all industries.

Table 21⁵⁵⁹
**Top 10 modern awards used in Accommodation and food services,
percentage of award-reliant organisations, 2013**

	Accommodation and food services (%)	All industries (%)
<i>Hospitality Industry (General) Award 2010</i>	64.2	13.3
<i>Restaurant Industry Award 2010</i>	17.8	3.7
<i>Fast Food Industry Award 2010</i>	8.1	1.8
<i>Registered and Licensed Clubs Award 2010</i>	3.4	1.4
<i>Cleaning Services Award 2010</i>	3.1	3.9
<i>General Retail Industry Award 2010</i>	2.0	15.1
<i>Clerks—Private Sector Award 2010</i>	2.0	16.0
<i>Food, Beverage and Tobacco Manufacturing Award 2010</i>	1.1	1.2
<i>Road Transport and Distribution Award 2010</i>	0.6	2.3
<i>Social, Community, Home Care and Disability Services Industry Award 2010</i>	0.4	1.2

Note: An award-reliant organisation has at least one employee that receives the exact award rate of pay.

(v) **Profitability**

[709] Profit margins are operating profits before tax as a percentage of income received. Profit margins provide an indicator of profitability in an industry and may indicate the level of

competition within an industry. Profit margins may also demonstrate the level of capital intensity.

[710] The profit margins of the Hospitality sector were lower than total selected industries for the period 2012–13 to 2014–15 (Chart 17). Profit margins in the Hospitality sector were around 8–9 per cent compared with around 11 per cent for total selected industries.

Chart 17⁵⁶⁰
Profit margins, 2012–13 to 2014–15

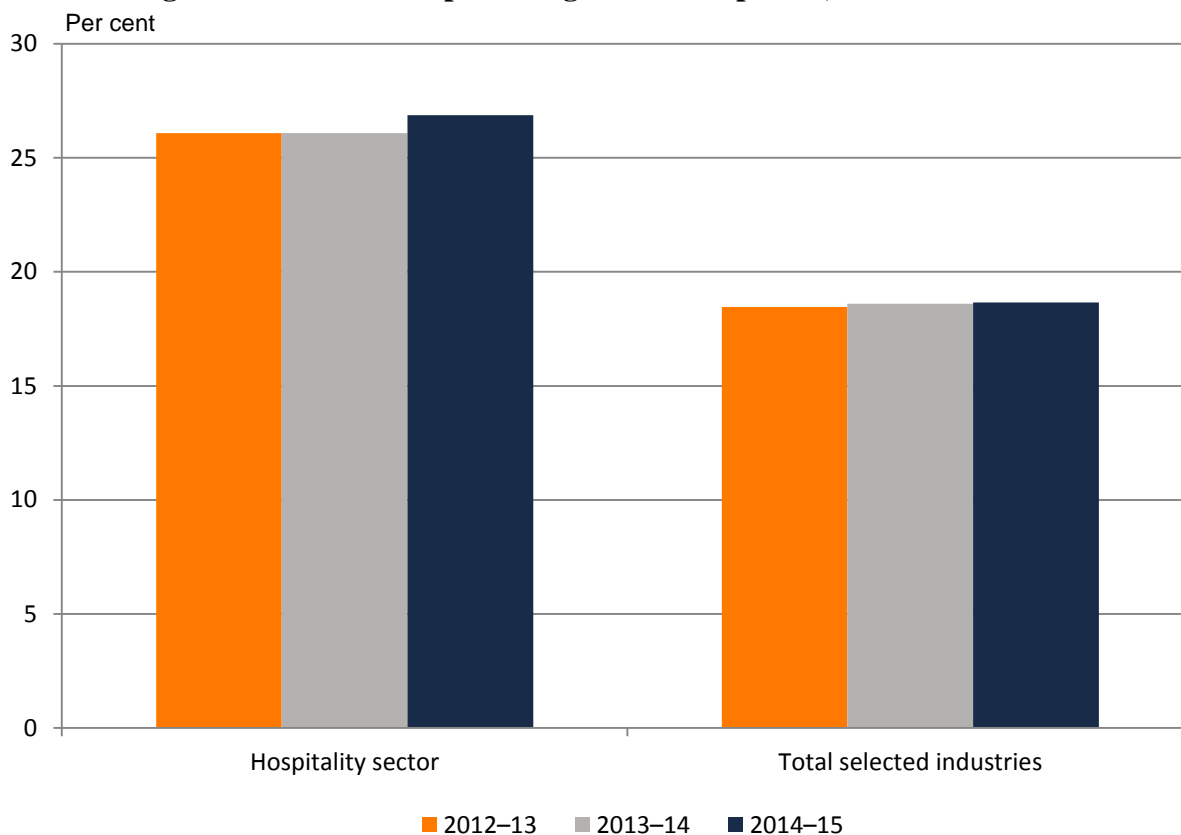


Note: Profit margins are calculated as the percentage of sales and service income available as operating profit before tax. Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey.

(vi) Wages and salaries

[711] Wages and salaries as a percentage of total expenses for the Hospitality sector and all industries for the years 2012–13 to 2014–15 are presented in Chart 18. In 2014–15, wages and salaries as a percentage of total expenses were 8.2 percentage points higher in the Hospitality sector (26.9 per cent) than total selected industries (18.7 per cent).

Chart 18⁵⁶¹
Wages and salaries as a percentage of total expenses, 2012–13 to 2014–15



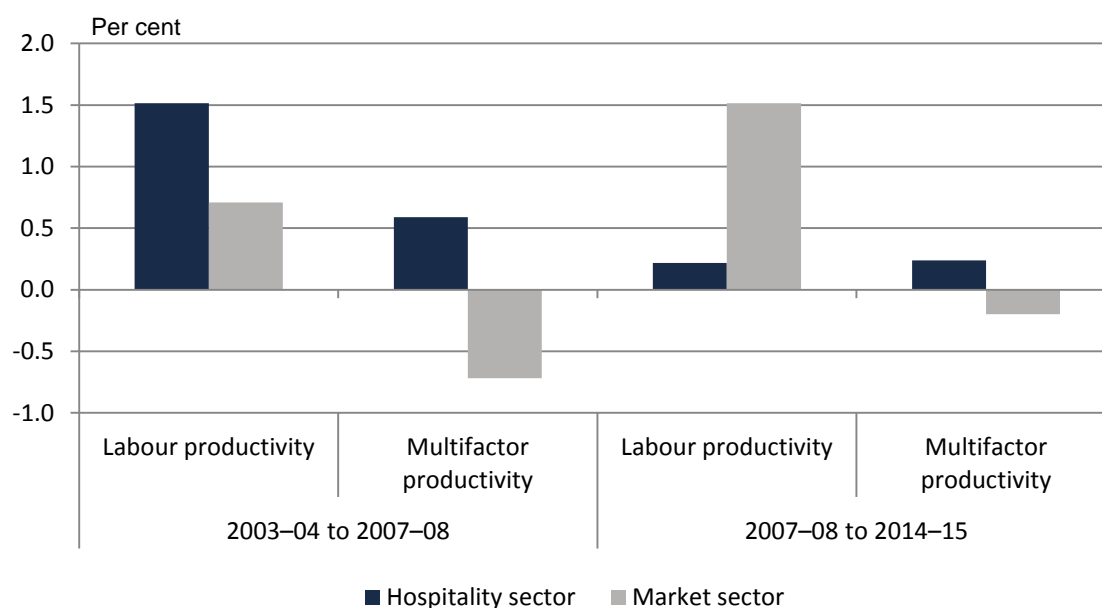
Note: Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey.

(vii) Productivity

[712] Average annual growth in productivity is presented for both labour and multifactor productivity over the two most recent productivity cycles, 2003–04 to 2007–08 and 2007–08 to 2014–15 (Chart 19). This follows a common approach to measuring productivity by comparing average annual rates of growth in the market sector⁵⁶² between peaks in the productivity cycle (as identified by the ABS) rather than focusing on short-run (quarterly and annual) trends.

[713] The data show that average annual growth of both labour and multifactor productivity were higher in the Hospitality sector compared with the market sector for the productivity cycle 2003–04 to 2007–08. In the most recent productivity cycle between 2007–08 and 2014–15, average annual growth in labour productivity in the Hospitality sector was lower than the market sector, while average annual growth in multifactor productivity was higher.

Chart 19⁵⁶³
Average annual growth rates of labour and multifactor productivity, 2003–04 to 2014–15

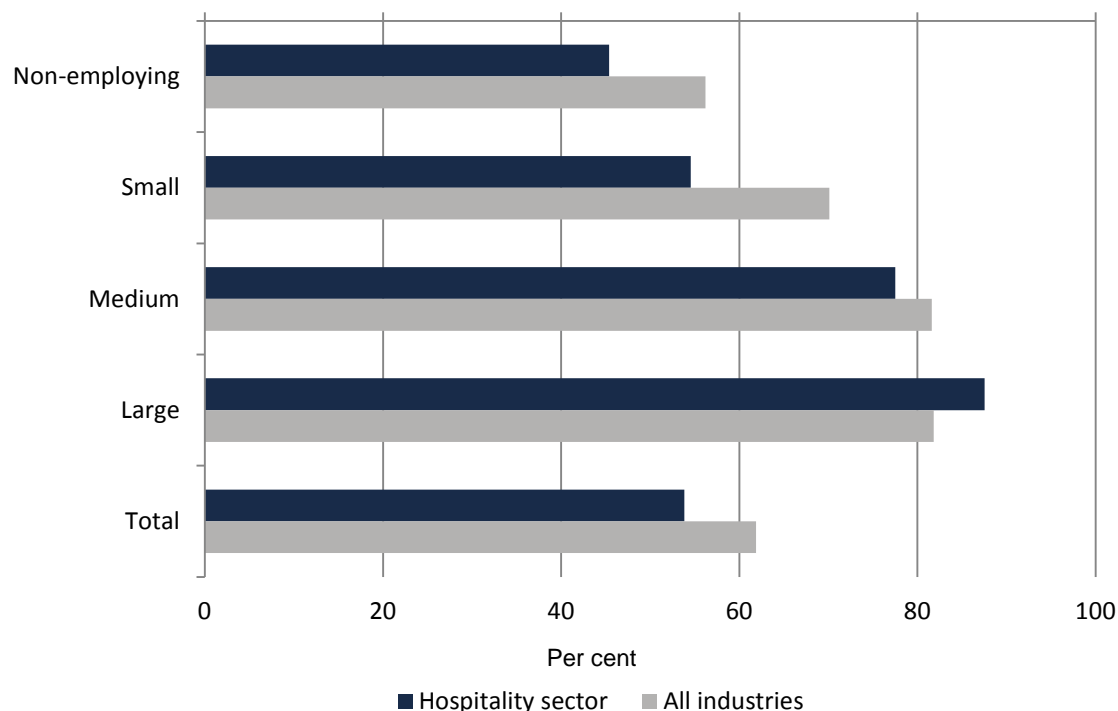


Note: The 2007–08 to 2014–15 growth cycle is incomplete. Labour productivity measures the amount of output per unit of labour which is measured in terms of gross value added per hour worked on a quality adjusted hours basis. Multifactor productivity measures the ratio of growth in output to growth in two or more factor inputs and represents that part of the change in output that cannot be explained by changes in the inputs. Multifactor productivity, in this case, is based on the gross value added of capital and labour in production and is measured on a quality adjusted hours basis. The total market sector comprises all industries except for Public administration and safety, Education and training and Health care and social assistance.

(viii) Business viability

[714] Chart 20 shows the survival rates in June 2015 of businesses that were operating in June 2011 by business size. By business size, survival rates increased with business size in the Hospitality sector and for all industries. However, survival rates in the Hospitality sector were lower than all industries across all business sizes except for large businesses.

Chart 20⁵⁶⁴
Business survival rates, by employment size, June 2011 to June 2015



Note: Survival rates in June 2015 of businesses that were operating in June 2011. The publication only includes actively trading businesses in the market sector and hence excludes entities that are in the public sector.

(ix) Enterprise characteristics

[715] Most enterprises in the Hospitality sector operated 7 days per week, while across all industries only about 3 out of every 10 enterprises operated 7 days per week and almost half of all industries operated on weekdays only (table 22).

Table 22⁵⁶⁵
Structure and operations, 2014

	Hospitality sector (%)	All industries (%)
<i>Operating days</i>		
Weekdays only	8.6	48.8
Weekdays and Saturday	5.3	17.5
Some weekdays and weekend	5.4	2.3
Operating 7 days	80.5	31.1
Other	np	0.4
	100.0	100.0
Average number of operating days per week	6.7	5.8
Average years of operation under current ownership	15.6	18.5

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

(x) Labour market trends

[716] Table 23 shows how employment in the Hospitality sector industry groups changed between August 2011 and August 2016. Over the period, employment in the Hospitality sector increased by more than the total workforce, especially full-time employment.

Table 23⁵⁶⁶
**Average annual growth rate of employed persons, by full/part-time status,
August 2011 to August 2016**

Industry group	Full-time (%)	Part-time (%)	Total (%)
Hospitality sector	1.1	2.6	2.0
All industries	0.7	2.7	1.3

Note: All data are expressed in original terms.

7.1.2 Hospitality sector employees*(i) Composition of employment*

[717] Employment in the Hospitality sector comprised around 7 per cent of total employment, in August 2016. As shown in Table 24, more than half of the workforce was female and employed part-time, which is above the proportions reported across all industries. Over one third of employees (35.7 per cent) were female and employed part-time, compared with 21.8 per cent of employees across all industries.

Table 24⁵⁶⁷
Composition of employed persons, August 2016

	Total employment (‘000s)	Percentage of total employment							
		Male		Female		Total		Total	
		Full time (%)	Part time (%)	Full time (%)	Part time (%)	Male (%)	Female (%)	Full time (%)	Part time (%)
Hospitality sector	841.3	23.3	23.3	17.7	35.7	46.6	53.4	41.0	59.0
All industries	11 869.1	43.5	10.1	24.6	21.8	53.6	46.4	68.1	31.9

Note: Data may not sum to 100 due to rounding. All data are expressed in original terms.

[718] As shown in Table 25, young people aged between 15 and 24 years were more likely to be employed in the Hospitality sector, comprising almost half of employed persons, compared with around 1 in 6 employed persons across all industries.

Table 25⁵⁶⁸
Employed persons by age, August 2016

Age (Years)	Hospitality sector		All industries
	No. ('000s)	Percentage of industry employment	Percentage of total employment
15–19	211.7	25.2	5.3
20–24	160.0	19.0	9.7
25–34	185.5	22.0	23.5
35–44	109.1	13.0	21.8
45–54	96.5	11.5	21.2
55–59	38.9	4.6	8.7
60–64	23.2	2.8	5.9
65 and over	16.4	1.9	3.8
Total	841.3	100.0	100.0

Note: All data are expressed in original terms.

(ii) Average hours worked

[719] Table 26 shows that the average hours actually worked per week in all jobs in August 2016 were lower for the Hospitality sector than across all industries.

[720] Full-time workers in the Hospitality sector worked longer hours per week on average than the total workforce; however, part-time workers worked fewer hours per week on average than the total workforce.

Table 26⁵⁶⁹
Average hours actually worked in all jobs, by full/part-time status, August 2016

Industry group	Average hours actually worked in all jobs		
	Full-time	Part-time	Total
Hospitality sector	44.2	15.3	27.1
All industries	40.6	17.4	33.2

Note: Actual hours of work refers to the hours actually worked during normal periods of work (including overtime) over a specified reference week. It excludes meal breaks, paid/unpaid time 'on call', commuting time and time off during work hours to attend educational activities not connected to the job. The actual hours of work over a specified period may be affected if the person took personal/annual leave, went on strike, changed job, or similar reasons.

(iii) Forms and conditions of employment

[721] Compared to all industries, a higher proportion of employees in the Hospitality sector did not have paid leave entitlements (Table 27).

Table 27⁵⁷⁰
Employed persons by employment type in main job, August 2016

	Hospitality sector		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
Employee	742.5	88.3	82.7
<i>With paid leave entitlements</i>	255.9	30.4	62.0
<i>Without paid leave entitlements</i>	486.7	57.9	20.8
Owner manager of enterprise with employees	69.1	8.2	6.2
Owner manager of enterprise without employees	26.6	3.2	10.9
Contributing family worker	3.1	0.4	0.2
Total	841.3	100.0	100.0

Note: All data are expressed in original terms.

[722] About 7 out of 10 full-time employees and over 1 in 7 part-time employees in the Hospitality sector had paid leave entitlements. Relative to all industries, both full-time and part-time employees in the Hospitality sector were more likely to be employed without paid leave entitlements (Table 28).

Table 28⁵⁷¹
Employees with and without paid leave, August 2016

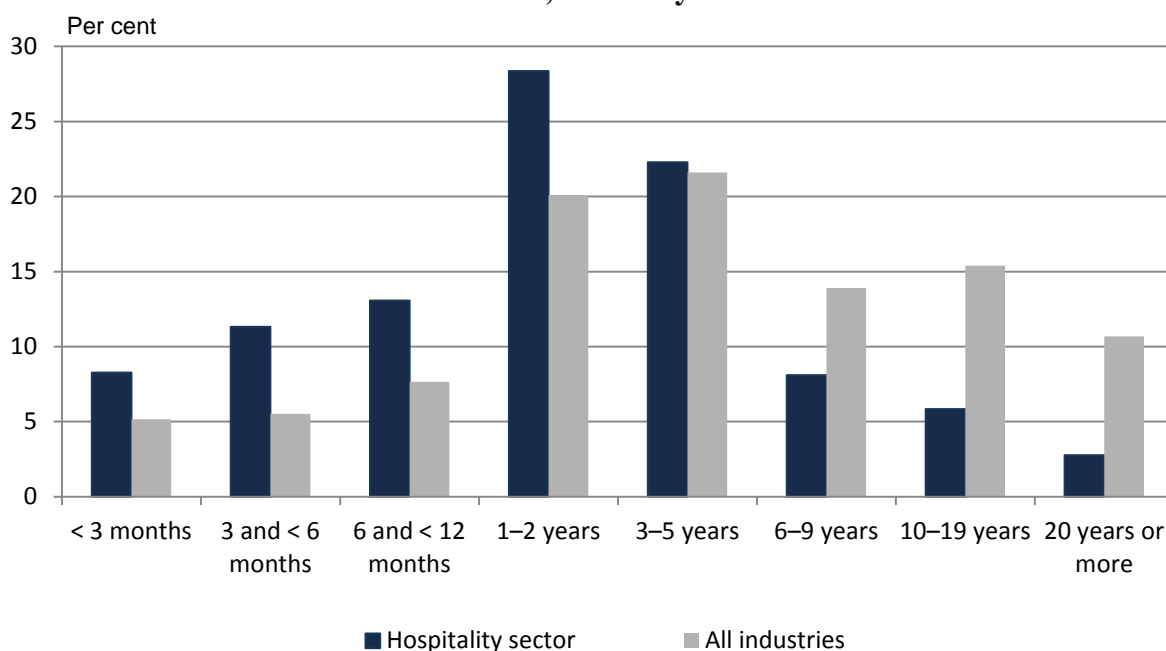
	Full-time		Part-time		All employees	
	With paid leave	Without paid leave	With paid leave	Without paid leave	With paid leave	Without paid leave
	(%)	(%)	(%)	(%)	(%)	(%)
Hospitality sector	68.8	31.2	15.0	85.0	34.5	65.5
All industries	88.3	11.7	46.1	53.9	74.9	25.1

[723] An absence of paid leave entitlements is an indication of casual employment. It follows there are a higher proportion of casual employees in the Hospitality sector than in all industries.

(iv) *Employment tenure*

[724] Workers in the Hospitality sector were more likely to experience a shorter duration of employment with an employer/business than workers across all industries. Chart 21 shows that almost 3 in 10 workers in the Hospitality sector had been with their current employer/business for '1–2 years', while almost 1 in 3 workers had been with their employer/business for less than 12 months.

Chart 21⁵⁷²
Duration of employment with current employer/business in Accommodation and food services, February 2015



Note: The duration categories have changed since the last version for the new ABS publication.

(v) **Work schedule**

[725] Table 29 shows the prevalence and types of shiftwork arrangements used in enterprises in the Hospitality sector and across all industries, in 2014. Over half of enterprises in the sector used shiftwork arrangements compared with less than one quarter across all industries. The most common shiftwork arrangements among enterprises in the Hospitality sector were evening and night shifts, short shifts of four hours or less, afternoon shifts and eight-hour shifts. Across all industries, the most common shiftwork arrangements were eight-hour shifts and set rosters.

Table 29⁵⁷³
Prevalence and types of shiftwork arrangements, 2014

	Hospitality sector (%)	All industries (%)
Uses shiftwork arrangements	58.7	23.8
<i>Types of shiftwork arrangements</i>		
Rotating rosters	74.0	57.1
Set rosters	73.1	77.6
Early morning shifts	58.7	62.2
Afternoon shifts	83.8	71.9
Evening and night shifts	87.5	70.8
Standard business hours	48.5	69.7
Split/broken shifts	60.5	36.1
Standby/on call	31.8	39.8
8-hour shifts	80.0	80.3

	Hospitality sector (%)	All industries (%)
12-hour shifts	21.0	27.8
Short shifts of 4 hours or less	86.0	53.7
Other	0.1	3.6

[726] Using the HILDA survey, Table 30 shows the current work schedule for employed persons in their main job in 2015. The most common schedule for employees in the Hospitality sector was a regular daytime schedule, although this proportion was less than for employed persons across all industries. Employed persons in the Hospitality sector were more likely to work a regular evening, night or rotating shift, or an irregular schedule compared with employed persons across all industries.

Table 30⁵⁷⁴
Current work schedule in main job, employed persons, 2015

	Hospitality sector (%)	All industries (%)
A regular daytime schedule	39.1	75.5
A regular evening shift	19.7	3.7
A regular night shift	6.0	1.7
A rotating shift (changes from days to evenings to nights)	18.4	9.4
Split shift (two distinct periods each day)	5.9	1.4
On call	1.8	1.1
Irregular schedule	9.1	6.9
Other	0.0	0.2
Total	100.0	100.0

(vi) *Earnings*

[727] Most employees in the Hospitality sector received the adult rate of pay; however, the proportion was less than for all industries. Around one quarter of employees in the Hospitality sector were paid a junior rate of pay (Table 31).

Table 31⁵⁷⁵
Employees by rate of pay, May 2016

	Hospitality sector (%)	All industries (%)
Adult rate of pay	75.5	94.0
Junior rate of pay	23.3	4.1
Apprentice or trainee	np	1.9
Disability rate	np	0.1
All rates of pay	100.0	100.0

Note: np = not published but included in totals.

[728] Average weekly earnings of employees in the Hospitality sector were lower than for all industries across each measure set out in Table 32. While average weekly earnings were less than half of average weekly earnings across employees in all industries, this increased to around 70 per cent for full-time adult employees.

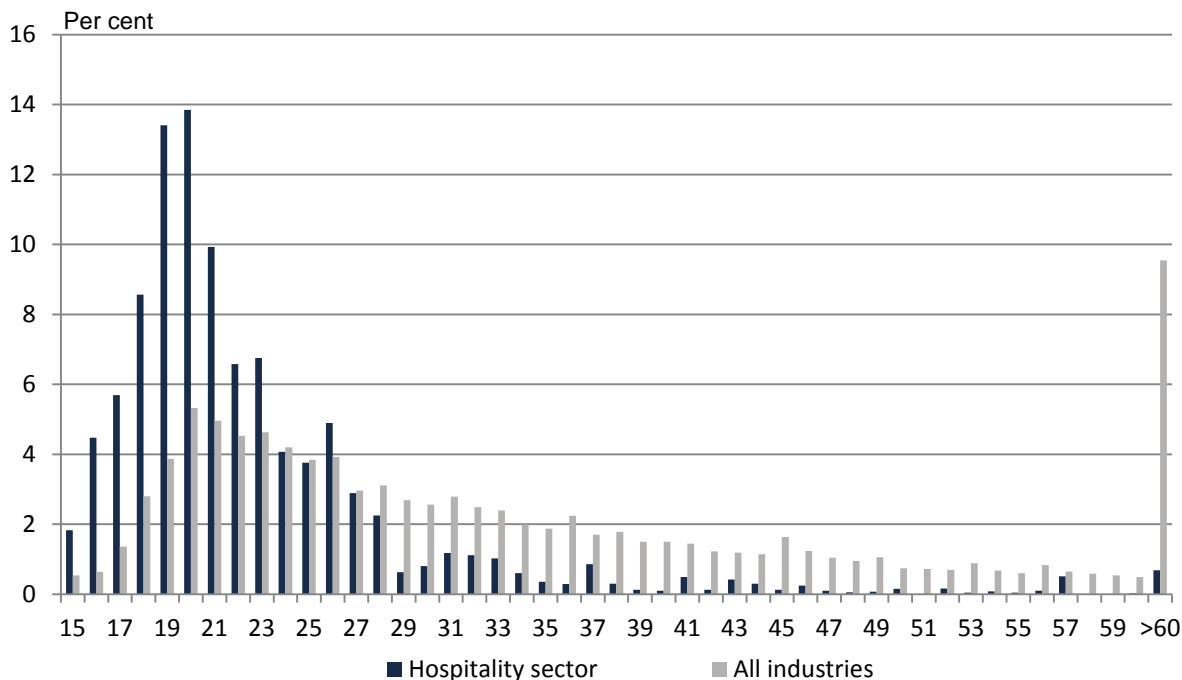
Table 32⁵⁷⁶
Average weekly earnings, May 2016

	Hospitality sector	All industries	Ratio of Accommodation and food services relative to all industries
	(\$)	(\$)	(%)
Average weekly earnings, all employees	541.20	1160.90	46.6
Average weekly earnings, full-time adult employees	1079.50	1573.30	68.6
Average weekly ordinary time earnings, full-time adult employees	1069.80	1516.00	70.6
Average weekly ordinary time earnings, full-time adult male employees	1112.50	1613.50	68.9
Average weekly ordinary time earnings, full-time adult female employees	999.60	1352.10	73.9

Note: All data are expressed in original terms.

[729] Lower average hourly total cash earnings for adult employees in the Hospitality sector are also evident by the distribution shown in Chart 22. The distribution of hourly total cash earnings for adult employees in the sector are much more concentrated toward the lower end of the wage distribution than the earnings of adult employees as a whole. Relative to all industries, the Hospitality sector had a higher concentration of employees earning up to \$23 per hour.

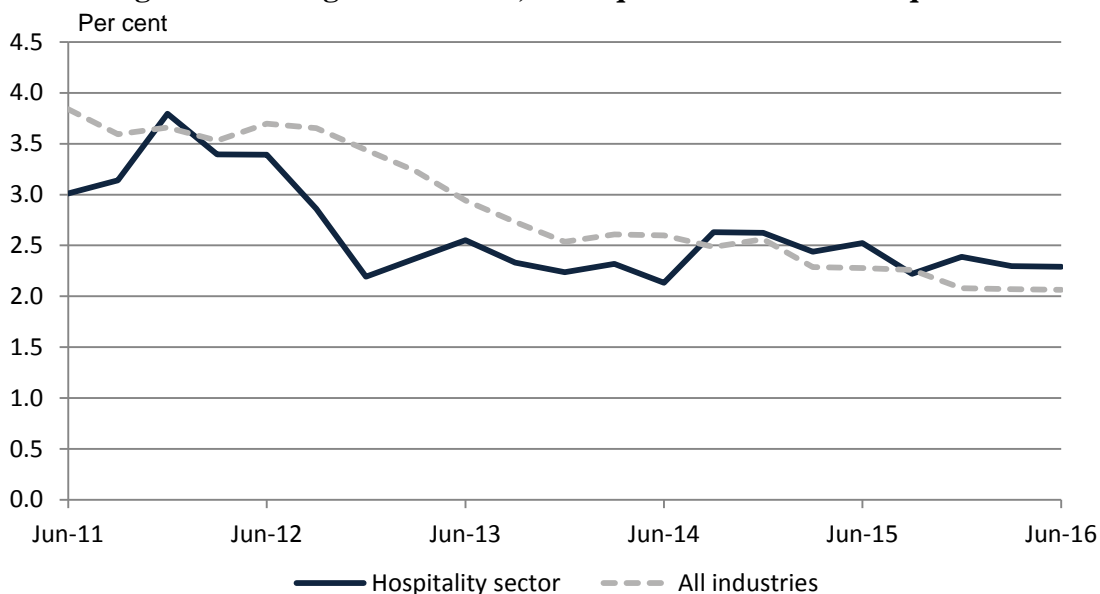
Chart 22⁵⁷⁷
Distribution of hourly total cash earnings, adult employees, May 2014



Note: Earnings are calculated at \$1 intervals up to and including the amount presented (e.g. \$17 includes amounts over \$16 per hour and up to and including \$17 per hour) for adult employees in the federal jurisdiction. Earnings are discounted to take account of casual loading.

[730] Wages growth in the Hospitality sector has been lower than wages growth across all industries for most of the period between the June quarter 2011 and the June quarter 2016. However, since the September quarter 2014, wages growth in the Hospitality sector has mostly been higher than wages growth across all industries (see Chart 23 below).

Chart 23⁵⁷⁸
Annual growth in Wage Price Index, June quarter 2011 to June quarter 2016



Note: All data are expressed in original terms.

(vii) Penalty payments

[731] The Commission's AWRS collected detailed data on employees' wages and can identify employees that received penalty rates. A higher proportion of employees working in the Hospitality sector received penalty rates compared with employees across all industries (see Table 33 below).

Table 33⁵⁷⁹
Percentage of employees who receive penalty rates, by method of setting pay, 2014

	Hospitality sector	All industries
	(%)	(%)
Award	28.5	22.0
Other methods	3.7	6.2
All employees	19.1	10.6

Note: 'Other methods' of setting pay include enterprise agreements and individual arrangements. The sample analysed was restricted to employees that reported working for businesses that either operated 6 or 7 days in a week, operated on weekends or used shiftwork arrangements. 'Penalty rates' are collected in the AWRS by asking participants for the gross (before-tax) amount received for penalty payments (for work performed outside standard hours).

(viii) 'Low paid' employees in the Hospitality sector

[732] As mentioned earlier, a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a) (see [165]–[168] above).

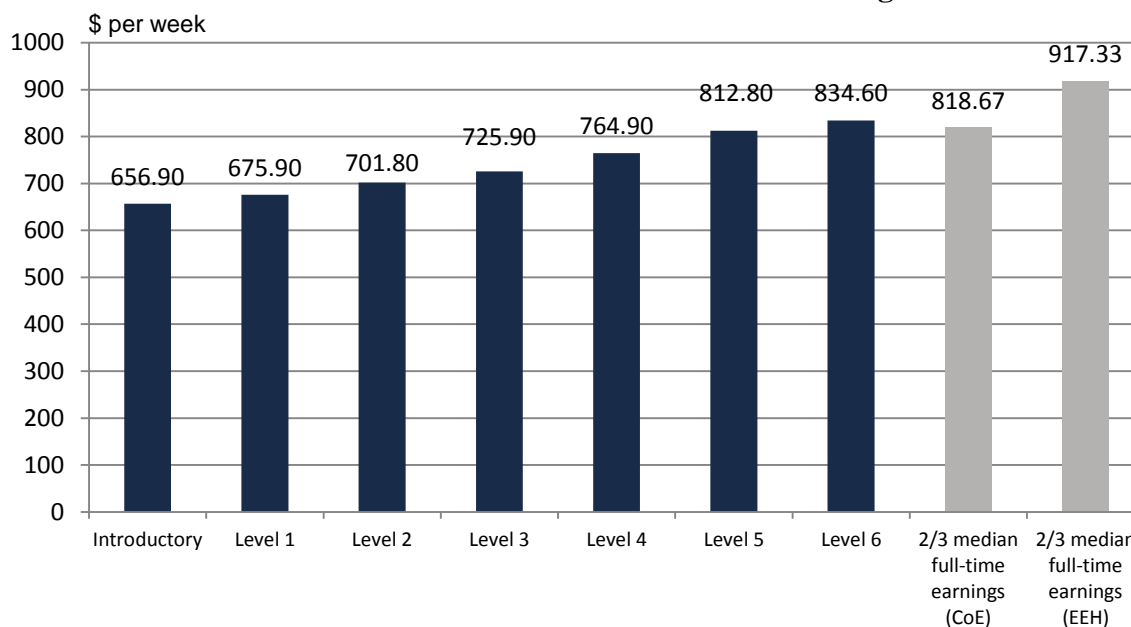
[733] The most recent data for median earnings is for May 2016 from the ABS EEH Survey. Data on median earnings are also available from the CoE survey in August 2015.

[734] The following charts present the minimum weekly wages of each classification in the *Hospitality Industry (General) Award 2010*, *Registered and Licensed Clubs Award 2010*, *Restaurant Industry Award 2010*, and *Fast Food Industry Award 2010*, and compare them with two-thirds of full-time median earnings. The minimum weekly wages presented from these awards are those determined from the *Annual Wage Review 2014–15* on 2 June 2015.

[735] Chart 24 shows that the full-time weekly wage for each classification in the *Hospitality Industry (General) Award 2010* was below the EEH measure of two-thirds of median full-time earnings. However, the full-time weekly wage for the Level 6 classification was above the CoE measure of two-thirds of median full-time earnings.

Chart 24⁵⁸⁰

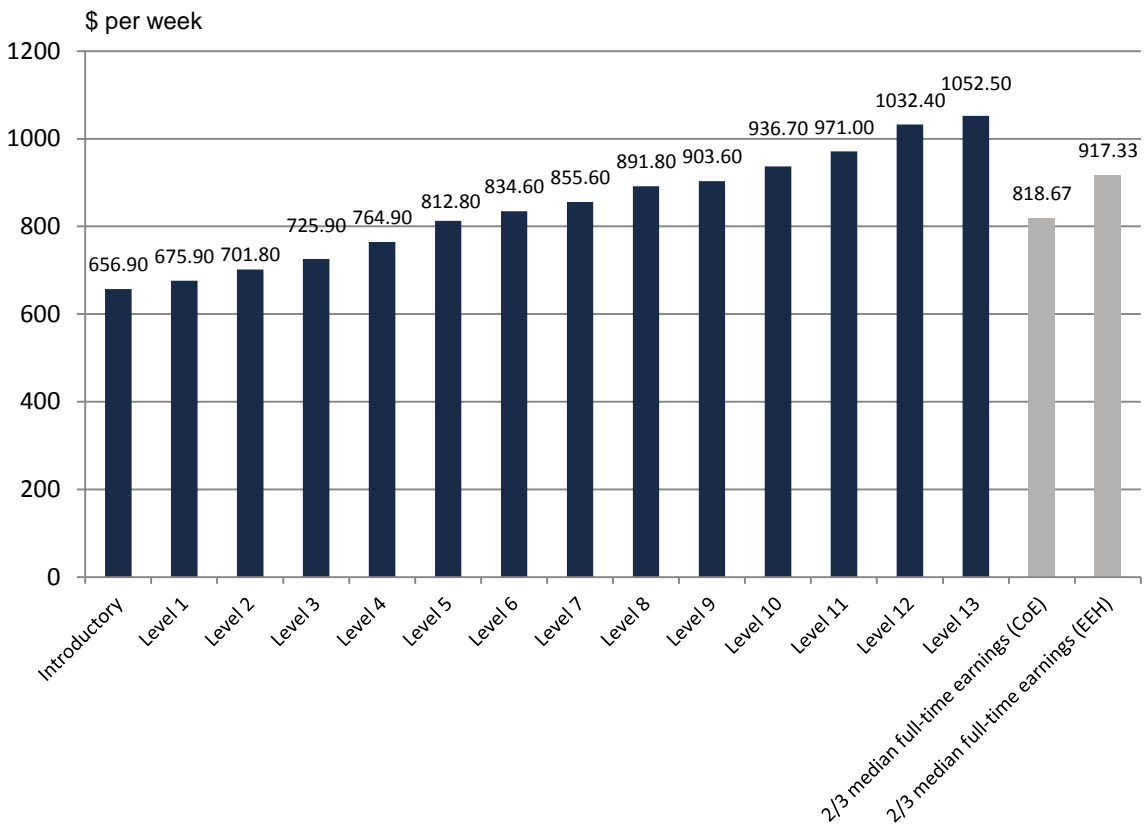
Comparison of minimum weekly wages in the *Hospitality Industry (General) Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the CoE survey are earnings in the main job for full-time employees. Weekly earnings from the EEH survey are weekly total cash earnings for full-time adult non-managerial employees.

[736] Chart 25 shows that the full-time weekly wages for classifications between Introductory and Level 5 in the *Registered and Licensed Clubs Award 2010* were below both the CoE and EEH measure of two-thirds of median full-time earnings. The full-time weekly wages for classifications between Level 6 and Level 9 were below the EEH measure of two-thirds of median full-time earnings.

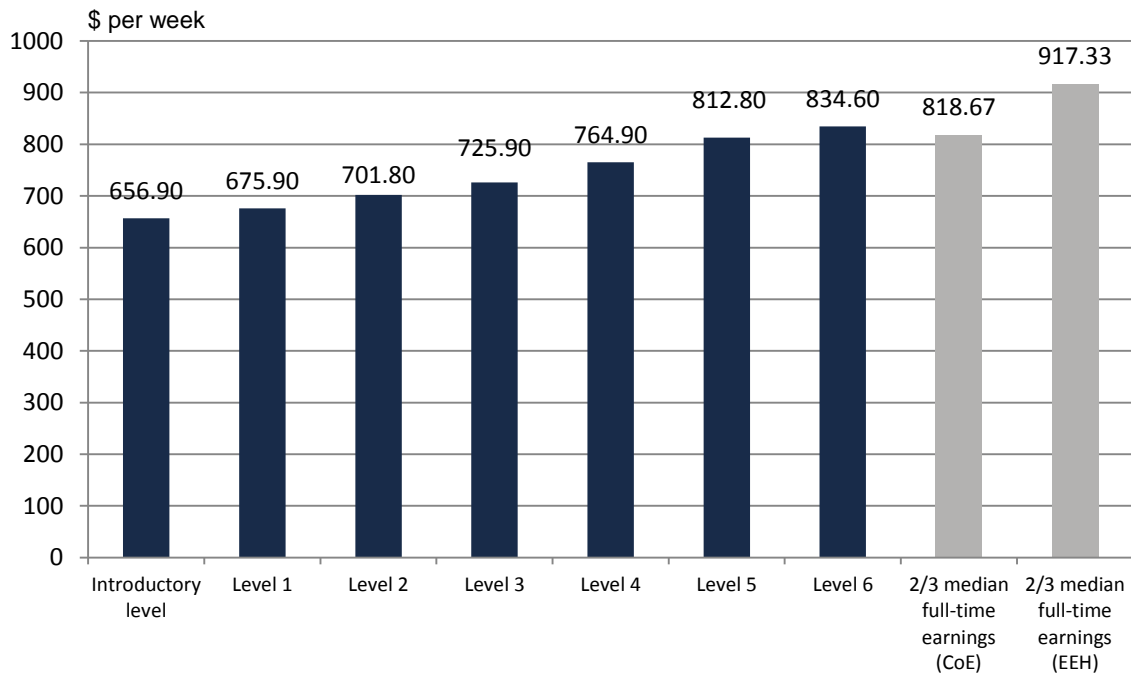
Chart 25⁵⁸¹
Comparison of minimum weekly wages in the *Registered and Licensed Clubs Award 2010*
and two-thirds of median full-time earnings



Note: Weekly earnings from the CoE survey are earnings in the main job for full-time employees. Weekly earnings from the EEH survey are weekly total cash earnings for full-time adult non-managerial employees.

[737] Chart 26 shows that the full-time weekly wages for each classification in the *Restaurant Industry Award 2010* were below the EEH measure of two-thirds of median full-time earnings. However, the full-time weekly wage for the Level 6 classification was above the CoE measure of two-thirds of median full-time earnings.

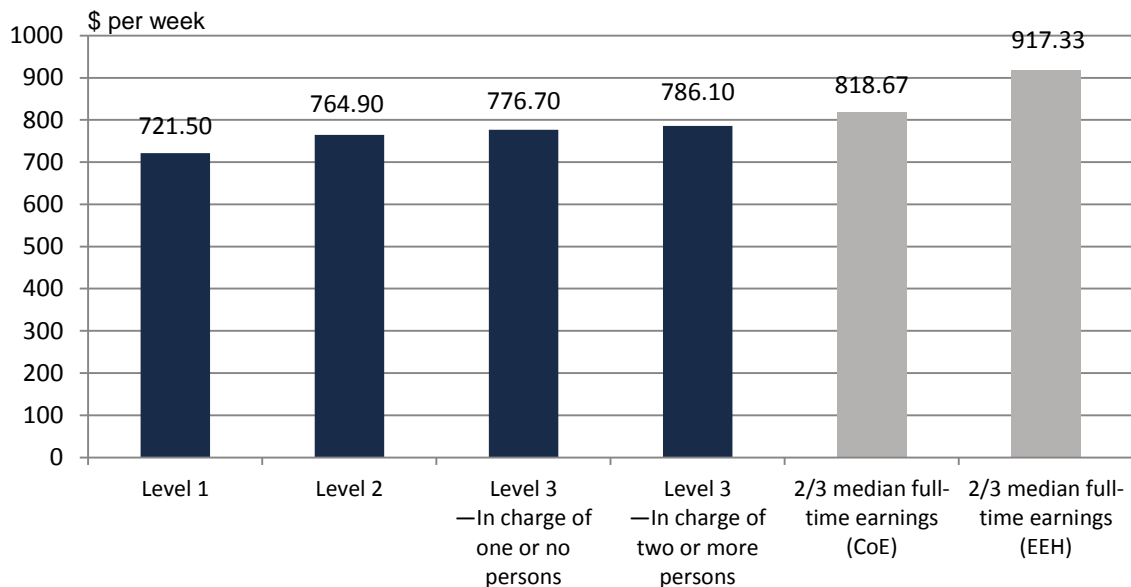
Chart 26⁵⁸²
Comparison of minimum weekly wages in the *Restaurant Industry Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the CoE survey are earnings in the main job for full-time employees. Weekly earnings from the EEH survey are weekly total cash earnings for full-time adult non-managerial employees.

[738] Chart 27 shows that the full-time weekly wage for each classification in the *Fast Food Industry Award 2010* was below both measures of two-thirds of median full-time earnings.

Chart 27⁵⁸³
Comparison of minimum weekly wages in the *Fast Food Industry Award 2010* and two-thirds of median full-time earnings



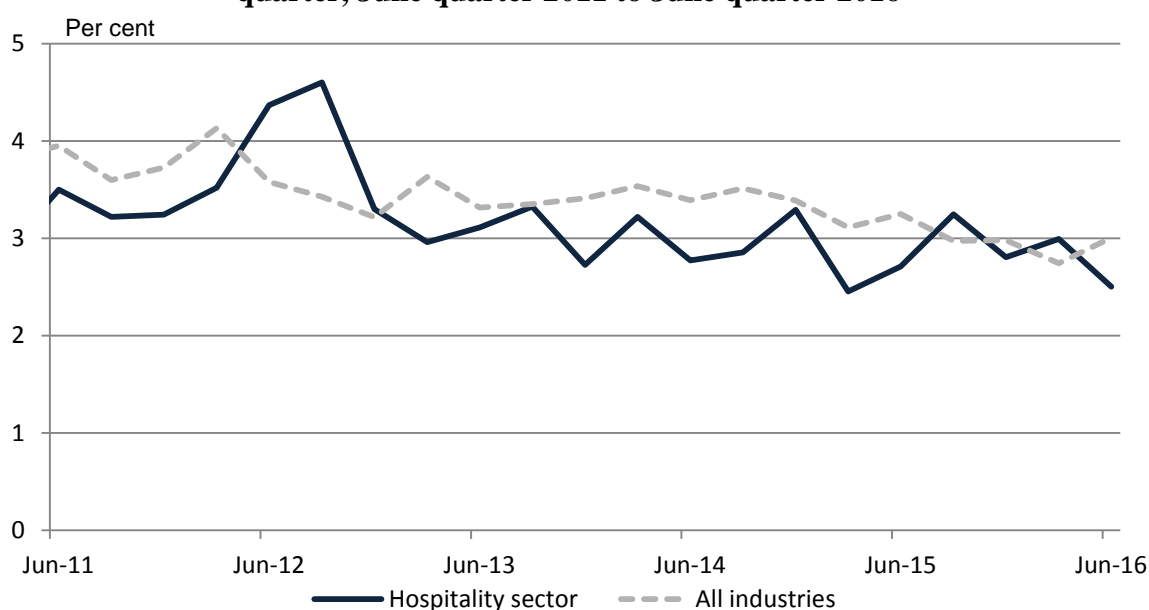
Note: Weekly earnings from the CoE survey are earnings in the main job for full-time employees. Weekly earnings from the EEH survey are weekly total cash earnings for full-time adult non-managerial employees.

(ix) *Bargaining*

[739] The WAD contains information on the average annualised wage increases (AAWIs) negotiated under enterprise agreements in each quarter. Some of this data are also published in the Trends in Federal Enterprise Bargaining quarterly report.

[740] AAWIs negotiated under enterprise agreements and approved in each quarter for the Hospitality sector between the June quarter 2011 and the June quarter 2016 were generally lower than across all industries (see Chart 28 below).

Chart 28⁵⁸⁴
Average annualised wage increases for federal enterprise agreements approved in the quarter, June quarter 2011 to June quarter 2016



7.1.3 Summary

[741] The Hospitality sector’s contribution to aggregate output, sales, profits and wages is relatively small, while its contribution to employment and hours worked is a little higher, and the sector is more likely to contain award-reliant employees.

[742] Key findings within this sector are that employers were relatively more likely to be characterised by:

- small and medium businesses;
- lower profit margins;
- higher wages and salaries as a proportion of total expenses;
- lower survival rates;
- strong or intense competition; and
- operating 7 days a week.

[743] Key findings within this sector are that employees were relatively more likely to be:

- female;
- part-time and casual workers;
- award-reliant;
- using shiftwork arrangements;
- receiving penalty rates;
- low-paid (based on two-thirds of median full-time earnings); and
- employed by the same business for a shorter duration of time.

[744] We now turn to deal with the particular awards in the Hospitality sector.

7.2 *Hospitality Industry (General) Award 2010*

7.2.1 The Claims

[745] The Australian Hotels Association and the Accommodation Association of Australia (the Hospitality Employers) seek to vary the terms of the *Hospitality Industry (General) Award 2010* (the *Hospitality Award*) in relation to the penalty rates payable for work performed by employees on Sundays and public holidays.

[746] The Hospitality Employers propose that the penalty rate for work performed on a Sunday be reduced from 175 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees).

[747] The Hospitality Employers also seek to introduce a two-tiered regime in respect of public holiday penalty rates under which higher penalty rates are prescribed for work performed on the public holidays specified under s.115(1)(a) of the FW Act, than the penalty rates prescribed for work performed on public holidays which are declared or prescribed by or under a law of a State or Territory (under s.115(1)(b)).

[748] Further, the Hospitality Employers propose that the references to ‘penalty’ and ‘penalty rates’ in clause 32, including the clause title, be amended to expressions related to ‘additional remuneration’. The changes sought are set out below, in a marked up version of clause 32.1.

32.1 An employee performing work on the following days will be paid the following percentage of the minimum hourly wage rate in clause 20—Minimum wages for the relevant classification:

	Monday to Friday	Saturday	Sunday	Public holiday	<u>Additional holiday</u>
	%	%	%	%	<u>%</u>
Full-time and part-time	100	125	175 <u>150</u>	250 <u>225</u>	250 <u>200</u>
Casual (inclusive of the 25% casual loading)	125	150	175 <u>150</u>	275 <u>175</u>	<u>125</u>

[749] We deal later with the proposed changes to public holiday penalty rates.

7.2.2 Background to the Hospitality Award

[750] After an initial period of consultation, the Award Modernisation Full Bench determined that the ‘Catering industry, Liquor & accommodation industry, Restaurants (including Clubs)’ would be a priority industry in the award modernisation process.⁵⁸⁵ In its decision of 19 December 2008 the Award Modernisation Full Bench decided to make a single modern award for the hospitality industry, (excluding Clubs), noting that:

[117] We have considered the further submissions of Restaurant and Catering Australia, HMAA and other organisations involved in the consultations and decided to make a single modern award for the hospitality industry, as proposed in the exposure draft.

[118] We accept that there are some differences in trading and staffing arrangements between various sectors within the hospitality industry. Equally, however, there is some commonality between the sectors. It is also significant that there is a level of diversity in the operations of various businesses within sectors of the industry.

[119] There is also some diversity in terms and conditions in federal awards and NAPSAs operating within the hospitality industry, as defined in the exposure draft. However, such differences apply equally across awards within the smaller sectors proposed as they do across sectors. There is a high level of commonality in federal award provisions covering the hotel, accommodation and restaurant sectors and some but less commonality in the relevant NAPSAs.⁵⁸⁶

[751] Despite RCI calling for a separate restaurant industry award, the Commission initially resolved to make a single modern award for the broader hospitality sector.⁵⁸⁷ A separate *Restaurant Award* was later created following an amendment to the Ministerial Request (see Chapter 7.4.3).

[752] In submissions filed on 1 August 2008, the AHA and the Liquor, Hospitality and Miscellaneous Union (LHMU), (now United Voice), outlined their respective proposals for the content of the proposed Hospitality modern award. In relation to penalty rates for weekend and public holiday work, both the AHA and LHMU submitted that penalty rates under the *Hospitality Award* should be set as follows:

- Permanent employees:
 - Saturday—125 per cent;
 - Sunday—175 per cent;
 - Public holidays—250 per cent,
- Casual employees:
 - Saturday—150 per cent;
 - Sunday—175 per cent
 - Public holidays—275 per cent.⁵⁸⁸

[753] The rates proposed by the AHA and LHMU reflected those that existed in the main federal award which provided that basis for the main terms of the modern award (*The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*⁵⁸⁹) (the

‘1998 Award’). The penalty rate conditions in the 1998 Award derive from the 1993 decision of Commissioner Gay in relation to the *Hotels, Resorts and Hospitality Industry Award 1992*⁵⁹⁰. We return to that decision in Chapter 7.2.6.

[754] The first exposure draft of the modern *Hospitality Award* was published on 12 September 2008.⁵⁹¹ While the Commission generally agreed with the submissions of AHA and the LHMU concerning weekend penalties and in respect of the penalties for full-time and part-time employees working on public holidays, the rates for casual employees performing work on public holidays were set at 175 per cent, rather than the rate of 275 per cent penalty rate in the 1998 Award.⁵⁹²

[755] After the publication of the exposure draft, the AHA expressed concern that the Sunday penalty of 175 per cent was too high, especially when viewed in light of an existing rate of 150 per cent under pre-reform awards in Queensland and Western Australia.⁵⁹³

[756] The exposure draft was republished in its final form by the AIRC in December 2008. The penalty rates remained unchanged from the earlier exposure draft, except the rate for casual employees working on public holidays which was increased to 275 per cent, in line with the proposals of LHMU and AHA.⁵⁹⁴ The accompanying Decision did not specify the rationale for the increase in the rate as between the exposure draft and the final version of the modern award.⁵⁹⁵

[757] In submissions filed in the current matter, the Hospitality Employers sought to emphasise that the award modernisation process was consultative, rather than adversarial in nature and that the Full Bench was principally informed by the parties’ submissions, rather than by witness evidence. Further, to the extent witness statements were relied upon by the parties, the Full Bench treated these witness statements as submissions rather than evidence.⁵⁹⁶

[758] United Voice draws the Commission’s attention to the fact that, at the time of making the modern award, the AHA and LHMU proposed the same penalty rates⁵⁹⁷ and to the following comment made by Mr Clarke, acting for the AHA, at a public hearing on 22 June 2008:

‘...restaurants must not obtain better award conditions by having lower penalty rates or entitlements in the proposed modern Hospitality Award. Hotels have considerable investment within their operations such as investment in training and development of staff compared to restaurant and café businesses. Restaurants will have an unfair advantage and lower wage costs to service the same types of clients as hotels. Hotel meals will be more expensive resulting in loss of trade therefore unfair additional costs placed on hotels.’⁵⁹⁸

[759] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench’s consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. The relevant award modernisation decisions show that in setting the penalty rates in the *Hospitality Award* the Award Modernisation Full Bench considered whether the modern award provisions reflected the existing penalty rates in the most widely-used pre-reform

instruments, rather than undertaking a detailed or considered review of the appropriate penalty rates for the industry.

7.2.3 The Hospitality Industry

[760] The ABS data of direct relevance to the *Hospitality Award* are limited.

[761] A paper⁵⁹⁹ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Using this framework, the *Hospitality Award* is mapped to six separate ANZSIC industry classes:

- 4400—Accommodation;
- 4511—Cafes and restaurants;
- 4513—Catering services;
- 4520—Pubs, taverns and bars;
- 9201—Casino operation; and
- 4123—Liquor retailing.

[762] The aggregation of these industry classes will be referred to as the Hospitality industry (general).

[763] The Census is the only data source that contains all of the employment characteristics in Table 34 for the Hospitality industry (general). The most recent Census data is from August 2011.

[764] The August 2011 Census data shows that there were around 360 000 employees in the Hospitality industry (general). Table 34 compares certain characteristics of employees in the Hospitality industry (general), with employees in ‘all industries’.

Table 34⁶⁰⁰
Labour force characteristics of the Hospitality industry (general),
ABS Census 9 August 2011

	Hospitality Industry (General)		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	155 034	43.0	4 207 586	50.8
Female	205 212	57.0	4 082 662	49.2
Total	360 246	100.0	8 290 248	100.0
Full-time/part-time status				
Full-time	152 882	44.9	5 279 853	67.8
Part-time	187 564	55.1	2 507 786	32.2
Total	340 446	100.0	7 787 639	100.0
Highest year of school completed				
Year 12 or equivalent	222 519	63.0	5 098 228	62.6
Year 11 or equivalent	39 529	11.2	885 404	10.9
Year 10 or equivalent	66 974	19.0	1 687 055	20.7
Year 9 or equivalent	15 373	4.4	317 447	3.9
Year 8 or below	7 380	2.1	141 973	1.7
Did not go to school	1 412	0.4	20 158	0.2
Total	353 187	100.0	8 150 265	100.0
Student status				
Full-time student	75 836	21.3	612 990	7.5
Part-time student	20 529	5.8	506 120	6.2
Not attending	259 698	72.9	7 084 360	86.4
Total	356 063	100.0	8 203 470	100.0
Age (5 year groups)				
15–19 years	51 749	14.4	547 666	6.6
20–24 years	78 271	21.7	927 865	11.2
25–29 years	54 235	15.1	1 020 678	12.3
30–34 years	37 534	10.4	933 827	11.3
35–39 years	30 150	8.4	934 448	11.3
40–44 years	27 323	7.6	938 386	11.3
45–49 years	25 876	7.2	911 739	11
50–54 years	23 037	6.4	848 223	10.2
55–59 years	16 966	4.7	652 190	7.9
60–64 years	10 695	3.0	404 470	4.9
65 years and over	4 409	1.2	170 718	2.1
Total	360 245	100.0	8 290 210	100.0
Average age				
	33.0		38.8	
Hours worked				
1–15 hours	80 606	23.7	875 554	11.2
16–24 hours	56 808	16.7	792 539	10.2
25–34 hours	50 152	14.7	839 694	10.8
35–39 hours	50 173	14.7	1 676 920	21.5
40 hours	37 912	11.1	1 555 620	20
41–48 hours	27 166	8.0	895 619	11.5
49 hours and over	37 629	11.1	1 151 693	14.8
Total	340 446	100.0	7 787 639	100.0

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[765] The profile of the Hospitality industry (general) employees differs from the profile of employees in ‘All industries’ in four important respects:

- (i) over half (55.1 per cent) of Hospitality industry (general) employees are employed on a part-time basis (i.e. less than 35 hours per week⁶⁰¹), compared with only 32.2 per cent of all employees;
- (ii) around 4 in 10 (40.4 per cent) of Hospitality industry (general) employees work 1–24 hours per week compared with only 21.4 per cent of all employees;
- (iii) over one-third (36.1 per cent) of Hospitality industry (general) employees are aged between 15 and 24 years compared with only 17.8 per cent of all employees; and
- (iv) over one quarter (27.1 per cent) of Hospitality industry (general) employees are students (21.3 per cent are full-time students and 5.8 per cent study part-time) compared with 13.7 per cent of all employees.

7.2.4 The Evidence

(i) The Hospitality Employers

[766] The Hospitality Employers rely on the evidence of 41 lay witnesses, who gave evidence during the proceedings:

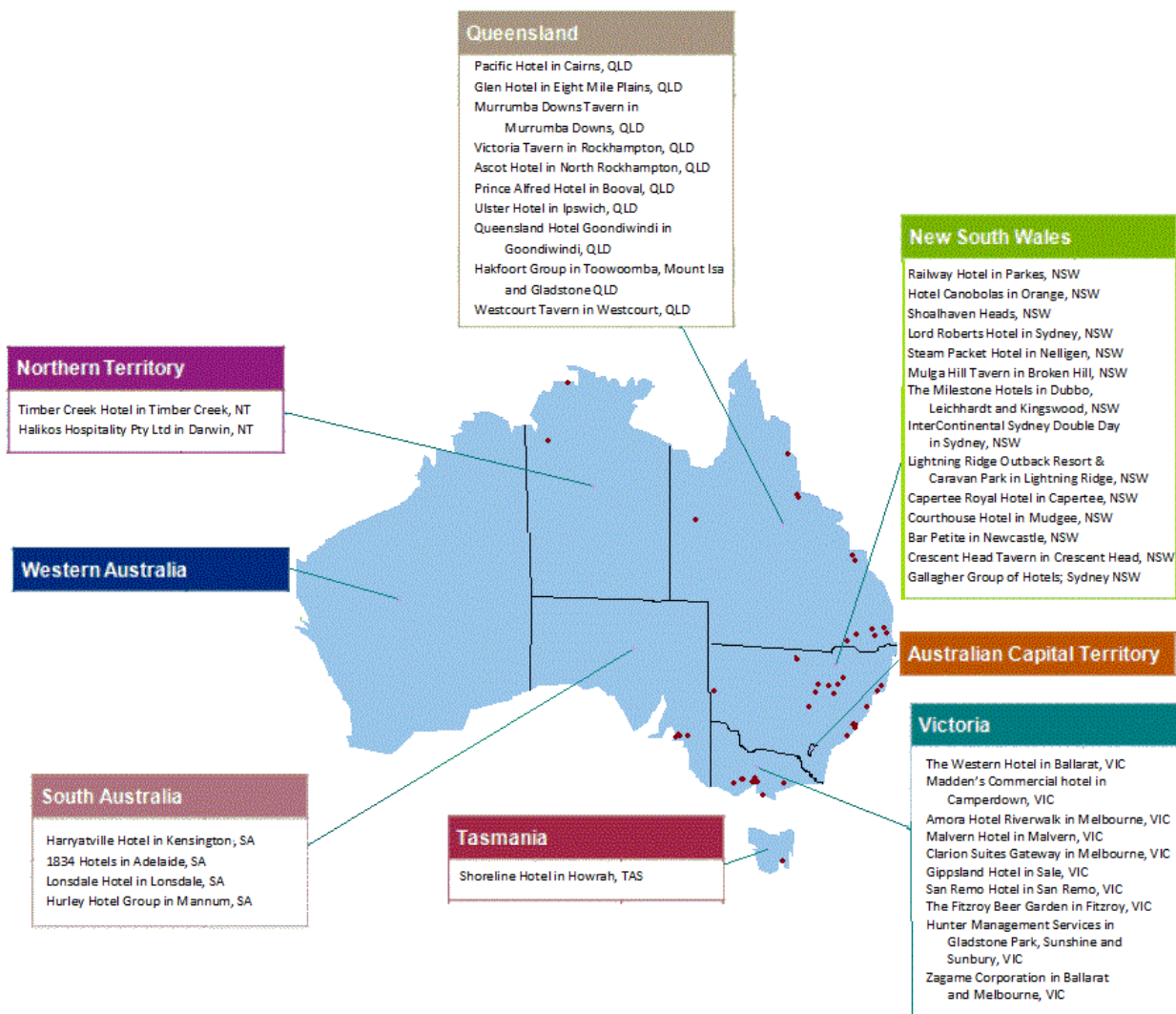
- Vanessa Anderson, human resources manager at the Pacific Hotel in Cairns, Queensland;⁶⁰²
- Graham Annovazzi, owner of the Capertee Royal Hotel in Capertee, NSW;⁶⁰³
- Timothy Bilston, General Manager of the Amora Hotel Riverwalk in Melbourne, Victoria;⁶⁰⁴
- Joanne Lesley Blair, Director of Zamovisa Pty Ltd which owns The Milestone Hotels in Dubbo, Leichhardt and Kingswood, NSW;⁶⁰⁵
- Jackie Booth, Chief Operating Officer of Zagame Corporation;⁶⁰⁶
- Darren Lea Brown, manager of the Shoreline Hotel in Howrah, Tasmania;⁶⁰⁷
- Andrew Bullock, CEO of 1834 Hotels;⁶⁰⁸
- Michael Burke, part-owner of the Malvern Hotel in Malvern, Victoria;⁶⁰⁹
- Tony Cakmar, General Manager of Clarion Suites Gateway in Melbourne, Victoria;⁶¹⁰
- Susan Cameron, owner of the Lord Roberts Hotel in Sydney, NSW;⁶¹¹

- Will Cordwell, owner of the Ascot Hotel in North Rockhampton, Queensland;⁶¹²
- Daniel Cronin, part-owner of The Western Hotel in Ballarat, Victoria;⁶¹³
- John Andrew Dowd, owner of Lightning Ridge Outback Resort & Caravan Park in Lightning Ridge, NSW;⁶¹⁴
- Kasie Ferguson, owner and manager of the Railway Hotel in Parkes, NSW;⁶¹⁵
- Patrick Gallagher, owner of the Gallagher Group of Hotels;⁶¹⁶
- David Gibson, owner of the Westcourt Tavern in Westcourt, Queensland;⁶¹⁷
- Ian Green, owner of the Courthouse Hotel in Mudgee, NSW;⁶¹⁸
- Darren Gunn, owner and manager of the Crescent Head Tavern in Crescent Head, NSW;⁶¹⁹
- Albert Hakfoort, CEO of the Hakfoort Group;⁶²⁰
- Colin Johnson, owner of the Prince Alfred Hotel in Booval, Queensland;⁶²¹
- Peter Johnston, owner of the Ulster Hotel in Ipswich, Queensland;⁶²²
- Michael Kearney, owner of Bar Petite in Newcastle, NSW;⁶²³
- Richard Lovell, owner of the Marryatville Hotel in Kensington, South Australia;⁶²⁴
- Dennis Madden, director and manager of Madden's Commercial Hotel in Camperdown, Victoria;⁶²⁵
- Keith McCallum, owner and manager of the Lonsdale Hotel in Lonsdale, South Australia;⁶²⁶
- Fiona McDonald, accounts manager at the Timber Creek Hotel in Timber Creek, Northern Territory;⁶²⁷
- Samuel McInnes, General Manager of the Hurley Hotel Group;⁶²⁸
- Sue Mitchell, owner of the Victoria Tavern in Rockhampton, Queensland⁶²⁹
- Michelle Morrow, Financial Controller and Human Resources Manager of Hunter Management Services.⁶³⁰
- David Ovenden, Group Operations Manager of the Glen Hotel in Eight Mile Plains, Queensland;⁶³¹
- Jim Ryan, owner and manager of The Gippsland Hotel in Sale, Victoria;⁶³²

- Helen Sergi, owner of the Steam Packet Hotel in Nelligen, NSW;⁶³³
- Peter Sullivan, owner of the Queensland Hotel Goondiwindi in Goondiwindi, Queensland;⁶³⁴
- Mel Tait, General Manager of the Murrumba Downs Tavern in Murrumba Downs, Queensland;⁶³⁵
- Dean Trengove, owner and manager of the Mulga Hill Tavern in Broken Hill, NSW;⁶³⁶
- Philip Tudor, owner of the Hotel Canobolas in Orange, NSW;⁶³⁷
- Belinda Usher, owner and manager of The Fitzroy Beer Garden in Fitzroy, Victoria;⁶³⁸
- Samantha Walder, Director of Human Resources at the InterContinental Sydney Double Bay in Sydney, NSW;⁶³⁹
- Colin Waller, owner and licensee of The Heads Hotel in Shoalhaven Heads, NSW;⁶⁴⁰
- Peter Williams, owner and manager of San Remo Hotel in San Remo, Victoria;⁶⁴¹ and
- Ashleigh Winn, manager of Halikos Hospitality Pty Ltd, which owns H Hotel, Frontier Hotel and H 105 Mitchell Hotel and Apartments in Darwin, Northern Territory.⁶⁴²

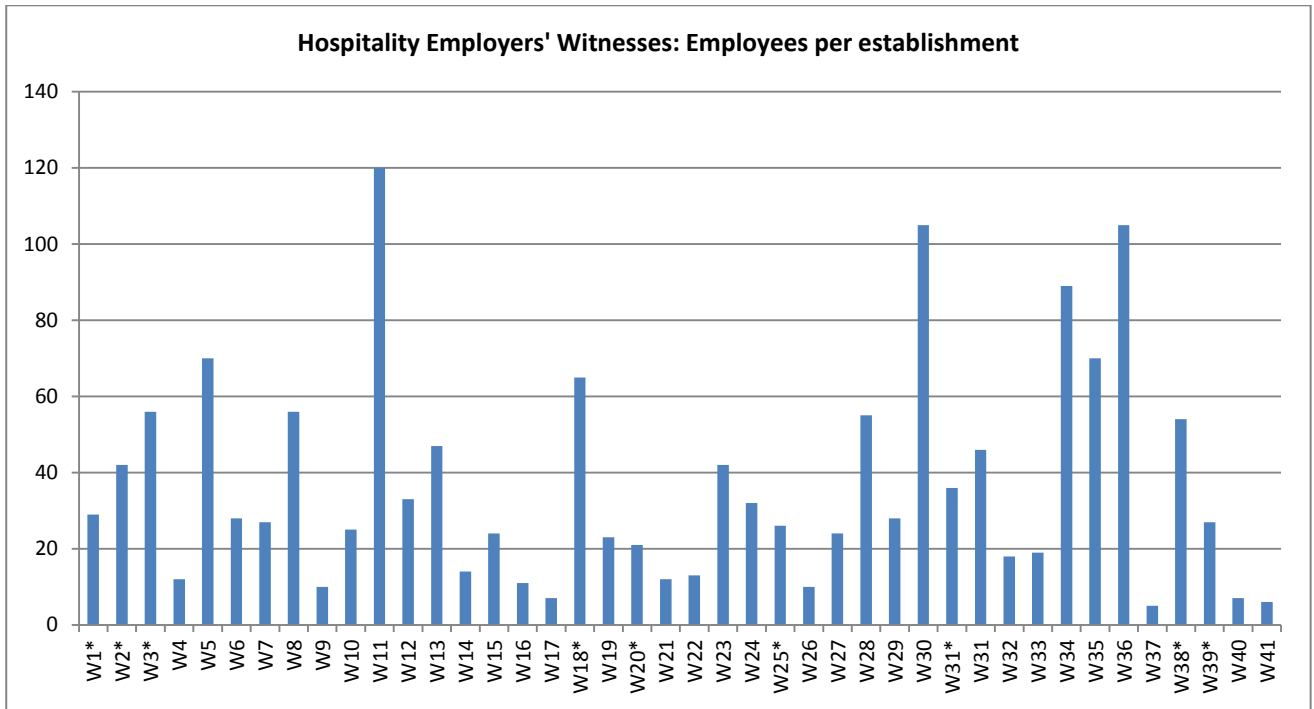
[767] The Hospitality Employers' witnesses gave evidence in respect of a diverse range of enterprises covered by the *Hospitality Award*. Evidence was given about enterprises in most States and Territories, as well as from a range of rural, regional and capital city locations (as shown in Chart 29 below).

Chart 29
Hospitality Employers' evidence – size of enterprises by location



[768] There was also considerable diversity in respect of the size of the enterprises (in terms of numbers of employees) which were the subject of the Hospitality Employers lay evidence. Chart 30 shows the number of employees per establishment for each of these witnesses. The evidence related to 80 establishments employing 3161 employees in total, ranging from 5 to 120 employees with an average of approximately 40 employees per establishment (39.5125).⁶⁴³

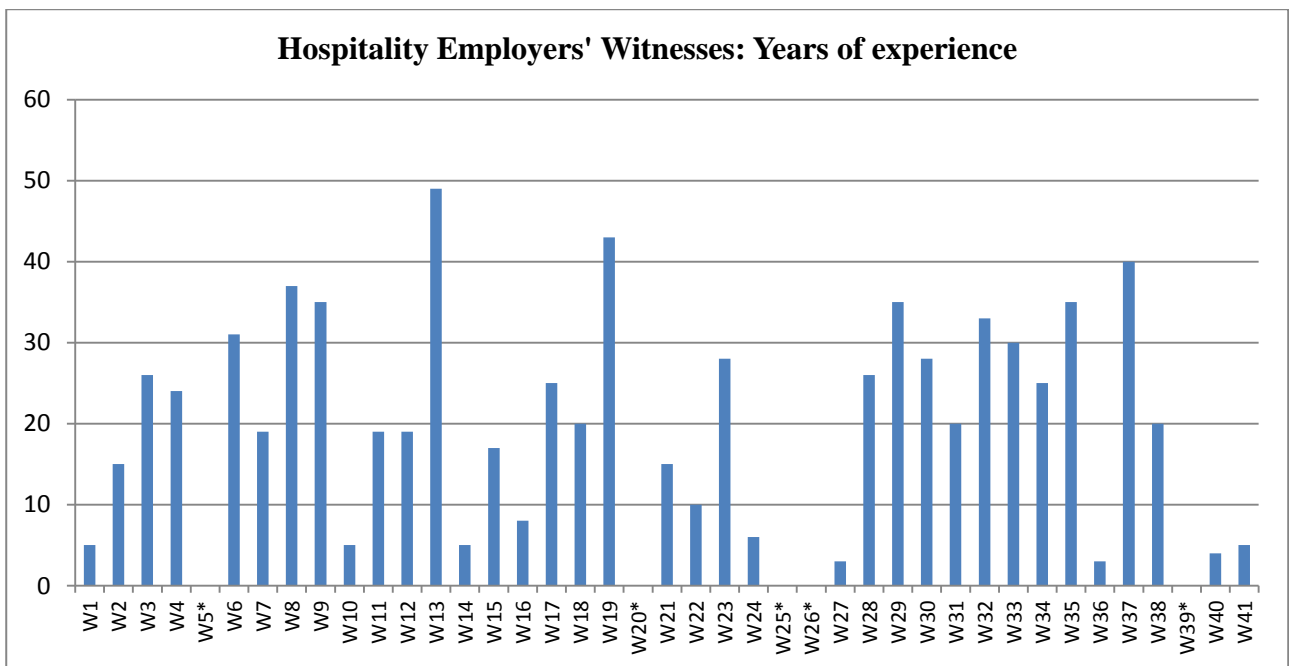
Chart 30 ⁶⁴⁴



[769] The vast majority of the Hospitality Employers lay witnesses had considerable experience in the hospitality sector. Chart 31 sets out the years of experience in the hospitality industry of each of the Australian Hotels Association witnesses. Of the 41 witnesses, only 5 did not give evidence about their experience.

[770] The level of experience of the remaining 36 witnesses ranged from 3 years to 49 years, with an average of just over 21 years' experience in the hospitality industry.⁶⁴⁵

Chart 31 ⁶⁴⁶



[771] Under cross-examination most of the lay witnesses called by the Hospitality Employers conceded that they had not undertaken specific calculations as to the precise monetary value of the proposed reduction in penalty rates. It was generally conceded that they had not undertaken any sort of cost-benefit analysis associated with increasing the level and range of their services and employing additional staff (or offering existing staff more hours), in the event the Sunday penalty rate was reduced. It was also generally conceded that the level of penalty rates is only one factor among a range of factors which affect the ability of their business to employ additional labour or offer more services to their customers. In light of the concessions made, we accept that much of the evidence of the lay witnesses may be regarded as speculative in nature. But this is necessarily the case. Evidence about intentions in light of proposed changes is necessarily hypothetical and speculative. Hospitality is a dynamic sector, subject to constant change, in response to changes in consumer preferences. It would be difficult to predict, with certainty, what precise actions would be taken in response to a particular change.

[772] However it is important to acknowledge that the evidence was given by experienced operators in the Hospitality sector about their *intentions* in the event that the Sunday penalty was reduced from 175 per cent to 150 per cent. It is also apparent that the witnesses make decisions about whether or not to open and how many staff to engage on a particular day, on a day-to-day basis.

[773] We also note that a number of the lay witnesses called by the Hospitality Employers were cross-examined in relation to the impact of Schedule B of the *Hospitality Award*, which provided transitional provisions in respect of loadings and penalty rates for casual employees in South Australia.

[774] The effect of the South Australian transitional arrangement was that employers with a casual workforce, which works across seven days of the week, may have a reduced labour cost as of 1 January 2015. During the transitional period between 1 July 2010 and 31 December 2014 the employer was required to pay their casual employees 150 per cent for each day of the week. However, during that period, the casual employees were not entitled to additional payments including with respect to weekend and public holiday work. After 1 January 2015, the employer was required to pay casual employees who worked Monday to Friday 125 per cent, casual employees who worked on a Saturday 150 per cent and casual employees who worked on a Sunday 175 per cent. If, as a result of that change, an employer's total labour cost had reduced, it may provide some information about the potential employment effects of such a reduction in labour cost.

[775] Three of the lay witnesses were cross-examined as to the effect of the transitional arrangements: Mr Bullock;⁶⁴⁷ Mr McCallum,⁶⁴⁸ and Mr Lovell⁶⁴⁹. The evidence from these witnesses suggests that despite the fall in the casual loading on Monday to Friday (from 150 per cent to 125 per cent) no additional employees had been employed to work on weekdays. This evidence may cast some doubt on the proposition that a reduction in weekend penalty rates would have a positive impact on employment. But it also needs to be put into context – it only reflects the experience of 3 hospitality employers in South Australia over a limited period since the end of the transitional period. Further, there may have been a range of other factors which contributed to the static employment levels in these businesses, including weaker demand (perhaps as a result of increased competition or changes in consumer

preferences); increases in other business expenses (such as rent or utilities) or higher labour costs due to the increase in the public holiday penalty rate and casuals Sunday rate.

[776] The diversity of the enterprises referred to in the Hospitality Employers lay evidence and the considerable experience of the lay witnesses are relevant to the weight to be attributed to this evidence. While the Hospitality Employers lay evidence cannot be said to be statistically representative of the employers covered by the *Hospitality Award*, the evidence is cogent, relevant and persuasive.

[777] It follows that we reject the United Voice submission that:

‘None of that evidence [i.e. the Hospitality Employers lay evidence] supports the contention that cuts to penalty rates will have any impact on employment...’

The AHA did not present any credible evidence that employers are making decisions to restrict trade or services on Sundays because of penalty rates.⁶⁵⁰

[778] The incidence of owner operators performing work on Sundays (instead of employing other labour) was particularly common in small and medium sized businesses. For example the owners of small and medium sized businesses gave the following evidence:

- Ms Ferguson, Owner/Manager of the Railway Hotel, Parkes, NSW (13 employees) said that the hotel does not roster ‘many casual employees to work on a Sunday’⁶⁵¹ and the owners worked on weekends.⁶⁵² Ms Ferguson and a supervising manager work on Sundays, assisted by one casual employee whereas on Saturdays 6 casual employees are rostered.
- Ms McDonald, Accounts Manager of the Timber Creek Hotel, Northern Territory (14 employees) said that on Sundays in the wet season ‘the owner of the Hotel will work in the kitchen which reduced the need for a cook position’.⁶⁵³
- Ms Mitchell, Owner of the Victoria Tavern, Rockhampton, Queensland (18 employees) said that as a result of penalty rates fewer award staff are hired on Sundays and public holidays ‘even though the Hotel receives business that would justify the contrary’⁶⁵⁴ and that ‘in lieu of rostering more staff’ she will ‘typically work on Sundays and public holidays to ensure adequate staff numbers’.⁶⁵⁵
- Mr Trengove, Owner and Manager of the Mulga Hill Tavern, Broken Hill, NSW (33 employees) said that the hotel is run with ‘skeleton staff on Sundays and public holidays’⁶⁵⁶ and he will personally ‘cover certain shifts on those days as a measure to cut costs’.⁶⁵⁷
- Mr Waller, Owner and Licensee of The Heads Hotel, Shoalhaven Heads, NSW⁶⁵⁸ (28 employees) said that he works weekends ‘to save costs’⁶⁵⁹ and ‘would prefer to allocate that work to 2 casual staff members in his place’.⁶⁶⁰
- Ms Sergi, Owner of the Steam Packet Hotel, Nelligan, NSW (11 employees) and her husband work on Sundays and public holidays to reduce the cost of labour on those days.⁶⁶¹

- Mr McCallum, Owner of the Lonsdale Hotel, South Australia (42 employees), works public holidays alongside his wife, son and daughter, so that not as many staff members are required.⁶⁶²
- Mr Dowd, Owner of the Lightning Ridge Outback Resort & Caravan Park, NSW (12 employees) works 12 to 14 hours per day as a cost saving measure in lieu of rostering staff and also rosters family members to work with him on public holidays.⁶⁶³
- Mr Annovazzi, Owner of the Capertee Hotel, Capertee, NSW (6 employees) does not roster any staff on public holidays and instead works on those days with his wife.⁶⁶⁴
- Mr Green, Owner of the Courthouse Hotel, Mudgee, NSW (7 employees) works on public holidays with the co-owner of the Hotel in the bar and the kitchen.⁶⁶⁵
- Mr Cordwell, Owner of the Ascot Hotel, Rockhampton, Queensland (5 employees) is usually the only person who works at the Hotel on Sundays and public holidays and operates the kitchen and bar.⁶⁶⁶
- Mr Sullivan, Owner of the Queensland Hotel, Goondiwindi, Queensland (24 employees) reduces staffing levels on Sundays and on public holidays Mr Sullivan and his wife also work.⁶⁶⁷
- Mr Gibson, Owner of the Westcourt Tavern Westcourt, Queensland (25 employees) works on public holidays and rosters only salaried employees in an effort to save costs.⁶⁶⁸
- Mr Burke, Owner of the Malvern Hotel, Malvern ,Victoria and Belgian Beer Café, Southbank, Victoria (54 employees) works on Sundays and public holidays with other owners and family.⁶⁶⁹
- Mr Ryan, Owner of the Gippsland Hotel, Sale, Victoria (23 employees) works on public holidays with his wife and managers and does not roster any casual staff.⁶⁷⁰
- Mr Williams, Owner of the San Remo Hotel, Victoria (24 employees) works on public holidays and rosters managerial staff to work instead of casual employees.⁶⁷¹

[779] The evidence also discloses that a range of operational limitations are imposed on Sundays, in order to reduce labour costs. These limitations broadly fall into three categories and are evident across small, medium and large sized businesses:

(i) Restricting trading hours

- Mr Bullock, Chief Executive Officer of 1834 Hotels in Adelaide, South Australia (which manages over 16 individually owned hotels employing 500 employees) said that because of penalty rates there are reduced trading hours on Sundays.⁶⁷²

- Mr Dowd, Owner of Lightning Ridge Outback Resort Caravan Park in Lightning Ridge, NSW) (12 employees) said that trading hours are reduced and live music is no longer offered on Sundays.⁶⁷³
- Ms Mitchell, Owner of the Victoria Tavern in Rockhampton, Queensland (18 employees) said that trading hours are reduced on Sundays so that the hotel does not operate at night.⁶⁷⁴
- Ms Cameron, Owner of the Lord Roberts Hotel, Sydney, NSW (19 employees) has reduced trading hours on Sundays so that the Hotel opens at 12.00 midday instead of 10.00 am and closes at 10.00 pm rather than midnight.⁶⁷⁵

(ii) Lower staffing levels

- Mr Bilston, General Manager of the Amora Hotel Riverwalk in Melbourne, Victoria (89 employees) said that ‘skeleton staff are utilised in the restaurant on Sundays to reduce the cost of wages due to penalty rates’.⁶⁷⁶
- Ms Cameron, Owner of the Lord Roberts Hotel in Sydney, NSW (19 employees) said that the penalty rate on Sunday ‘is too great’ and so the hotel reduced operating hours on Sunday.⁶⁷⁷
- Mr Cronin, part Owner and Manager of The Western Hotel in Ballarat, Victoria (27 employees) said that although 70 per cent of the Hotel’s revenue is related to weekend trade ‘due to the penalty rates that are incurred’ the hotel operates ‘at lower staffing levels’ on these days and rosters management and salaried staff to work on Sundays.⁶⁷⁸
- Mr Winn, Hotel Manager of Halikos Hospitality Pty Ltd, Darwin, Northern Territory (133 employees) said that the Company’s 3 hotels in Darwin operate on a skeleton staff on Sundays and public holidays.⁶⁷⁹ Generally staff levels on those days are 60 per cent of levels on other days.⁶⁸⁰
- Mr Bullock, Chief Executive Officer of 1834 Hotels, South Australia and Northern Territory (which manages over 16 individually owned hotels employing 500 employees) has reduced staff numbers on weekends and public holidays by reducing trading hours and limiting menus in order to reduce costs.⁶⁸¹ Casual staff are also replaced with salaried staff on those days whenever possible.⁶⁸²
- Mr Ovenden, Group Operations Manager of The Glen Hotel, Eight Mile Plains, Queensland⁶⁸³ (120 employees) said that the hotel does not operate with a receptionist on Sunday and this is the only day of the week ‘we have no one on the phones because of the costs associated with that’.⁶⁸⁴
- Mr Hakfoort Chief Executive Officer of the Hakfoort Group, Queensland (231 employees) has reduced the numbers of casual staff rostered on Sundays and public holidays and instead rosters salaried employees to work on those days and uses casual employees to fill gaps.⁶⁸⁵

- Mr Tony Cakmar General Manager of Clarion Suites Gateway, Melbourne, Victoria (70 employees) said that the Hotel operates on a skeleton staff on Sundays and public holidays and where possible casual employees are not rostered on those days.⁶⁸⁶

(iii) Restrictions on the type and range of services provided

- Mr Annovazzi (Owner of the Capertee Royal Hotel in Capertee, NSW– 6 employees) said that as a result of current penalty rates, rooms are not made up on Sundays or public holidays and there is no entertainment on Sundays and higher prices due to a 10% surcharge.⁶⁸⁷
- Mr Bilston (General Manager of the Amora Hotel Riverwalk in Melbourne, Victoria – 89 employees) said that on Sundays the Lobby bar is closed⁶⁸⁸, the restaurant operates with a skeleton staff⁶⁸⁹, room cleaning is delayed⁶⁹⁰ and there is no turndown service.⁶⁹¹
- Mr Bullock (Chief Executive Officer of the 1834 Hotels in Adelaide, South Australia– managers of over 16 individually owned hotels employing 500 employees) said that because of penalty rates lower-priced carvery meals are no longer offered at a number of hotels on Sundays.⁶⁹²
- Mr Cakmar (General Manager of the Clarion Suites Gateway in Melbourne, Victoria– 70 employees) said that the hotel restaurant is closed for Sunday dinner due to penalty rates.⁶⁹³
- Mr Dowd (Owner of the Lightning Ridge Outback Resort & Caravan Park in Lightning Ridge, NSW- 12 employees) said that due to penalty rates, trading hours are reduced and live music is no longer offered on Sundays.⁶⁹⁴
- Mr Gallagher (Owner of the Gallagher Group of Hotels in Sydney, NSW- 182 employees) said that the upstairs area of Jacksons is closed on Sundays in an attempt to reduce wage costs.⁶⁹⁵
- Mr Hakfoort (Chief Executive Officer of the Hakfoort Group in Queensland– 231 employees) said that the following restrictions are placed on services at establishments within the Group to reduce the cost of penalty rates on Sundays and public holidays:
 - The restaurant area of the Burke & Wills Hotel is closed on Sundays and public holidays;
 - The hours for breakfast service have been reduced at the Conservatory Restaurant at the Burke & Wills Hotel;
 - The dinner service at Albert’s Restaurant at the Burke & Wills Hotel has been reduced;

- Rooms in accommodation Hotels in the group are not cleaned on Sundays or public holidays unless necessary and only refreshment of rooms and the delivery of breakfast is provided.⁶⁹⁶
- Ms Mitchell (Owner of the Victoria Tavern in Rockhampton, Queensland Queensland – 18 employees) said that due to penalty rates a breakfast service is not viable on Sundays and public holidays.⁶⁹⁷
- Ms Morrow (Human Resources Manager of the Hunter Management Services, Victoria– owner of four hotels and employer of 329 persons) said that sections of the hotels are closed on some public holidays including TAB and bistro, and the making up rooms is delayed on Sundays if possible.⁶⁹⁸
- Mr Trengove (Owner of the Mulga Hill Tavern in Broken Hill, NSW – 33 employees) said that ‘as a result of having to pay the current penalty rates’ the dining service is closed for lunch on Sunday⁶⁹⁹ and promotions, live entertainment are not offered on Sundays.⁷⁰⁰
- Ms Sergi (Owner of the Steam Packet Hotel, Nelligen, NSW– 11 employees) closes the Hotel Bistro on Sunday evenings during winter (other than in school holiday periods). The Hotel stays open because of customer expectations, based on the Hotel being the only one in Nelligen.⁷⁰¹
- Mr Burke (Part Owner of the Malvern Hotel Malvern Victoria and Belgian Beer Café Southbank Melbourne Victoria– 29 employees) closes the Hotel restaurant on Sundays and reduces the number of staff and therefore service provided on public holidays where the restaurant is open (3 of 11 public holidays per year). The Belgian Beer Café is busy on Sundays but the upstairs restaurant is not opened because of the cost of penalty rates.⁷⁰²
- Mr Tudor (Owner of the Hotel Canobolas in Orange, NSW– 55 employees) said that the hotel does not provide live music or provide a cheaper food promotion such as Sunday roast ‘due to the amount we spend on wages.’⁷⁰³
- Ms Walder (Director of Human Resources of the InterContinental Sydney Double Bay in Sydney, NSW– 105 employees) also said that the rooftop area of the hotel is closed on public holidays when there is not strong occupancy and where possible the servicing of accommodation rooms was ‘rolled over’ from Sunday to Monday ‘to avoid paying housekeeping staff on Sunday’.⁷⁰⁴
- Mr Williams (Owner of the San Remo Hotel in San Remo, Victoria– 24 employees) said that accommodation rooms were not serviced on Sunday unless booked.⁷⁰⁵
- Ms Anderson (Human Resources Manager Pacific Hotel, Cairns, Queensland – 105 employees) said that as a result of penalty rates the Hotel’s restaurant is closed on Sundays for four months of the year between March and June. The restaurant is also closed and no room service is offered on nine out of 11 public holidays during the year.⁷⁰⁶

- Mr Lovell (Owner of the Marryatville Hotel Kensington South Australia – 28 employees) has ceased offering bistro meals on public holidays and altered the terms of the Hotel's licence to remove the obligation to provide full meal service on public holidays.⁷⁰⁷
- Mr Kearney (Owner of Bar Petite Newcastle, NSW – 7 employees) reduces staff on Sundays and has cut lunch service to three days a week, closing the bar between 12.00 midday to 3.00 pm, Monday to Thursday.⁷⁰⁸
- Mr Gallagher (Owner of the Gallagher Group of Hotels, Sydney, NSW – 182 employees) reduces services across weekends and public holidays in all Hotels in the Group including closing particular areas, splitting the gaming room, restricting entertainment by not providing live music, and reducing staff numbers on public holidays.⁷⁰⁹
- Mr Cronin (Owner of the Western Hotel Ballarat Victoria – 27 employees) offers reduced services on Sundays and public holidays or closes, does not make rooms up on those days.⁷¹⁰
- Mr Burke (Owner of the Malvern Hotel, Malvern, Victoria and Belgian Beer Café Southbank, Melbourne, Victoria – 54 employees) closes the Hotel restaurant on Sundays and does not open the upstairs section of the Belgian Beer Café on Sundays despite it being busy.⁷¹¹
- Ms Mitchell (Owner of the Victoria Tavern Rockhampton Queensland – 18 employees) does not serve breakfast on Sundays or public holidays as penalty rates mean it is not economically viable.⁷¹²
- Mr Sullivan (Owner of the Queensland Hotel Goondiwindi, Queensland – 24 employees) closes the bar on Sunday if there are less than six patrons and does not open the dining room for Sunday lunch. A trial of offering a lunch time Sunday roast to minimise the requirement on the kitchen to prepare full meals, was abandoned because the cost of penalty rates for one extra staff member to work was not worth the amount of money the Hotel made.⁷¹³ Mr Sullivan also gave an example of a Sunday night when the kitchen was open with three staff working and the Hotel suffered a loss of \$100 as the labour costs associated with penalty rates were so high.⁷¹⁴
- Mr Brown (Manager of the Shoreline Hotel, Howrah, Tasmania – 56 employees) offers services on Sundays and public holidays for reduced hours including not cleaning accommodation rooms on those days and is considering further reducing the Hotel's services by closing the bistro (the largest loss making area) in order to concentrate on gaming, the bottle shop and reduced bar services.⁷¹⁵
- Mr Williams (Owner San Remo Hotel, Victoria – 24 employees). Rooms are not made up on Sundays unless they are booked the next day which means patrons who arrive without a booking cannot be accommodated.⁷¹⁶

- Ms Usher (Owner Fitzroy Beer Garden Fitzroy Victoria – 12 employees) opens on Sundays but closes on Mondays and Tuesdays to save costs. Only one bar is open on Sundays and public holidays.⁷¹⁷

[780] The Hospitality Employers lay witnesses also gave evidence about the likely impact of a reduction in the Sunday penalty rate (from 175 per cent to 150 per cent) on employment levels and service.

[781] In terms of the likely employment effect, a number of owner operators of small to medium hospitality enterprises expressed a willingness to provide more hours of work to *Hospitality Award* covered employees on Sundays, rather than doing the work themselves. For example:

- Ms Ferguson (Owner and Manager of the Railway Hotel in Parkes, NSW– 13 employees) said that there would be the potential to engage an additional casual so that she would not have to work Sundays and public holidays.⁷¹⁸
- Ms Sergi (Owner of the Steam Packet Hotel in Nelligen, NSW– 11 employees) said that she could provide existing casual staff with between 3–8 hours' work on public holidays⁷¹⁹ and this would allow her and her husband to have time off.⁷²⁰
- Ms Usher (Owner and Manager of the Fitzroy Beer Garden in Fitzroy, Victoria– 12 employees) said that she expects that the 6 hour shifts currently worked by either herself or her husband would be taken by one of the existing casuals.⁷²¹
- Mr Waller (Owner of the Heads Hotel in Shoalhaven Heads, NSW- 28 employees) said that he estimates work for two additional casuals at 3 to 4 hours each, possibly up to 5 hours⁷²² and he would rather engage casuals to work weekends so that he does not have to.⁷²³
- Mr Williams (Owner and Manager of the San Remo Hotel in San Remo, Victoria– 24 employees) said that by reducing the number of hours that he works, there would be more hours available for staff.⁷²⁴

[782] There was also evidence that there would be additional hours of work offered to either existing or new employees in small to medium sized enterprises. For example:

- Mr Burke (Owner of the Malvern Hotel, Malvern, Victoria and Belgian Beer Café Southbank, Melbourne, Victoria – 54 employees) said that the Hotel would offer an additional 16 Sunday hours for casual employees and would engage apprentices to work at the Malvern Hotel and the Belgian Beer Café and a trainee would also be engaged for the Café. This works out at around 120 additional hours for casual employees as well as the hours worked by apprentices and the trainee.⁷²⁵
- Mr Cordwell (Owner of the Ascot Hotel Rockhampton Queensland – 5 employees) would keep the Hotel open later on Sundays and public holidays if the AHA proposal to reduce penalty rates was granted and would roster staff to work an extra 2 shifts of 5 hours. If employees worked on Sundays then more people could be employed to work during the week.⁷²⁶

- Mr Williams (Owner of the San Remo Hotel, Victoria – 24 employees) would roster more casual employees for, collectively, an additional 23 hours on public holidays to offer usual services including regular operating hours and housekeeping services.⁷²⁷
- Mr Ovenden (Glen Hotel in Eight Mile Plains, Queensland – 120 employees) said that there would be opportunity to offer additional hours to casual employees on Sundays and to engage a receptionist on Sundays.⁷²⁸
- Ms Tait (Murrumba Downs Tavern Queensland – 32 employees) would have longer shifts for existing permanent employees and employ more permanent and casual employees.⁷²⁹

[783] The evidence of the Hospitality Employers lay witnesses supports the proposition that a lower Sunday penalty rate would increase the level and range of services offered, with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees). The types of suggested changes to the level and range of services are summarised below.

(i) Extend operating hours

- Ms Cameron (Lord Roberts Hotel in Sydney, NSW) said that there would be the potential to open the hotel on Sunday mornings with consequential increase in availability of casual hours.⁷³⁰
- Mr Hakfoort (Hakfoort Group; Queensland) said that trading hours could be extended.⁷³¹
- Ms Blair (Milestone Hotels Dubbo, Leichhardt and Kingswood New South Wales) said that the Sydney Hotels would trade for longer on Sundays if penalty rates were reduced.⁷³²
- Mr Gallagher (Gallagher Group of Hotels) said that if the AHA proposal was granted he would open hotels for longer hours and consider offering more work to staff on public holidays and Sundays.⁷³³
- Ms Usher (Fitzroy Beer Garden Fitzroy Victoria) would offer usual services on Sundays and public holidays and would open the business on Tuesdays when it is currently closed and would split the Sunday and Tuesday shifts between salaried and casual staff creating more work for casual staff.⁷³⁴

(ii) Provide additional meal services

- Ms Anderson (Pacific Hotel in Cairns, Queensland) said that there would be the possibility to open the restaurant on every Sunday.⁷³⁵
- Ms Blair (The Milestone Hotels in Dubbo, Leichhardt and Kingswood, NSW) said that bistro opening hours would be extended at the Sydney hotels.⁷³⁶

- Mr Cakmar (Clarion Suites Gateway in Melbourne, Victoria) said that the hotel may be able to open the restaurant for lunch on Sundays⁷³⁷ and that the restaurant would open all Sundays, as opposed to the current arrangement where the restaurant is open on some Sundays.⁷³⁸
- Mr Hakfoort (Hakfoort Group; Queensland) said that he would extend the food service periods.⁷³⁹
- Mr Sullivan (Queensland Hotel Goondiwindi in Goondiwindi, Queensland) said that he would improve customer service by providing Sunday lunch.⁷⁴⁰
- Mr Bullock (1834 Hotels South Australia and Northern Territory) said that it may be possible to offer customers a full service at all times including opening all departments of the Hotels in the Group during normal trading hours and offering full menus.⁷⁴¹
- Ms Cameron (Lord Roberts Hotel in Sydney, NSW)⁷⁴² said that she would consider offering Sunday brunch at her hotel on the basis that her loss would be reduced to a more acceptable level and with the intention of making a profit by increasing volume.⁷⁴³
- Mr Kearney (Bar Petite Newcastle, NSW) would reinstate the lunch service he has cut on Monday to Thursday.⁷⁴⁴

(iii) Provide live entertainment

- Mr Trengove (Mulga Hill Tavern in Broken Hill, NSW) said that it might be possible to provide a full dining service on Sundays and to provide live entertainment.⁷⁴⁵
 - Ms Blair (The Milestone Hotels in Dubbo, Leichhardt and Kingswood, NSW) said that live music would be possible on Sundays with the engagement of a solo guitarist.⁷⁴⁶
 - Mr Ovenden (Glen Hotel in Eight Mile Plains, Queensland) said that there would be opportunity for engagement of a receptionist and live music on Sunday.⁷⁴⁷
 - Mr Trengove (Mulga Hill Tavern in Broken Hill, NSW) said that it might be possible to provide a full dining service on Sundays and to provide live entertainment.⁷⁴⁸
 - Ms Cameron (Lord Roberts Hotel, Sydney New South Wales) would have a DJ playing at the Hotel on a regular basis and would also offer trivia nights.⁷⁴⁹
 - Mr Darren Gun (Crescent Head Tavern New South Wales) would consider providing live entertainment on Sundays and public holidays.⁷⁵⁰

- Ms Tait (Murrumba Downs Hotel Queensland) would have live entertainment on public holidays or events such as an Easter egg hunt for families.⁷⁵¹

(iv) *Invest in infrastructure to provide an improved level of service to customers*

- Mr Gunn (Crescent Head Tavern in Crescent Head, NSW) said that there would be opportunity for investment in child friendly areas.⁷⁵²
- Ms McDonald (Timber Creek Hotel in Timber Creek, Northern Territory) spoke of the opportunity to improve the quality of services through improved toilet and shower facilities in the caravan park.⁷⁵³
- Mr McInnes (Hurley Hotel Group – Pretoria and Hackney Hotels in South Australia) would consider undertaking renovations at the Hackney Hotel by providing a larger combined bar area with an open roof.⁷⁵⁴
- Ms Mitchell (Victoria Tavern Rockhampton Queensland) would like to make the Hotel more family friendly by investing in a playground facility⁷⁵⁵
- Mr Johnston (Ulster Hotel Ipswich Queensland) said that an extra day of trading could provide sufficient funds to renovate the Hotel kitchen and improve the variety of meals served to patrons.⁷⁵⁶

(v) *Provide cleaning services for accommodation facilities*

- Mr Cronin (The Western Hotel in Ballarat, Victoria) said that accommodation rooms would be serviced on Sundays.⁷⁵⁷
- Mr Hakfoort (Hakfoort Group; Queensland) said that cleaning services could be provided for all accommodation facilities on Sundays and public holidays.⁷⁵⁸ Mr Hakfoort would also like to offer in-house laundry services for accommodation guests but has contracted this out due to the cost of penalty rates. If the AHA proposal was granted Mr Hakfoort would consider employing staff directly to offer this service.⁷⁵⁹

(ii) *United Voice*

[784] In opposing the variation of the *Hospitality Award*, United Voice relied on the evidence of 7 lay witnesses:

- Sean Davis, casual Duty Manager at the Grange Hotel;⁷⁶⁰
- Steven Petrov, gaming supervisor at a hotel with gaming facilities at Zagames Ballarat Hotel;⁷⁶¹
- Andrew Sanders, casual Food and Beverage Attendant at Peter Rowland Catering;⁷⁶²
- Jan Syrek, security officer at Crown Perth;⁷⁶³

- Carol Gordon, casual receptionist at a hospitality establishment at Elphin Villas;⁷⁶⁴
- Amit Gounder, housekeeping employee at Sheraton on the Park Hotel; and⁷⁶⁵
- Rachel-Lee Zwarts, apprentice chef at the Torrens Arms Hotel.⁷⁶⁶

[785] Only Andrew Sanders and Sean Davis were required for cross-examination.

Sean Davis

[786] Mr Davis has worked in the hospitality industry for 30 years in a range of roles and since April 2015 has been employed as a casual duty manager at an Adelaide hotel. At the time he made his witness statement Mr Davis worked an average of 35 hours per week and usually works Wednesday to Saturdays from 5.00 pm to close (usually around 1.30 am–2.00 am). As to Sunday work, at that time, Mr Davis' evidence was:

'I am not on the roster regularly on a Sunday, however I am often called in when other staff are sick. I estimate I work two or three Sundays out of every month.'⁷⁶⁷

[787] By the time Mr Davis came to give oral evidence in the proceedings, his roster had changed such that he is rostered on Wednesday, Thursday and Sunday.⁷⁶⁸

[788] As to the impact of working on weekends Mr Davis says:

'I have always worked weekends and public holidays. I try to get these shifts because of the penalty rates I am paid on these days. These are also the busiest days at the hotels.

The penalty rates mean I earn more money each week. If penalty rates were changed I, of course, would earn less. I am only just getting by on my current wage.

Although I receive penalty rates for working weekends and public holidays, working these shifts comes at a huge cost to me and my family. As I work in hospitality I cannot really refuse to work on the weekends or public holidays as these are the busiest periods for the industry. If the rates were changed I would be working the same hours for less money. This might cause me to seriously consider training for a different industry with the view to changing my career.

The cost to my family of working weekends and evenings is that I am rarely am (sic) able to spend quality time with them. I am usually working when the children are home from school in the afternoons and evenings. On my days off earlier in the week I am often very fatigued and tired and try and catch up on sleep. It is not unusual that I work till well after midnight, get home even later, and then get up by 7.30am to help get the children to school.

I am often unable to take the children to their sporting activities on the weekend such as soccer or netball as I am working. The responsibility of running around four children to different sports then falls solely upon my wife.

I rarely am able to attend any family gatherings or functions, including my own children's birthday parties as these are usually held on weekends or evenings when I am working.

As a result of working Weekends I have absolutely no social life and find it very difficult to maintain my friendships as I am unable to catch up with them on weekends because I am working.

Working weekend and evenings over a significant period of time can become very mentally debilitating and physically taxing on my body. On occasions I have felt depressed as a result of being isolated from my family and friends and have sometimes found it difficult to cope with the day to day pressures of life.⁷⁶⁹

[789] At paragraphs 34–41 of his statement Mr Davis sets out the impact upon him of a reduction in penalty rates as sought by the Hospitality Employers, in particular:

‘I already have to make hard choices about my spending. My family currently cannot afford to indulge in luxuries. If my penalty rates are reduced this will mean that my spending choices become harder.’⁷⁷⁰

[790] The Hospitality Employers contend that insofar as Mr Davis’ evidence is relied upon to illustrate the effect on earnings of the variation to the Sunday penalty rate, that evidence will not provide any meaningful assistance because there is no recurring pattern to Mr Davis’ Sunday work and therefore a reliable comparative evaluation cannot be made about the effect upon his weekly earnings of a change in the Sunday rate. We disagree. As Mr Davis said in cross-examination, he is currently rostered on Sundays.

[791] The Hospitality Employers also contend that Mr Davis is available and willing to work on Sundays. Mr Davis’ willingness and availability for weekend work is said to emerge from the following passage in his cross-examination:

‘Yes. And in the course of that interview I take it you were asked about your availability for work during the week?---Yes.
And did you indicate you were available – were there any days that you were not available?--Tuesdays.
That was the only day you were unavailable?---Yes. And you don’t work Tuesdays do you?---Not so far, no.
So you were available to work any day other than Tuesday, including the weekends?---If I want a job then, yes.
Yes. And you’ve always worked the weekends according to your statement?---Generally, yes. Mostly, yes.’⁷⁷¹

[792] Further, Mr Davis agreed that he has been available to work weekends and that he has not declined work on either a Saturday or a Sunday:

‘You’ve been available to work the weekends?---Well, you have to. You haven’t got a choice.
You’ve been available to work those weekends?---Well, yes, absolutely. Yes. So in your current position at the Grange, have there been occasions where you have declined to work, say, a Saturday?---No, absolutely not. It pays better.
And have there been occasions where you have declined to work a Sunday?---No.’⁷⁷²

[793] The passages from Mr Davis’ evidence which are relied on by the Hospitality Employers need to be seen in context. It is clear from his evidence as a whole that it is not Mr

Davis' preference to work on weekends, rather it is an economic necessity. The following passages from his cross-examination support this conclusion:

'It's also the case you've tried to get those weekend shifts at other establishments in the past?--- Well, it's not so much as trying to get the shifts. It's you make yourself available for them so that you get the job. Because they need people to work weekends because no one wants to work weekends or nights.

So you tell the managers that you're available to work those times?---Well, if I want the job I have to. I have no choice.⁷⁷³

Steven Petrov

[794] Mr Petrov has worked in the hospitality sector since 1998 and is currently a gaming supervisor at a hospitality establishment in Victoria. He is employed under the *Hospitality Award* and paid an annual salary (a loading of about 25 per cent on the award minimum rate) instead of weekend, shift or public holiday penalty rates. Mr Petrov's current working arrangements are detailed at paragraph 15 and 16 of his statement:

'I work Monday, Friday, Saturday and Sunday, from 6pm until close. Close time can vary but on average, if it all goes well, on Monday, Friday and Saturday the venue closes at 3.00am and we work until about 4.30am. On Sunday the venue closes at 3.00am but we normally finish at 5.00am because we have to balance the financial week. We physically have to weigh the coin hoppers so the financial records for the week can be balanced. Once my meal breaks are removed, I work approximately 40 hours per week, but I am usually at work for about 11 hours each shift.

One consequence of my roster is that I work nearly every public holiday because I always work Monday, Friday, Saturday and Sunday.⁷⁷⁴

[795] As to the impact of weekend and public holiday work Mr Petrov says:

'Because I work on Monday, Friday, Saturday and Sunday I cannot attend any family events because they are held on weekends and I am excluded from them because of the hours I am rostered to work.

A good example is the birthday parties of my grandchildren. They are held on the weekend so that most people can attend. I can't participate in any of these events because I have to work.

Lots of other people enjoy the weekend because they are out partying and enjoying themselves but I can't participate in that stuff. Even things that people take for granted like going to the footy - I can't do that because of the hours I have to work in the hospitality industry.

I used to be involved in a lot of things - karate, gym work with training partners, squash - but that all had to go very early in my career because I couldn't commit to things on the weekend which is the most convenient time for everyone else, because the work always has to come first.

I have worked nearly every Christmas Day in the last 15 years. I do a rushed mini version of Christmas at home and then take off. This makes me feel like I'm missing out. I also carry the burden of letting people down. The best word for it is 'guilt'. It makes me feel guilty that I have to rush Christmas.

The good thing about working on the weekend is the weekend penalty rate. Basically I work weekends in order to obtain a higher rate of pay. My annual salary is based on the Award and the penalty rates in it. Other than that, there is nothing good about working weekends.⁷⁷⁵

[796] At paragraphs 31–38 of his statement, Mr Petrov sets out the impact upon him of a reduction in penalty rates as sought by the Hospitality Employers, in particular:

‘Under the Award, my annual salary cannot be less than what I would earn if I was paid the minimum hourly rates in the Award. If the proposed cut to the Sunday penalty rate is made by the Commission the base that my annual salary is calculated from will be reduced by 52 weeks multiplied by \$58.74 which equals a total yearly reduction of \$3,054.48.

If this happens, then the loss of Income will mean that everything becomes more difficult. When I took out a mortgage, I didn’t do so on the basis that penalty rates would be reduced. I would need to cut back across the board. This would also affect Betty because we are both in the same industry and our household will cop it doubly if penalty rates are cut.⁷⁷⁶

Andrew Sanders

[797] Mr Sanders is a student and works for a catering business on a casual basis mainly as a waiter and a bartender. He is employed under the *Hospitality Award* and classified as a Level 2 Food and Beverage Attendant, grade 2.

[798] At the time he made his statement Mr Sanders worked an average of 18 hours per week, but his hours were highly variable.⁷⁷⁷

[799] Mr Sanders does not work every Sunday but expects he will have to work regular Sundays in the future.⁷⁷⁸

[800] As to the impact of weekend work Mr Sanders says:

‘I find that people don’t understand what it is like to work on the weekends. My friends will ask me why I can’t take time off, or why I cannot work another night. I miss out on so many of the things my friends do. The nights I work are the nights people do things like go out to dinner, see movies, and have parties. When they go out, I am working. I do not get to go to birthdays. When I started it was worse, because I was invited to more events, but now people have stopped asking me to things.

Because I work late at night, I have to sleep late the next day to get enough sleep. If I have worked Friday or Saturday night then I lose half the next day because I am asleep. I then get up and go to work again. I regularly miss out on the things people do on the weekend. If I do not sleep in, I am too tired to really enjoy what I am doing.

My grandmother died recently, and it has been hard on my family. She held us together and we have to work on seeing each other. Every so often we will hold a family get together on a weekend, and I will usually have to forego this for work. I do not get to see my family otherwise. I would like to be able to see them more.⁷⁷⁹

[801] Mr Sanders estimates that if the Sunday and public holiday penalty rates in the *Hospitality Award* were reduced as proposed by the Hospitality Employers then he would lose about \$40 on a 9 hour Sunday shift:

‘I have calculated to earn back that \$40, I would have to work an extra 1.5 hours on Saturday or an extra two hours on Thursday or Friday.

While I would be able to work those additional hours, it would cause problems with my study and my social life. I would miss out on more social and family events, and my grades would suffer. I know this because in the second semester of 2014 I was doing three subjects while working the same number of hours. I am expected to commit 27 hours each week to my course, including class time, class preparation, and homework. I feel that my grades suffered because I don’t have enough time. I am reducing my course-load to two subjects in the second semester of 2015; I hope that this will balance better with my work.

...

Even if I am available to work additional hours, I do not know if I will be offered additional hours by my employer. The National Gallery of Victoria can only host so many events, and that decides how many shifts I work. I have asked for work at other venues that have contracts with my employer, but they say that they prefer to keep the same people working at the same places.⁷⁸⁰

[802] We note that Sunday work is not a regular feature of Mr Sanders’ work and, that when he is rostered on a Sunday, no typical pattern emerges from the number of hours he works.⁷⁸¹

Jan Syrek

[803] Mr Syrek is a full-time security officer at a casino in Perth and is employed under an enterprise agreement, the *Hospitality Sector WA United Voice – Crown Enterprise Agreement 2013* (the Crown Agreement)⁷⁸² and, consequently, the *Hospitality Award* currently has no direct application to him.

[804] Mr Syrek gives evidence about the impact of work on weekends and public holidays,⁷⁸³ particularly on his capacity to engage in social activities with his family:

‘The biggest impact of working weekends has been on [his fiancé] because she usually works Monday to Friday, so we often do not see each other all week. We have not made many friends together as a couple, so she usually just spends time with her mum or brother when I am working on a weekend.’⁷⁸⁴

[805] At paragraphs 42–48 of his statement Mr Syrek sets out the impact upon him of a reduction in penalty rates as sought by the Hospitality Employers. We note that the base hourly rate of \$24.99 used by Mr Syrek in the illustrative calculations⁷⁸⁵ derives from the Crown Agreement. At that time the applicable award rate was \$19.10 per hour. We attach little weight to this aspect of Mr Syrek’s evidence. While the Crown Agreement remains in operation any variation to the *Hospitality Award* as a result of these proceedings would have no impact upon him.

Carol Gordon

[806] Ms Gordon has worked in the hospitality sector since March 2014 as a casual receptionist (classified as a Level 2, Front Office Grade 1 under the *Hospitality Award*).

[807] Ms Gordon's evidence as to the adverse impact of weekend and public holiday work is set out at paragraphs 22–26 of her statement. Working at these times impacts on Ms Gordon's care for her foster child, who has serious medical issues, and on her social life:

‘Working on weekends has had a negative impact on my social life. For example, I have a group of friends who meet up for a meal every month or so, generally lunch on Saturday or Sunday or dinner on Saturday. Everyone else works Monday to Friday. Our meals are now fitted around my roster. I can only go out with my friends on a free weekend, because Riley wants me to spend my free night with him on weekends I am rostered to work.’⁷⁸⁶

[808] At paragraphs 35–40 of her statement, Ms Gordon sets out the impact upon her of a reduction in penalty rates as sought by the Hospitality Employers. We return to this aspect of Ms Gordon's evidence shortly.

Amit Gounder

[809] Ms Gounder commenced employment in the housekeeping department at the ‘Sheraton on the Park’ hotel in Sydney in 2001. Upon returning for parental leave in 2010 Ms Gounder has been a part-time employee working 24 hours per week, from 7.00 am to 3.00 pm on Saturday, Sunday and Monday each week (including public holidays).⁷⁸⁷ At the time she made her statement Ms Gounder was classified as a Guest Services Employee Grade 2 and paid \$18.47 per hour.

[810] As to the impact of weekend and public holiday work Ms Gounder says:

‘I work on weekends because my husband's work means he is only available to take care of our seven year old son on weekends. The penalty rates I am paid on weekends help to balance the loss of family time. I would prefer to be able to spend the weekends with my family but the costs of before and after school care for my son on weekdays would mean that a large chunk of my wages would go straight to child care expenses. I'd also have to work more days to earn the same amount if I didn't get weekend rates.

I sometimes miss out on family events including weddings and birthday parties because I have to work on weekends. The only way I can attend these weekend events is if I take annual leave. My employer is co-operative in letting me have short periods of annual leave but that still means I have less annual leave to take as a block if we go away for holidays.’⁷⁸⁸

[811] It appears from Ms Gounder's evidence that while weekend and public holiday work adversely impacts on the time spent with family, working at such times suits her personal circumstances as that is the time when her husband is available to care for their son.

[812] Ms Gounder earns \$1,137.01 per fortnight, and if Sunday penalty rates in the *Hospitality Award* were reduced in the manner sought by Hospitality Employers she would lose \$73.88 per fortnight:

‘the loss of income will mean we have less choice about our spending. It will be harder to pay off our mortgage and maintain the standard of living we are used to. We might have to cut out the karate sessions my sons participates in, and paying my daughter's university fees.’⁷⁸⁹

Rachel-Lee Louise Zwarts

[813] Ms Zwarts has worked in the hospitality industry since about 2010, and has been an apprentice chef since September 2013.⁷⁹⁰ In May 2015 she started as a full-time apprentice chef at the Torrens Arms Hotel. Ms Zwarts works split shifts on various days and regularly works on weekends and public holidays:

‘I usually work the public holidays and I like to get the extra money that comes from penalty rates on Sundays and public holidays. The extra money makes up for the difficulty of working those days.

Weekends and public holidays are the times I get paid the most so I try to work these days.’⁷⁹¹

[814] As to the impact of working on Sundays Ms Zwarts’ evidence is as follows:

‘I am religious and working Sundays makes it really difficult to get to Church.

The main services are on Sunday morning. I usually work quite late in Saturday night and if I have to work on Sunday my shift starts at 10.00am so I can’t get to the Sunday morning service.

I try to attend evening services when I can but it isn’t the same. There are less people and it is not as much of a community. My family is not there at the evening services.

I don’t get to see much of my family because by the time I get up after working late the night before they have gone to work. When I get home it is pretty late, well after 10.30pm, and they are in bed.’⁷⁹²

[815] Ms Zwarts deals with the impact of a reduction in penalty rates as proposed by the Hospitality Employers at paragraphs 24–32 of her statement, in particular:

‘On a nine and a half hour shift work on Sunday I would lose \$26.32 if the changes to the penalties were put in place. I am only paid a base rate of \$11.07 per hour. This means I would be working effectively two hours for no pay.

If the changes happen to the penalties it will really affect me because I don’t get paid very much at the moment because I am an apprentice. Any reduction in pay will make it even harder for me to pay my bills and try to save.

I only have around \$50.00 to spend after my bills now. With my expenses and the pay I receive I struggle to save at all even though I still live at home. Without the penalty rates I will have hardly anything to spend or save; it doesn’t seem fair because I work really hard.’⁷⁹³

7.2.5 Consideration

[816] We propose to deal with the s.134 considerations first.

[817] Section 134(1)(a) of the FW Act requires that we take into account ‘relative living standards and the needs of the low paid’. 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). As shown in Chart 24 (see paragraph [735]) a substantial proportion of award-reliant employees covered by the *Hospitality Award* are ‘low paid’.

[818] As stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs.

[819] The evidence of the United Voice lay witnesses puts a human face on the data and provides an individual perspective on the impact of the proposed changes. Many of these employees earn just enough to cover their weekly living expenses. Saving money is difficult. Unexpected expenses such as school trips, illness, or repairs, can produce considerable financial stress. As United Voice submits:

‘The prospect of reductions in income has already caused anxiety. Many workers are unable to work extra hours to make up for lost income without making significant changes to their lives, such as reducing or stopping study, or finding substitute childcare. There is genuine uncertainty about whether employers would actually be in a position to offer additional hours work to make up for the lost income.’⁷⁹⁴

[820] Ms Gordon’s evidence⁷⁹⁵ is illustrative in this regard. In the weeks she worked on weekends she earned between \$357.90 and \$362.50. The proposed cuts to penalty rates, if made, would reduce her income by between \$25 and \$40 per week. She manages her spending carefully, and any reduction would mean she has ‘little margin for error in her spending’.⁷⁹⁶

[821] Ms Gordon’s evidence was that she is unlikely to be offered additional hours because the work is highly seasonal, and even if she was offered additional hours, her ability to accept those hours was limited by her responsibilities as primary caregiver for her nephew.⁷⁹⁷

[822] The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission’s conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers’ hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.

[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 of pay (independent of penalty rates).

[824] We are conscious of the adverse impact of a reduction in Sunday penalty rates on the earnings of hospitality workers who work on Sundays and this will be particularly relevant to our consideration of the transitional arrangements associated with any such reduction.

[825] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that

employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[826] The Hospitality Employers submit that s.134(1)(b) is a ‘neutral’ consideration as ‘The evidence does not establish that the current level of penalty rate encourages or discourages collective bargaining’.⁷⁹⁸

[827] It is important to appreciate that s.134(1)(b) speaks of ‘the need to *encourage* collective bargaining’. As we are not persuaded that a reduction in penalty rates would ‘*encourage* collective bargaining’ it follows that this consideration does not provide any support for a change to Sunday penalty rates.

[828] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. Obtaining employment is the focus of s.134(1)(c).

[829] On the basis of the common evidence we conclude that a reduction in the Sunday penalty rate in the *Hospitality Award* is likely to lead to some additional employment. We are fortified in that conclusion by the evidence of the lay witnesses called by the Hospitality Employers. As mentioned earlier, that evidence supports the following propositions:

- some owner operators of small to medium hospitality enterprises will provide additional hours to *Hospitality Award* covered employees on Sundays, rather than doing the work themselves; and
- a lower Sunday penalty rate would increase the level and range of services offered by some hospitality enterprises, with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees).

[830] We reject United Voice’s submission that the lay evidence led by the Hospitality Employers is simply conjecture and speculation, and that ‘None of that evidence supports the contention that cuts to penalty rates will have any impact on employment’.⁷⁹⁹

[831] United Voice also submits⁸⁰⁰ that it is significant that none of the employers have produced any ‘natural experiments’ evidence to support their contention that cutting penalty rates will increase employment. Further, it submits that the ‘employment effect’ is a critical part of the employer’s case and accordingly:

‘It is proper to expect that they would have sought to provide available empirical information to explain that effect. Given such evidence was available, and had been identified to the employers, it is reasonable to draw an inference that such evidence was not relied upon because it would not have assisted the employer parties.’⁸⁰¹

[832] United Voice rely on *Jones v Dunkel*⁸⁰² in support of the proposition that we should draw the suggested inference from the absence of any ‘natural experiment’ evidence.

[833] Some of the principles in relation to what is commonly termed ‘the rule in *Jones v Dunkel*’ are as follows:

1. The unexplained failure by a party to give evidence, to call witnesses, or to tender documents or some other evidence *may* in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The rule provides that an inference *may* be drawn in certain circumstances not that such an inference *must* be drawn.⁸⁰³

2. The rule permits an inference that the untendered evidence would not have helped the party who failed to tender it and entitles the Commission to more readily draw any inference fairly drawn from the other evidence. But the rule does not permit an inference that the untendered evidence would in fact have been damaging to the party not tendering it. The rule cannot be employed to fill gaps in evidence, or to convert conjecture and suspicion into inference.⁸⁰⁴

3. The rule only applies where a party is 'required to explain or contradict' something and this depends on the issues thrown up by the evidence in a particular case.⁸⁰⁵

[834] We accept that there have been a number of occasions in the past two decades where penalty rates or minimum wages have been reduced in the Accommodation and food services sector and that such occasions provide an opportunity for a 'natural experiment' to discern the employment effects of such a change. As the Full Bench observed in the *Restaurants 2014 Penalty Rates decision*:

'There are clear examples in the history of industrial regulation of the restaurant industry in which weekend penalty rates have been abolished or reduced, but no evidence was forthcoming to demonstrate that this had discernibly positive effects in terms of turnover and employment. The Deputy President, correctly in our view, pointed to the period 2006 to 2010 in Victoria when restaurant operators not bound by the then-applicable federal award were not required to pay any penalty rates at all as providing an opportunity to test empirically what the business and employment effects of a removal of penalty rates would be. However, no evidence was called at first instance from any restaurant operator in Victoria, and the evidence did not otherwise touch upon this period. There was another historical opportunity which we can identify. Prior to the Work Choices period commencing in 2006, restaurants in New South Wales were largely regulated by an award of the Industrial Relations Commission of New South Wales, the Restaurant &c., Employees (State) Award. In 1996, the NSW Commission (Marks J) heard and determined various applications, including an application from the Restaurant and Catering Association of NSW and other employers, in respect of that award. The employers' application sought amongst other things a reduction in weekly penalty rates. In the Commission's decision issued on 23 August 1996, it was determined that the Saturday penalty rate should be reduced from 50% to 25% and the Sunday penalty rate reduced from 75% to 50% (with casual employees receiving casual loadings in addition). On the employers' case presented before the Deputy President, that change should have increased turnover and employment in the NSW restaurant industry. But there was no evidence that was actually the case.'⁸⁰⁶

[835] Further, as pointed out by United Voice, the transitional arrangements in respect of penalty rates for casual employees in South Australia covered by the *Hospitality Industry (General) Award 2010* provide a further opportunity for a 'natural experiment'.

[836] We are not persuaded that the rule in *Jones v Dunkel*⁸⁰⁷ is applicable in the context of these proceedings, for 3 reasons.

[837] First, as mentioned in Chapter 3 (at [110]), the Review is to be distinguished from *inter parties* proceedings of the type to which *Jones v Dunkel*⁸⁰⁸ is apposite.

[838] Second, the application of the rule is dependent on the issues thrown up in the particular case. Contrary to United Voice's contention, the Hospitality Employers and the RCI do not advance the bold proposition that cutting penalty rates will increase employment. The positions advanced are more nuanced. At paragraph [35] of their reply submission the Hospitality Employers made it clear that:

‘... the Associates do not advance the broad proposition that any reduction in any loading/penalty will necessarily have a consequential employment effect.’

[839] In its final written submission at paragraph [97], the RCI advances the following argument in relation to the consideration at s.134(1)(c) (which is directed to employment):

‘... Having regard to the evidence, it is apparent that the current level of penalty rates, particularly on Sundays, is having a detrimental effect on trading and employment opportunities.’

[840] Further, in its reply submission, at paragraph [25], the RCI states:

‘The point of RCI's submissions has never been about advocating that certain positive outcomes will be achieved as a matter of fact but rather the importance of removing disincentives and barriers which exist.’

[841] Third, *Jones v Dunkel*⁸⁰⁹ is directed at the unexplained failure by a party to call a witness or to tender documents. It seems to us that United Voice is seeking to extend the rule such that a party would be required to *create* evidence – in the form of a report documenting the effects of a ‘natural experiment’. No authority was advanced in support of such a proposition.

[842] If we are wrong about the application of the rule in *Jones v Dunkel*⁸¹⁰ in the present context we would exercise our discretion *not* to draw the inference sought. In doing so we have had regard to the issues raised above and to the inherent difficulty of undertaking research of this nature.

[843] In the context of labour market studies, Card (1992)⁸¹¹ first used the natural experiment approach to assess changes in employment in California with a group of neighbouring locations that, although similar to California, made no adjustment to their minimum wage. Although this methodology has continued to influence research in this field, it is difficult to apply this technique to labour market research in Australia.

[844] Credible Australian research which quantitatively analyses the impact of changes in the national minimum wage and award rates of pay on employment and hours worked would be relevant to the conduct of annual wage reviews.⁸¹² Accordingly, as part of its medium-term research program, the Commission commenced a competitive open tender process for this research in September 2014. The tender sought to elicit research which could quantify the impact of changes in national minimum wage and award rates of pay on employment and hours worked in Australia through methods other than Computable General Equilibrium modelling. As noted in the tender:

‘...[r]esearch that empirically estimates the employment effects of minimum wages adjustments in an Australian context has been limited. This is due to the specific nature of the research, which draws on an in-depth understanding of Australia’s industrial relations system and the limitations posed by data collected in Australia.’⁸¹³

[845] To elicit as many quality tenders as possible, the Commission undertook a shortlisting process which included providing a nominal fee to successful shortlisted tenderers to further develop their proposals. The Commission also sought the services of expert academics to provide comments on de-identified tender proposals which were incorporated into the Commission’s tender evaluation process. Unfortunately, despite this process the Commission was unable to award a contract due to the lack of reliable data.

[846] Several reasons make natural experiments for changes in penalty rates more difficult to analyse than changes in minimum wages. In particular, there is no data source that regularly identifies workers receiving penalty rates, thus making it more difficult to identify an appropriate group of workers that form a comparator group (one that shares the same characteristics as people affected by the adjustment but do not benefit from the adjustment).

[847] In addition to this, longitudinal data that can identify the affected workers and track their labour market movements over time is required and this also does not currently exist in Australia. Again, data sources of this nature are strongly featured throughout the international evidence.

[848] Contrary to United Voice’s submission the consideration in s.134(1)(c) lends support to a reduction in Sunday penalty rates.

[849] It is convenient to deal with the considerations s.134(1)(d) and (f) together.

[850] Section 134(1)(d) requires that we take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’.

[851] Section 134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[852] It is self-evident that if the Sunday penalty rate was reduced then employment costs would reduce. It was not contended that a reduction in the Sunday penalty rate would impact on productivity or regulatory burden. This consideration supports a reduction in the Sunday penalty rate. As we have mentioned, s.134(1)(f) is not confined to a consideration of the impact of the 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’. In addition to the impact on employment costs it is also apparent that a reduction in the Sunday penalty rate would have other positive effects on business.

[853] The evidence of the lay witnesses called by the Hospitality Employers supports the proposition that the current level of Sunday penalty rates has led employers to reduce labour costs associated with Sunday trading by restricting the availability of services. The range of such operational limitations broadly fall into 3 categories:

- restricting trading hours;
- lower staffing levels; and
- restrictions on the type and range of services provided.

[854] The evidence of the Hospitality Employers' lay witnesses also supports the proposition that a lower Sunday penalty rate would *increase* the level and range of services offered on a Sunday. The type of changes suggested in the lay witness evidence are:

- extended operating hours;
- providing additional meal services;
- providing live entertainment;
- investing in infrastructure to provide services; and
- provide cleaning services for accommodation facilities.

[855] On this basis, it may be said that a reduction in penalty rates will promote flexible modern work practices. This consideration lends support to a reduction in Sunday penalty rates.

[856] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly, 'employees working on weekends'. As mentioned earlier, an assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[857] It is convenient to deal with matters (ii) and (iii) first.

[858] As to matter (ii), the minimum wage rates in the *Hospitality Award* do not already compensate employees for working on weekends. We note that the *Hospitality Award* makes provision for annualised salary arrangements under which an employee is paid at least 25 per cent above their minimum weekly wage rate instead of, among other things, penalty rates for weekend work, provided such an agreement does not disadvantage the employee concerned (see clause 27.1 of the *Hospitality Award*). But such arrangements are not the focus of matter (ii).

[859] In relation to matter (iii), weekend work is a feature of the Hospitality sector. As mentioned earlier (see [715]), most enterprises in the Hospitality sector operate 7 days a week compared to 31.1 per cent of enterprises across all industries (80.5 per cent). Almost half of

all enterprises only operate on weekdays. This feature of the Hospitality sector was confirmed by the lay witnesses called by the Hospitality Employers and United Voice.

[860] We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by United Voice spoke to the adverse impact of weekend work on the ability of hospitality sector employees to engage in social and familial activities. While for some of those witnesses Sunday work had a particularly adverse impact, most simply referred to the impact of weekend work and did not distinguish between Saturday and Sunday work.

[861] We note that in the event Sunday penalty rates were reduced (but not removed entirely) employees working on Sundays would still receive ‘additional remuneration’.

[862] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in Sunday penalty rates would apply equally to men and women workers. For the reasons given earlier we regard s.134(1)(e) as neutral to our consideration of the claims before us.

[863] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’. We regard s.134(1)(g) as neutral to our consideration of the claims before us. No party contended to the contrary.

[864] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[865] The Hospitality Employers note that the evidence presented has been addressed to the hospitality industry and that: ‘It is not suggested that it would allow for an informed consideration of the economy wide effects of the current Award’.⁸¹⁴ We agree with the submission put. A detailed assessment of the impact of a reduction in Sunday penalty rates in the *Hospitality Award* on the national economy is not feasible on the basis of the limited material before us.

[866] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us.

[867] The central issue in these proceedings is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’.

[868] The Hospitality Employers’ principal contention is that the existing penalty rate acts as a deterrent to employment and as such the current penalty rates are neither fair nor relevant. In short, the existing Sunday penalty rate is not ‘proportional to the disability’. In this context the Hospitality Employers point to the fact that the existing Sunday loading (75 per cent) is three times the loading for Saturday work (25 per cent).

[869] As set out earlier, the Hospitality Employers propose that the Sunday penalty rate be reduced from 175 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees). No change is proposed to Saturday penalty rates.

[870] The change proposed by the Hospitality Employers is said to be fair and relevant for the contemporary hospitality industry, having regard to the following matters:

- (a) the availability of labour;
- (b) the willingness of employees to work and a preference for Sunday, especially from amongst casual employees;
- (c) consumer activity on weekends;
- (d) workforce composition;
- (e) hospitality industry business trading hours; and
- (f) the frequency of work on weekends and public holidays.

[871] In opposing the changes sought by the Hospitality Employers, United Voice contends that a reduction in penalty rates will not result in any measurable impact, other than the employer cash flow and profits.⁸¹⁵

[872] As to the proposition that (in essence) a reduction in penalty rates will only increase employer cashflow and profits, we note that this submission is put by United Voice in respect of each of the employer applications in which it has an interest (namely, the *Hospitality Award*, the *Restaurant Award* and the *Fast Food Award*). A similar submission is advanced by the SDA, in relation to the *Pharmacy Award*, it submits:

‘It can be anticipated that, in some material proportion, any reduction in labour costs will be absorbed as profit rather than applied to increasing the hours of work (whether by existing or new employees).’⁸¹⁶

[873] It is convenient to deal with these submissions here, rather than simply repeat the point in the sections dealing with each of the modern awards.

[874] As observed in the PC Final Report, in examining this issue it is important to distinguish between short-run and long-run impacts:

‘Any changes in the cost of any inputs — up or down — must have at least short-term impacts on the profitability of the relevant businesses as they do not usually instantaneously alter their input mix, drop prices or adapt in other ways. So the imposition of higher penalty rates resulting from award modernisation in some industries and jurisdictions would have had short-term adverse effects on profitability, while the reduction of penalty rates, as recommended in this inquiry, would also provide short-term additional profits to businesses. The duration of these profitability effects will depend on the specific circumstances of the market...

However, long run profitability is unlikely to be affected by penalty rate levels. Effects on profits are not enduring at the industry level because two processes tend to restore normal levels of profitability. Higher rates of return on capital attract entry in industries, such as those in the HERRC, that do not face substantial business entry and exit costs. (Exit and entry rates are high in most industries, and especially so in restaurants, catering, takeaways and cafes — figure 14.2 and table 14.2.) This spreads existing customers among a larger number of businesses, and tends to lower returns.

Equally, in a workably competitive market (as is clearly the case in the HERRC industries), existing businesses facing competition tend to lower average prices or increase the quality of the product to consumers by opening longer, increasing staff-to-customer ratios, or employing better qualified staff. Their business strategy will depend on market conditions. But, whether it is through price or quality effects, increased profits are ultimately transferred to consumers. The converse process applies when a regulatory shock adversely affects profits, with the failure of some businesses and the adaptation by others (such as by opening for reduced hours on Sundays).⁸¹⁷

[875] The Productivity Commission goes on to observe that there is ‘little evidence to suggest that measures of profits have any particular trend reflecting penalty rates (table 14.3)’. Table 14.3 from the PC Final Report is reproduced below as Table 35.

Table 35

Profits and losses in selected industries

2006-07 to 2013-14^a

	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
	Index of profit margin (2006-07=100)							
	Index	Index	Index	Index	Index	Index	Index	Index
Total retail trade	100.0	91.4	93.7	98.3	98.8	95.1	94.3	97.6
Accommodation	100.0	80.5	126.3	102.3	72.3	111.8	105.0	91.7
Food and beverage services	100.0	64.7	98.7	125.2	98.6	102.8	103.5	102.8
Total arts and recreation services	100.0	104.5	106.9	117.1	102.5	100.3	99.8	98.4
All industries	100.0	93.9	85.7	95.6	103.5	100.6	87.6	90.1
	Share of enterprises making a loss							
	%	%	%	%	%	%	%	%
Total retail trade	20.7	26.2	24.9	28.4	30.9	27.6	26.2	24.3
Accommodation	26.4	26.0	25.3	23.8	..	19.4	19.4	19.6
Food and beverage services	22.5	33.2	34.8	30.7	..	23.4	22.9	25.6
Total arts and recreation services	29.9	27.6	28.2	30.6	34.6	19.3	20.2	24.7
All industries	23.5	23.7	24.8	25.4	25.4	21.4	20.8	20.0

^a Profit margins (operating profits as a share of revenue) vary from industry to industry because they have varying levels of capital. For example, an industry may have a high profit margin because it is a capital intensive industry, though its return on capital may be equivalent to another business with a lower profit margin. Accordingly, normalising the initial profit margin to 100 provides a better way of comparing the measures over time.

Source: ABS (various issues), *Australian Industry*, Cat. no. 8155.0.

[876] Given the matters referred to in the PC Final Report, we reject the United Voice and SDA contention that a reduction in penalty rates will *only* increase employer cashflow and profit. While such changes will have a short term impact on the cashflow and profitability of the relevant businesses, long run profitability is unlikely to be affected by a reduction in penalty rates.

[877] Returning to the submissions advanced by the Hospitality Employers we note at the outset that they are *not* proposing that the Sunday penalty rate be reduced to the Saturday penalty rate. The Hospitality Employers also accept that there is disability associated with Sunday work and that there is a need to compensate for that disability. As stated in their written submissions:

‘... the Associations accept that there is disability associated with working on Sundays. The Associations accept the need for additional remuneration on Sundays in order to compensate employees for the disability and to attract labour to work on that day. In accepting the existence of disability and a need to compensate, the Associations also say that the Award should meet that need in a way that is fair and balanced. Importantly, the Award should not penalise the hospitality employer or deter employment.’⁸¹⁸

[878] It is implicit in the claim advanced that the Hospitality Employers accept the proposition that the disutility associated with Sunday work is *higher* than the disutility associated with Saturday work. If this was not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same.

[879] We note that the Hospitality Employers also submit that the Sunday penalty rate should be set having regard to the need to attract labour. We do not accept that submission. Modern awards provide a minimum safety net of terms and conditions. A modern award penalty rate must be ‘fair and relevant’ and set having regard to the applicable provisions in the FW Act. Considerations associated with the need to attract labour are best addressed through collective bargaining or the payment of overaward wages.

[880] We note that the PC Final Report recommended that for full-time and part-time employees the Sunday penalty rates be set at the higher rate of 125 per cent and the existing Saturday penalty rate.

[881] In the *Hospitality Award* the existing Saturday penalty rate for full-time and part-time employees is 125 per cent. Hence, if adopted the Productivity Commission recommendation would result in the reduction of the Sunday penalty rate for full-time and part-time employees from 175 per cent to 125 per cent.

[882] As mentioned earlier, in the Review the Commission is not constrained by the terms of a particular application, it may vary a modern award in whatever terms it considers appropriate, subject to procedural fairness considerations. Accordingly, if we were satisfied of the merit of doing so, it would be open to us to adopt the recommendation in the PC Final Report (and reduce the Saturday penalty rate to 125 per cent) or indeed to go further and reduce the Sunday penalty rate. But as we are not satisfied of the merit of doing so, we have decided not to adopt that course.

[883] As set out in Chapter 6, there is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Further, generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of that disutility is much less than in times past.

[884] We are satisfied that the existing Saturday penalty rates in the *Hospitality Award* achieve the modern awards objective – they provide a fair and relevant minimum safety net.

7.2.6 Conclusion

[885] For the reasons given we have concluded that the existing Sunday penalty rate is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The word ‘relevant’, in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.

[886] Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, we have decided to reduce the Sunday penalty rate for full-time and part-time employees, from 175 per cent to 150 per cent.

[887] We now turn to the application of weekend penalty rates in the *Hospitality Award* to casual employees. The *Hospitality Award* provides that casual employees are paid a casual loading of 25 per cent.

[888] Casuals are currently paid 150 per cent of the applicable minimum hourly rate for Saturday work, that is, the 125 per cent Saturday penalty rate *plus* the 25 per cent casual loading. Yet, curiously, the Sunday rate for casuals is 175 per cent (inclusive of the 25 per cent casual loading), which is the same as the Sunday rate for full-time and part-time employees.

[889] As we have mentioned, the PC Final Report makes reference to the interaction of penalty rates and casual loadings and concludes that:

‘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.’⁸¹⁹

[890] There is considerable force in the Productivity Commission’s conclusion.

[891] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.

[892] The Hospitality Employers acknowledge the distinct purpose of penalty rates, when they submit:

‘... penalty rates can be distinguished from other terms and conditions such as minimum wages by virtue of penalty rates being compensation for the disability associated with the time at which work is performed. Penalty rates do not compensate for the nature of the work or the skills and attributes required to perform it – those being the purpose of minimum wages.’⁸²⁰

[893] The different treatment for casuals who work on Sundays (as opposed to Saturdays) may be traced back to a decision by Commissioner Gay, on 6 May 1993, to vary the *Hotels, Restaurants and Hospitality Industry Award 1992* (a precursor award to the *Hospitality Award*).⁸²¹ Prior to that decision weekend penalty rates for casual employees were 75 per cent of the ordinary rate for work on Saturdays (175 per cent) and 100 per cent on Sundays (200

per cent) . The Commissioner fixed a Saturday penalty rate of 25 per cent on Saturdays and a Sunday penalty rate of 75 per cent for all employees (i.e. full-time, part-time and casuals). The effect was that the Saturday rate for casuals was reduced from 175 per cent to 150 per cent and the Sunday rate for casuals from 200 per cent to 175 per cent, inclusive of casual loading. The Commissioner's reasons for adopting that course are not immediately apparent from his decision. We note that the Commissioner expressed the view that the Sunday penalty rate should be less than the overtime rate but appreciably more than the Saturday penalty rate.

[894] The Commissioner's decision also predates the *Casual Loading Test Case Decision*, in December 2000.⁸²² In that matter the Full Bench increased the casual loading in the *Metal Industries Award 1998*, to 25 per cent, and said:

‘... we are satisfied that paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects, should constitute the main components to be assessed in determining casual loading...’⁸²³

[895] The distinct purpose of the casual loading is made clear from clause 13.1 of the *Hospitality Award*:

‘The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment’

[896] Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on Sundays.

[897] In our view, the casual loading should be *added* to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission's ‘default’ method. Accordingly, the Sunday rate for casual employees in the *Hospitality Award* will be $25 + 150 = 175$ per cent.

[898] We note that this is the rate currently prescribed in clause 32.1 for casuals and hence we do not propose to change that rate. The Sunday rate for full-time and part-time employees will be reduced to 150 per cent.

[899] We deal with the transitional arrangements associated with the reduction in the *Hospitality Award* Sunday penalty rate (for full-time and part-time employees) in Chapter 13 of our decision.

[900] For the reasons given earlier, we are satisfied that the existing Saturday penalty rates in the *Hospitality Award* provide a fair and relevant minimum safety net and accordingly, they achieve the modern awards objective. Accordingly, we do not propose to vary the existing Saturday penalty rates.

[901] Finally, we turn to the proposal by the Hospitality Employers to remove the reference to ‘penalty’ and ‘penalty rates’ in clause 32 of the *Hospitality Award* and to insert references to ‘additional remuneration’. We note that a similar variation is proposed by the Pharmacy Guild of Australia in respect of the *Pharmacy Industry Award 2010*.

[902] No particular submission was advanced in support of the proposal to change the terminology in the *Hospitality Award*, by either the Hospitality Employers or any other party and it is opposed by United Voice.⁸²⁴

[903] We assume that the change proposed is sought on the basis that s.134(1)(da)(iii) of the FW Act speaks of ‘the need to provide *additional remuneration* for ... employees working on weekends’. The change proposed would also be consistent with the contemporary purpose of ‘penalty rates’. As mentioned in Chapter 3, deterrence is no longer a relevant consideration in setting weekend penalty rates. The purpose of such rates is not to penalise employers for rostering employees to work at such times, it is to compensate employees for the disutility of working on weekends. These considerations favour the change in terminology proposed by the Hospitality Employers.

[904] However, as United Voice submits, such a change may create uncertainty and confusion amongst the employers and employees to whom the *Hospitality Award* applies. The expression ‘penalty rates’ is commonly understood and is used in the FW Act. Indeed s.139(1), which deals with what type of terms may be included in a modern award, refers to: ‘penalty rates for ... employees working on weekends’.

[905] Further, the change in terminology proposed is only advanced in respect of 2 modern awards. The introduction of different expressions (which have the same meaning) in different modern awards is apt to confuse. Such an outcome would not be consistent with ‘the need to ensure a simple, easy to understand ... modern award system’ (s.134(1)(g)). If changes of the type proposed were to be made then, *prima facie*, they should be made in all modern awards which currently provide for ‘penalty rates’.

[906] The submissions in respect of this issue were very limited. We propose to provide a further opportunity for interested parties to express a view about the proposed change in terminology. We deal with the process for doing so in Chapter 12: Next Steps.

7.3 Registered and Licensed Clubs Award 2010

7.3.1 The Claims

[907] CAI seeks to vary clause 29 – Penalty Rates of the *Registered and Licensed Clubs Award 2010* (the *Clubs Award*) by reducing the penalty rates for Saturday work, from 150 per cent to 125 per cent, and for Sunday work, from 175 per cent to 150 per cent. The changes sought are set out below, in a marked up version of clause 29.1:

29.1 An employee other than a maintenance and horticultural employee performing work on the following days will be paid the following percentage of the minimum wage rate in clause 17—Minimum wages for the relevant classification:

	Monday to Friday	Saturday	Sunday	Public holiday
	%	%	%	%
Full-time and part-time	100	150 <u>125</u>	175 <u>150</u>	250 <u>200</u>
Casual (inclusive of the 25% casual loading)	125	150	175 <u>150</u>	250 <u>200</u>

[908] If granted, CAI's proposed variation to clause 29.1 would:

- reduce the penalty rates paid to full-time and part-time employees for work performed on a Saturday from 150 per cent of their minimum rate of pay to 125 per cent;
- reduce the penalty rates paid to all employees for work performed on a Sunday from 175 per cent of their minimum rate of pay to 150 per cent;

[909] CAI also seek reductions in the public holiday penalty rate. We deal later with that aspect of CAI's claim.

7.3.2 Background to the *Clubs Award*

[910] In the award modernisation process, the Award Modernisation Full Bench initially drafted and published a single exposure draft for the hospitality industry. At that stage the Full Bench said:

'We have decided to defer consideration of award coverage for the licensed and registered club sector. It may be that the sector could be included in the proposed hospitality industry modern award, with or without some special conditions and/or appropriate transitional provisions. The different types of clubs within the sector, and the different activities undertaken by them, raise issues of potential overlap with events staged by clubs and grounds management and maintenance. This matter requires further consideration in Stage 3.'⁸²⁵

[911] The Full Bench confirmed its commitment to this approach later in 2008:

'In our statement of 12 September 2008, which accompanied the exposure drafts, we expressed a provisional view that the nature of work in the hospitality industry and the terms and conditions of employment in federal awards and NAPSAs were such that a single modern award could be made in respect of the hospitality industry, although consideration of the clubs and off-shore resorts sectors were deferred until Stage 3.'⁸²⁶

[912] The issue of a separate clubs award was considered during the Stage 3 award modernisation proceedings. At that time CAI submitted that 'a national Club Industry Award should be made, that is separate and distinct from any other rationalised hospitality industry award that may be made as part of this process'.⁸²⁷ CAI contended that the clubs industry 'is a separate and distinct industry from most other industries in the hospitality sector', based on the following:

- Clubs are not-for-profit organisations;
- Clubs are community based and community run organisations;
- Clubs are established on the basis of interest mutuality;
- Clubs are subject to separate and distinct regulations and regulatory framework;
- They are required to adopt a set of rules (a constitution) subject to the provisions of the applicable regulatory framework;

- They are subject to control by members and only members and bona-fide visitors can avail themselves of the facilities;
- They do not pay a dividend to their members so any excess funds are channeled back into the community;
- Each club is committed to maximizing local support and offering affordable social opportunities in a fun, safe and friendly environment in order to raise funds in furtherance of their community objectives;
- Employees of Clubs provide a service to their members which goes beyond the service provided in a commercial establishment;
- In many Regional Areas employees of Community Clubs are multi-skilled in that they perform work across a range of functions such as Clerical, greenkeeping and counter service;
- Clubs offer a variety of sports, activities and entertainment for its patrons and members that are not normally offered at other hospitality venues.

[913] The Full Bench dealt with this issue during the Stage 3 proceedings as follows:

‘The question of award coverage for licensed and registered clubs first arose in the priority stage of award modernisation. We deferred a final conclusion, noting that it might be possible to include the sector in the Hospitality Modern Award and the potential overlap in relation to events staged by clubs and grounds management and maintenance.

There is general support amongst employer and employee associations in the industry for a separate licensed and registered clubs modern award. While it might be possible to include clubs within the Hospitality Modern Award, with some sector specific arrangements, we have decided to make a separate clubs award. We publish a draft Registered and Licensed Clubs Award 2010. The LHMU and CAI provided a draft award, in a largely agreed form, and we have used this as the basis of the exposure draft.’⁸²⁸

[914] The *Clubs Award* was published in final form on 4 September 2009.⁸²⁹

7.3.3 The Clubs Industry

[915] The ABS data of direct relevance to the Clubs industry is quite limited.

[916] As mentioned earlier, data is collected by the ABS on industry employment using the ANZSIC. Clubs constitute a class within the Accommodation and food services division.

[917] A paper⁸³⁰ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Using this framework the *Clubs Award* is ‘mapped’ to the Clubs (Hospitality) industry class, which is at the ANZSIC 4 digit level.

[918] The Census is the only data source that contains all of the employment characteristics in Table 36 for Clubs (Hospitality). The most recent Census data is from August 2011.

[919] The August 2011 Census data shows that there were around 43 000 employees in Clubs (Hospitality). Table 36 compares certain characteristics of employees in the Clubs (Hospitality), with employees in ‘all industries’.

Table 36 ⁸³¹
**Labour force characteristics of the Clubs (Hospitality) industry class,
ABS Census 9 August 2011**

	Clubs (Hospitality)		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	19 577	45.2	4 207 586	50.8
Female	23 718	54.8	4 082 662	49.2
Total	43 295	100.0	8 290 248	100
Full-time/part-time status				
Full-time	18 811	45.8	5 279 853	67.8
Part-time	22 264	54.2	2 507 786	32.2
Total	41 075	100.0	7 787 639	100
Highest year of school completed				
Year 12 or equivalent	22 731	53.5	5 098 228	62.6
Year 11 or equivalent	4509	10.6	885 404	10.9
Year 10 or equivalent	11 863	27.9	1 687 055	20.7
Year 9 or equivalent	2332	5.5	317 447	3.9
Year 8 or below	963	2.3	141 973	1.7
Did not go to school	59	0.1	20 158	0.2
Total	42 457	100.0	8 150 265	100
Student status				
Full-time student	6170	14.4	612 990	7.5
Part-time student	2502	5.9	506 120	6.2
Not attending	34 095	79.7	7 084 360	86.4
Total	42 767	100.0	8 203 470	100
Age (5 year groups)				
15–19 years	4363	10.1	547 666	6.6
20–24 years	7817	18.1	927 865	11.2
25–29 years	4556	10.5	1 020 678	12.3
30–34 years	3749	8.7	933 827	11.3
35–39 years	3771	8.7	934 448	11.3
40–44 years	3800	8.8	938 386	11.3
45–49 years	4050	9.4	911 739	11
50–54 years	4025	9.3	848 223	10.2
55–59 years	3425	7.9	652 190	7.9
60–64 years	2496	5.8	404 470	4.9
65 years and over	1243	2.9	170 718	2.1
Total	43 295	100	8 290 210	100
Average age	37.5		38.8	
Hours worked				
1–15 hours	7693	18.7	875 554	11.2
16–24 hours	6553	16.0	792 539	10.2
25–34 hours	8018	19.5	839 694	10.8
35–39 hours	7485	18.2	1 676 920	21.5
40 hours	4902	11.9	1 555 620	20
41–48 hours	3296	8.0	895 619	11.5
49 hours and over	3128	7.6	1 151 693	14.8
Total	41 075	100	7 787 639	100

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[920] The profile of Clubs (Hospitality) employees differs from the profile of employees in ‘All industries’ in three important respects:

- (i) about 54 per cent of Club employees work part-time (i.e. less than 35 hours per week⁸³²), compared with only 32.2 per cent of all employees;
- (ii) over one-third (34.7 per cent) of Club employees work 1–24 hours per week, compared to just over one-fifth (21.4 per cent) of all employees; and
- (iii) Club employees are likely to be younger than employees in other industries, 28.2 per cent of Club employees are aged 15–24 years, compared with 17.8 per cent for all industries.

7.3.4 The Evidence

(i) *Clubs Australia*

[921] CAI called 5 witnesses in support of its application to vary the *Clubs Award*:

- Richard Tait: Executive Director for CAI and Executive Manager of Workplace Relations for The Registered Clubs Association of NSW (ClubsNSW);⁸³³
- John Dellar: Manager of Club Hawthorn Incorporated, a club in Hawthorn, Victoria;⁸³⁴
- Gwyn Rees: Deputy Chief Executive of Clubs Australian Capital Territory;⁸³⁵
- Jeffrey Cox: Operations Manager of Coffs Ex Services Club, an Ex Services and Sports Club that owns two other community clubs in Urunga and Woolgoolga; and⁸³⁶
- Anthony Casu: General Manager of Narooma Sporting & Services Club Ltd.⁸³⁷

[922] United Voice objected to substantial parts of Mr Tait’s original witness statement. That objection was largely resolved by agreement, between United Voice and CAI and as a consequence the most relevant aspects of Mr Tait’s evidence – insofar as it concerns weekend penalty rates – is set out at Annexure B to Exhibit CAI.⁸³⁸ Annexure B to Mr Tait’s statement is a report by *KPMG ‘National Club Census 2011’*, dated 2012 (the KPMG Clubs Report). KPMG was engaged to examine the economic and social contribution of licensed clubs in Australia. Mr Tait described the KPMG Clubs Report as ‘a lobbying document in relation to showing the social contribution clubs have to their community and... for the government to understand that contribution’.⁸³⁹ The KPMG Clubs Report provides an analysis of the *gross* (as distinct from net) benefits of clubs to the Australian economy, as noted at paragraphs 67–68 of the report:

‘It is important to note that the analysis undertaken as part of this project focuses on the gross benefits of clubs to the Australian economy, as opposed to the net benefits. A gross analysis differs from a net analysis in the following two ways:

- Firstly, it has been widely acknowledged that problem gambling creates a social cost, or dis-benefit, driven by addictive behaviour and its subsequent social costs. A net analysis of the benefits of clubs would measure the benefits of the clubs as the sum of the direct and indirect economic benefits net of any dis-benefits, including those driven by problem gambling.
- Secondly, gambling involves a transfer of wealth between two parties. In a state or territory economy, gambling revenue derived from interstate and international tourists represents a net gain to the local economy. However, gambling losses by local residents only represent a partial transfer between two sectors of the economy. On this basis, consumer expenditure on gambling would therefore be substituted elsewhere in the economy if clubs did not operate. The economic and social benefits driven by these changes in expenditure would potentially be different to those realised from expenditure at registered clubs. A complete net analysis would account for these expenditure substitutions and their potential economic and social benefits.’

[923] The KPMG Clubs Report relies on data obtained from individual clubs who responded to a survey during the course of 2011. A copy of the survey instrument is annexed to the KPMG Clubs Report.⁸⁴⁰

[924] All 6,577 clubs who were licensed with the respective State and Territory licensing bodies as at May 2011 were invited to participate in the survey. Some 1,015 clubs completed the survey, a response rate of 15 per cent. To adjust for differences between the average size and type of clubs who responded to the survey (i.e. the sample of survey respondents) and the entire industry (i.e. population of licensed clubs in Australia), KPMG stratified both the sample and population data. The sampling error at a 95 per cent confidence interval was less than 10 per cent.⁸⁴¹

[925] While the material in the KPMG Clubs Report is somewhat dated (as it relies on survey data from May 2011) and is of limited direct relevance to the claims before us, it does provide a useful insight into some important characteristics of the Clubs industry.

KPMG Clubs Report – Gross Economic Benefits – Key Findings

[926] The key findings of the KPMG Clubs Report on this regard are as follows:

- The licensed clubs industry is highly fragmented, comprising more than 6,500 individual venues spread across Australia.
- Clubs across Australia make a significant contribution to the Australian economy. In 2011, licensed clubs generated an estimated combined revenue of approximately \$9.6 billion across their operations.
- The industry is also a large employer in both metropolitan and regional locations. In 2011, licensed clubs across Australia are estimated to have employed approximately 96,000 people across a variety of roles.

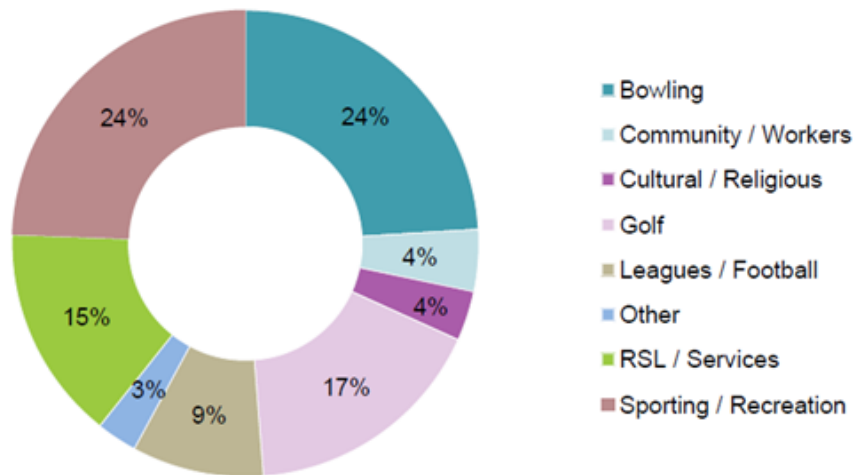
- 54,000 employees are located in metropolitan locations while 39,000 are located in regional locations (excluding employees in ACT and NT).
- Clubs also provide a significant amount of formal training to employees, spending more than \$28 million in 2011.
- Licensed clubs also invest heavily in capital assets. In 2011, licensed clubs across Australia invested an estimated \$1.3 billion.
- Licensed clubs also generate flow-on impacts to other industries through:
 - increased demand for goods and services that support the supply chains for clubs;
 - increased demand for consumer-orientated industries that cater to clubs; and
 - impacts on the cost of business inputs generated by changes in the price of some goods and services as a result of the operation of clubs.
- It is estimated the total (direct and indirect) contribution of the licensed clubs across Australia to value added (i.e. the value of production less the value of intermediate goods used in production) was \$7.2 billion in 2011.
- It is estimated the total (direct and indirect) contribution of licensed clubs across Australia to employment was almost 75,000 full-time equivalent jobs in 2011.

KPMG Clubs Report – The Clubs

[927] In July 2011 there were about 6,577 licensed clubs in Australia. Some of these clubs were part of an amalgamated group, where a ‘parent’ club controls the operations of its ‘subsidiary’ clubs. There is a significant variety of licensed clubs in Australia – ranging from sporting to service clubs, to community and cultural/religious clubs. Sports/recreation clubs are the most common (1,604 registered in 2011) followed by bowling clubs (1,581 venues), golf clubs (1,118 venues) and RSL/services clubs (979 venues).

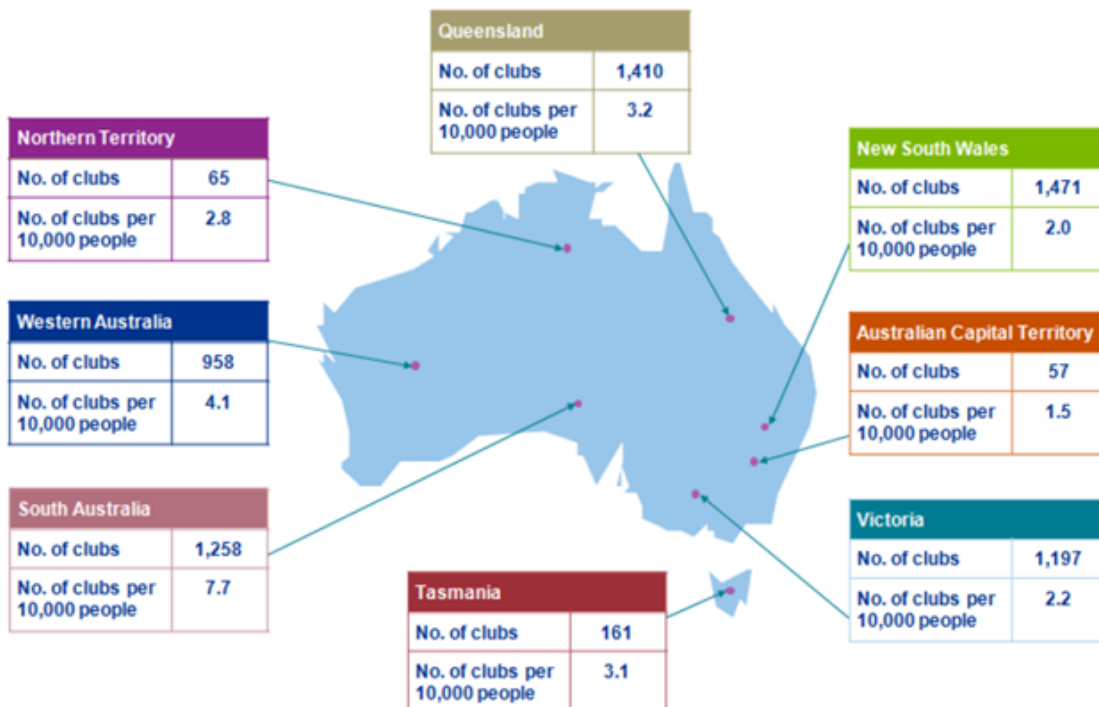
[928] Chart 32 summarises the types of clubs registered in Australia.⁸⁴²

Chart 32
Types of clubs in Australia



[929] Licensed clubs operate throughout Australia. While a number of clubs operate in metropolitan areas, a significant number of smaller clubs operate in regional and rural locations. Chart 33 summarises the distribution of licensed clubs across Australia.⁸⁴³

Chart 33
Spread of clubs across Australia



[930] Whilst clubs share a common not-for-profit, members’ led business model they are highly varied in their purposes. Types of clubs include bowling clubs (which comprise over 1,500 venues), sporting and recreation clubs (over 1,600 venues), returned servicemen clubs (over 900 venues) and golf clubs (over 1,100 venues).

[931] In addition to types, there is also significant variability in terms of the size of clubs in Australia. The most common way of defining clubs according to their size is with reference to their total annual Electronic Gaming Machine (EGM) revenues.

[932] Of the 6,577 clubs registered in Australia in 2011, 4,458 had no EGM revenues. These were followed by 496 clubs that generated annual EGM revenues of less than \$200,000, 733 clubs that generated EGM revenues of between \$200,000 and \$1 million, and 652 clubs that generated between \$1 million and \$5 million. At the top end of the market, there were 155 clubs that generated EGM revenues of between \$5 million and \$10 million, and 83 that were above this level.

[933] There is significant variability in the size of clubs' membership bases. Of the clubs surveyed for this report, the smallest club – an RSL club – reported having 2 members. The largest on the other hand – an amalgamated leagues club – reported having 110,134 members. The average number of members across all clubs in Australia is approximately 1,800.

[934] The overall industry is highly reliant on gaming machines for the majority of its income.⁸⁴⁴

[935] The KPMG Clubs Report refers to a 2008 report by the NSW Independent Pricing and Regulatory Tribunal (IPART).⁸⁴⁵ The IPART report is described as a detailed examination of the financial viability of the NSW registered clubs industry. The IPART Report: Key findings in respect of financial viability included:

- Most clubs in NSW were heavily dependent on gaming machine revenue.
- Individual clubs were prospering or declining for a variety of reasons, including:
 - access to volunteer labour;
 - the skills and effectiveness of its Board and management teams;
 - competition within the local community both from other clubs and alternate forms of entertainment; and
 - demographic and social changes within their local communities.

[936] While IPART's findings and recommendations related to NSW clubs only, the themes can be applied to licensed clubs nationally, given the similarity in operations and issues faced between clubs in all states and territories.⁸⁴⁶

KPMG Clubs Report – The Employees

[937] The survey responses indicate that clubs in Australia employed approximately 96,000 people in 2011⁸⁴⁷, in full-time, part-time, casual and trainee or apprentice capacities. About 80 per cent of employees are estimated to have been employed in clubs located in the eastern states of NSW, Queensland and Victoria.

[938] As shown in Table 37 below, employment in clubs is estimated to comprise of:

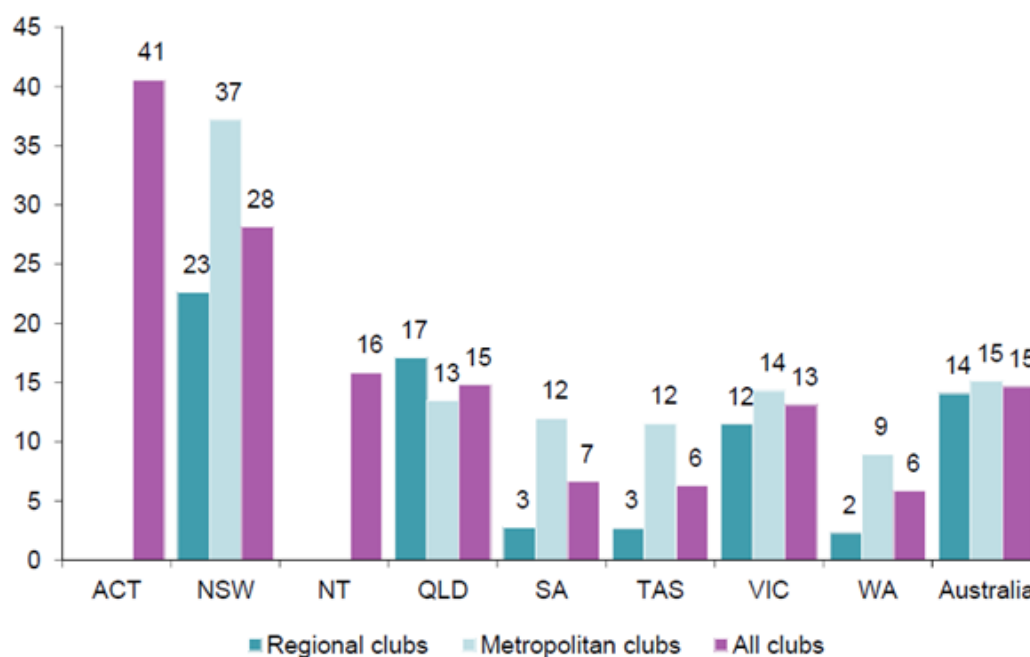
- 27,000 full-time employees (28%);
- 20,000 part-time employees (21%);
- 47,000 casual employees (49%); and
- 2,000 trainees and apprentices (2%).

Table 37
Distribution of employment type

	Full-time	Part-time	Casual	Trainee and apprentice	Total	% of accommodation and food services
ACT	660	560	1,040	60	2,320	18
NSW	12,290	10,950	17,240	920	41,400	16
NT	260	170	570	20	1,020	14
QLD	5,530	3,750	11,110	520	20,910	13
SA	2,110	1,150	4,960	180	8,400	16
TAS	260	130	610	20	1,020	6
VIC	4,200	2,920	8,200	360	15,680	8
WA	1,470	720	3,310	120	5,620	8
Australia	26,780	20,350	47,040	2200	96,370	12

[939] The average number of employees per club is illustrated in Chart 34.

Chart 34
Average employees per club



[940] The survey responses suggest that clubs in the ACT and NSW tend to employ a greater number of people per club than all other jurisdictions. This higher employment is likely to be driven by the higher proportion of larger clubs in the ACT and NSW compared to the remainder of Australia.

[941] The age profiles of employees were as follows:

- approximately 40% of club employees were aged between 25 years and 44 years;
- about the next 30% of employees were aged 24 years and under;
- the next 27% were aged between 45 years and 64 years; and
- the final 3% were aged 65 years and over.

[942] The survey responses suggest that clubs in Australia consistently employed a greater proportion of females, with only 46% of the national workforce being male.

[943] Volunteers make an important contribution to the operation of clubs, as the KPMG Clubs Report notes:

‘Clubs are able to provide low cost facilities and fund local community activities because of large networks of volunteer labour. Using volunteer labour in the form of directors, and for trading, sporting and other purposes enables clubs to reduce labour costs and pass on savings to their members and the community. There was an average of 39 volunteers per club in 2011. Nationally, there were over 250,000 club volunteers, with approximately half of these volunteers being involved in the sporting function. Overall, metropolitan clubs had more volunteers than regional clubs.’⁸⁴⁸

[944] Licensed clubs are also highly effective in mustering volunteers in order to assist in both their operation and the provision of services to members and the community. The industry is managed by over 54,000 directors (or equivalents), who are mostly engaged on a voluntary and unpaid basis. The industry also uses more than 123,000 volunteers in the provision of sporting assistance (including junior sport coaching, refereeing and management). In total, over 250,000 volunteers are sourced and utilised by the industry.

[945] Clubs are able to provide low cost facilities and fund local community activities because of large networks of volunteer labour. Using volunteer labour enables clubs to reduce labour costs and pass on savings to their members and the community. Clubs use volunteers in many business areas including the management and organisation of club activities and operations, trading and sporting functions. Volunteers may also gain utility by participation in the community.

[946] The number of volunteers in each State and Territory is presented in Table 38.

Table 38 ⁸⁴⁹
Volunteer type

	Director	Trading	Sporting	Other	Total	Average per club
ACT	460	90	1,660	470	2,680	47
NSW	11,000	2,370	26,050	9,740	49,160	33
NT	540	320	1,230	420	2,510	39
QLD	11,770	7,810	27,310	9,050	55,940	40
SA	10,810	10,250	22,940	7,540	51,540	41
TAS	1,380	1,280	2,850	970	6,480	40
VIC	10,180	8,380	24,580	7,400	50,540	42
WA	8,240	8,060	17,320	5,670	39,290	41
Total	54,380	38,560	123,940	41,260	258,140	39
Average per club	8	6	19	6	39	

Note: Totals may not add due to rounding.

[947] The majority of volunteers were directors or involved in sporting activities. Club Census 2011 responses suggest that approximately half of all volunteers were involved in sporting functions in 2011. SA had the largest number of volunteers, closely followed by Victoria and NSW. On average, ACT clubs have the most volunteers. Clubs in SA, Tasmania, Victoria, Queensland and WA also had higher averages than the national average of volunteers per club. NSW is the only State that has a lower average than the national average.⁸⁵⁰

[948] Club volunteers contributed 5,877,500 volunteer hours in 2011.⁸⁵¹ KPMG estimated the value of volunteer labour to be \$2,850 million, in 2011.⁸⁵²

[949] We now turn to the evidence of Mr Rees, Deputy Chief Executive of Clubs ACT. A substantial part of Mr Rees' witness statement⁸⁵³ was redacted by consent, following an objection by United Voice. The remainder of Mr Rees' evidence, though brief, is consistent with the KPMG Clubs Report. In particular Mr Rees says:

‘Clubs ACT represents 51 of the 54 clubs trading in the ACT and 100% of all clubs holding a gaming machine licence.

The clubs vary in size but in a similar fashion to other states are varied in their purposes, examples of which include ethnic, workers and religious types. Clubs also maintain and operate the vast majority of the ACT's sport, recreational infrastructure including bowls, golf and football.⁸⁵⁴

[950] Mr Rees was not required for cross-examination and we accept his evidence.

[951] As a consequence of the concessions made by CAI in respect of the admissibility of Mr Rees' evidence there is no evidence before us in respect of any individual club in the ACT. The absence of such evidence was drawn to the attention of CAI and it was invited to seek leave to adduce direct evidence from an ACT club if it wished to do so.⁸⁵⁵ No such application was made.

[952] CAI called three witnesses who gave evidence in relation to the operation of particular clubs.

[953] Mr Jeffrey Cox gave evidence in relation to the Coffs Ex Services Club, which operates 3 clubs in the Coffs Harbour area in NSW. The principal venue is the Coffs Ex Services and Sports Club and 2 smaller community clubs at Urunga and Woolgoolga.

[954] The Coffs Ex Services Club employs 163 employees of whom 54 are full-time, 82 are part-time and 27 are casual employees. A significant part of the club's business is 'to provide lawn bowls, golf, squash and croquet facilities, multiple sub-clubs, free senior entertainment and promotions'.⁸⁵⁶ Sunday trading hours are from 10.00 am to 10.00 pm. Mr Cox's evidence is that the Club is unable to trade profitably on Sundays because:

- Sunday is generally a 'low income' day (average club revenue on a Sunday is \$60,000, compared to \$70,000 on Monday to Wednesday); and
- it is a high wage expense day.⁸⁵⁷

[955] As to the impact of a reduction in penalty rates, Mr Cox's evidence was as follows:

'If there was a reduction in the current penalty rates by 25% - 50% for weekends and public holidays, we would *potentially* extend our operating hours and then be able to offer more hours to our part-time and casual employees...

Potentially a reduction in penalty rates would increase our trade revenue as we would be able to trade longer with longer opening hours. This would translate into the provision of greater services being made available to our members and guests and investment into community projects.'⁸⁵⁸ (emphasis added)

[956] We would observe that Mr Cox was somewhat equivocal about the employment and community benefits which may flow from a reduction in penalty rates.

[957] Further, shortly after Mr Cox swore his affidavit the Commission approved the *Coffs Ex Services Memorial and Sporting Club Enterprise Agreement 2015*⁸⁵⁹ (the Coffs Club Agreement). Relevantly, the Coffs Clubs Agreement provides higher rates of pay than those provided in the *Clubs Award* and provides the same level of penalty rates as currently provided in the *Clubs Award*. One of the objectives of the agreement is to 'Ensure the future financial sustainability of the Club'.⁸⁶⁰ The nominal expiry date of the agreement is 25 August 2018. Any variation to the *Clubs Award* a result of these proceedings will have no impact on the Coffs Ex Services Club while the Coffs Club Agreement remains in operation. However, any variation to the award will underpin any future agreement.

[958] Mr Anthony Casu gave evidence in relation to the Narooma Sporting and Services Club Limited (the Narooma Club), which operates 2 clubs, Club Narooma and Club Dalmeny, and employs about 60 employees under the *Clubs Award*, of whom 18 are full-time, 23 part-time and 19 are casual employees.

[959] The Narooma Club's best trading days are on Friday and Saturday (at about \$25,000 per day), with Sundays being about 20 per cent lower (or about \$20,000). The daily average revenue for Monday to Thursday is about \$13,000.⁸⁶¹

[960] The Narooma Club conducts a cost-benefit analysis when considering operational changes to the staffing roster. As to the impact of a reduction in penalty rates (as sought by CAI), Mr Casu's evidence was:

'If there was a reduction in penalty rates, the club would not change current trading hours and it would be unlikely to increase the levels of revenue on those days, but the club would increase services during the trading hours. As increase in the provision of member services would mean we would increase our staff numbers or increase the hours available to existing staff. This increase would be seen as coming from casual-part-time staffing and could be as high as another 8 hours per day over the weekends supplying additional servicing to the members.'⁸⁶²

[961] Mr Casu was cross-examined about this aspect of his evidence.⁸⁶³

[962] In short, Mr Casu's evidence is that, if CAI's proposed variation to penalty rates were adopted then the Narooma Club would increase the service it provides on weekends and as a consequence the hours worked by its current casual workforce *could* increase by *as much as* 8 hours per day on both Saturday and Sunday. In other words the employment impact of granting the claim *could* be as much as the equivalent of an additional 8 hour shift on Saturday and Sunday.

[963] Mr John Dellar gave evidence in relation to Club Hawthorn, a sporting club in Victoria. The club is centred around the sport of squash and, to a lesser degree snooker, and has a gaming room with 40 gaming machines.⁸⁶⁴ The club employs 9 employees, of whom 2 are full-time and 7 are casual employees.⁸⁶⁵

[964] The club's current trading hours are: Monday–Thursday 10.00 am to 11.00 pm, Friday and Saturday 10.00 am to 1.00 am and Sunday noon to 9.00 pm. In terms of daily revenue, Sunday is the least successful trading day generating about 60 per cent of the average revenue on Monday to Thursday.⁸⁶⁶

[965] Mr Dellar indicated that if the penalty rate structure in the *Clubs Award* was varied as proposed by Clubs Australia then the Hawthorn Club would trade for an additional 4 hours on Sunday (that is it would open early, at 9.00 am or 10.00 am and, close later), resulting in additional hours for the existing staff who work on Sundays or engagement of an additional staff member to work on Sundays.⁸⁶⁷

[966] Mr Dellar also observes that if penalty rates were reduced there would be an overall reduction in the club's wages bill which would enable additional hours to be provided to existing employees during the week:

'If the reduction in penalty rates occurred it would also be viable to employ additional staff on all days, not just weekends and public holidays. The flow on affect is that the reduction in total cost to the bottom line of the wages bill can be invested into more staff mid-week where currently cost is restraining the number of people actually required for good service.'⁸⁶⁸

[967] No specifics were given as to the number of additional hours that would be provided during the week and Mr Dellar conceded that he had not calculated what the reduction to the clubs wages bill would be if the penalty rate variations were made.⁸⁶⁹

(ii) *United Voice*

[968] In opposing the variation of the *Clubs Award*; United Voice relied on the evidence of 3 lay witnesses:

- Mary Quirk: a full-time Bar Manager at Coledale RSL;⁸⁷⁰
- Wayne Jones: a permanent full-time employee engaged as Purchasing Officer and Head Cellar man at Bribie Island Bowls Club;⁸⁷¹ and
- Damien Cooper: a casual Barman and Courtesy Bus Driver employed at Goodna Services Club in Goodna, Queensland.⁸⁷²

*Mary Quirk*⁸⁷³

[969] Ms Quirk is a full-time Bar Manager at the Coledale RSL who works Sunday to Wednesday, from 9.30 am to 7.30 pm. As Ms Quirk is regularly rostered on a Sunday she receives an additional week's annual leave each year.⁸⁷⁴

[970] Ms Quirk gives evidence about the impact of work on weekends and public holidays:

'I am a Roman Catholic. I am not deeply devout but it is an important part of my life and I would attend church occasionally if I were able to do so on Sunday. I do attend mass occasionally on Saturday evening... Working Sundays has meant I have not been able to be a part of my church community as I would have liked. Sunday is the day of worship in my religion, so that is when my family and friends attend church... There are regular religious family events every year such as first communions, confirmations and christenings. I have missed out on a lot of these events and this makes me sad.'⁸⁷⁵

[971] During cross-examination Ms Quirk acknowledged that she could attend the 7.00 am service on Sunday mornings and still get to work by 9.30 am.⁸⁷⁶

[972] At paragraphs 17–20 of her statement Ms Quirk sets out the impact upon her of the reduction in Sunday penalty rates sought by CAI and notes that she would 'lose approximately \$52 per week from my weekly take home pay'.⁸⁷⁷

*Wayne Jones*⁸⁷⁸

[973] Mr Jones has worked in the hospitality sector for about 30 years. Since 2005 he has been employed as the Purchasing Officer and Head Cellar man at the Bribie Island Bowls Club. He is a level 6 Manager under the *Clubs Award* and works Tuesday to Friday, from 7.00 am to 1.30 pm and on Saturday from 7.00 am to 3.00 pm. He does not usually work on Sundays or Mondays, unless a stocktake is done on those days. Stocktakes are done on the first day of each month.

[974] Mr Jones understood that there was an expectation that when you work in the hospitality industry you have to be prepared to work on weekends and public holidays:

‘When I started in the industry, it was made clear to me that unless I was willing to work on weekends and public holidays I would not be offered a position (including the Bribie Island Bowls Club). As a manager, I have set this expectation for my own staff.’⁸⁷⁹

[975] Mr Jones deals with the impact of weekend and public holiday work at paragraph 20–23 of his statement and says, in particular:

‘When my children were younger, and into their teenage years, I have missed out on weekend family, social and sporting events because I had to work. Working on weekends means that I simply do not get to participate in the normal family and social activities that occur during those times.’⁸⁸⁰

[976] At paragraphs 27–35 of his statement Mr Jones sets out the impact upon him of the penalty rate changes sought by CAI:

If my Saturday penalty rates are reduced, then I will lose over \$30 per week from my weekly take home pay. If this happens, then the loss of income will mean that I would find it even more difficult to cover my family’s living costs. I already have hard choices to make, which would only get harder. In these circumstances I may not have any money for emergency costs, such as unexpected car repairs. The only way I could then cover such expenses would be through a loan, which of course incurs interest and other charges. In order to make up the lost income, I have calculated that I would have to work an additional 2 to 3 hours per week. While I would be able to work those additional hours (should they be available), the impact of doing so would mean that I would spend even less time with my family. Even if I am available to work additional hours, I do not believe my employer would be in a position to offer additional hours. I work a 38 hour week, so if I work any additional hours with my employer I will be paid overtime. It is likely my employer would instead hire more casuals to cover the shortfall in staff.’⁸⁸¹

Damien Cooper⁸⁸²

[977] Mr Cooper is a casual Barman and Courtesy Bus Driver at the Goodna Services Club, in Goodna Queensland. He works an average of 40 hours per week (Fridays and Saturdays: 5.00 pm to 2.30 am; Mondays and Thursdays: 4.30 am to 10.30 pm; Sundays: noon to 9.30 pm), and on public holidays as required.

[978] As to the impact of weekend and public holiday work Mr Cooper says that ‘I simply do not get to participate in normal social activities that occur during weekends... I miss out on a lot of activities that are meaningful to me’. Mr Cooper makes specific reference to missing football games he would have attended with his partner and catching up with his daughter, because of the hours he works.’⁸⁸³

7.3.5 Consideration

[979] As mentioned earlier, CAI proposes a reduction in both the Sunday *and* Saturday penalty rates in the *Clubs Award*. No other employer body is proposing a reduction in Saturday penalty rates, in either this award or in any of the other modern awards before us.

[980] Two general points may be made in respect of the proposal by CAI and the submissions advanced in support of that proposal.

[981] The first is that there is an inherent contradiction in the position put by CAI. On the one hand, it is contended that there is no difference between Saturday and Sunday work, yet if adopted the variations proposed would result in different penalty rates for Saturday and Sunday (125 per cent and 150 per cent respectively).

[982] This issue was put to counsel for CAI during the course of closing submissions and he responded as follows:

‘... to align both Saturday and Sunday rates at 125 per cent in Clubs Australia’s view ... would be too large a drop for Sunday rates in one hit, and it really is as logical as that ... There is no necessary science in it and it is not – it certainly would recognise that there be a higher rate of pay for employees working on a Sunday...

There is no evidence or there is little evidence to say that the persons who work on a Sunday should receive a greater reduction than 25 per cent from the current rate of pay...

... there is no mathematical recognition within the Clubs Australia’s position that says that the Sunday rate should necessarily be an additional 25 per cent on top of the Sunday rate. It is simply because Clubs Australia does not wish to put to the Commission that there should be a reduction from 175 per cent to 125 per cent for Sunday’.⁸⁸⁴

[983] The response given speaks of the type of approach taken in times past, namely to advance a position based on an assessment of what is industrially feasible instead of a detailed exposition of the merits of the particular proposal. This observation leads us to the second general point in respect of the position put by CAI.

[984] As mentioned earlier, proposed variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. On any view of it the variations proposed by CAI constitute significant changes to the modern award. Such changes should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

[985] The case put on behalf of CAI made only a cursory reference to the relevant s.134 considerations⁸⁸⁵ and there was a paucity of evidence advanced in support of the proposed changes. The submissions put were general in nature and failed to adequately address the relevant statutory provisions.

[986] It will be recalled that CAI led evidence from only 3 witnesses in relation to the operation of particular clubs: Messrs Cox, Casu and Dellar.

[987] Mr Cox gave evidence in relation to the Coffs Ex Services Club, which employs 163 employees. CAI submits that Mr Cox’s evidence was that ‘A reduction in penalty rates on weekends and public holidays would potentially lead to an extension of the club’s operating hours with consequential additional hours being offered to part-time and casual employees’.⁸⁸⁶

[988] However, Mr Cox was somewhat equivocal about the employment and community benefits which may flow from a reduction in penalty rates and there was no detail of, or substantive basis for, these potential outcomes provided.

[989] Mr Casu gave evidence in relation to the Narooma Club, which employs about 60 employees. In short, Mr Casu's evidence was that if CAI's proposed penalty rate reductions were implemented then the employment impact could be as much as the equivalent of an additional 8 hour shift on a Saturday and Sunday. In other words, a very modest employment impact.

[990] Mr Dellar gave evidence in relation to the Hawthorn Club, which employs 9 employees. Mr Dellar's evidence was that if the penalty rate regime proposed by CAI was implemented then the Hawthorn Club would trade for an additional 4 hours on Sunday resulting in additional hours for existing staff who work on Sundays or the engagement of an additional staff member to work on Sundays. Mr Dellar also said that if penalty rates were reduced additional hours would be provided to existing employees during the week, but no specifics were given as to the number of additional hours and he conceded that he had not calculated what the reduction to the club's wages would be if the penalty rate variations were made.

[991] As we have mentioned, the Clubs industry is highly fragmented, comprising of 6,500 individual venues across Australia. There is a significant variation in the type of clubs and the size of clubs. The KPMG Clubs Report noted that the types of clubs ranged from sporting to service clubs, to community and cultural/religious clubs. In relation to the clubs surveyed for that report, the smallest club reported having 2 members and the largest had 110,134 members.

[992] Given the limitations to Mr Cox's evidence we are essentially left with evidence from 2 clubs (both 'sporting' clubs), one in NSW and the other in Victoria, employing 60 and 9 employees respectively.

[993] While we do not suggest that it is necessary for the proponent of a significant variation to a modern award to provide evidence in respect of the impact of the proposed variation on each and every part of the industry covered by the relevant modern award, the evidentiary case put by CAI was patently inadequate.

7.3.6 Conclusion

[994] On the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, CAI has not established a merit case sufficient to warrant the granting of the claim.

[995] If these were simply *inter partes* proceedings we would dismiss the CAI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award. There is also, at least on face value, a disconnect between the present provisions in the *Clubs Award* and those that will apply within the hospitality industry more broadly.

[996] We have given consideration to the next steps to be taken in respect of the review of weekend penalty rates in the *Clubs Award*. It seems to us that there are 2 options in respect of the future conduct of this aspect of these proceedings.

[997] Option 1: We could make determinations revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employers and employees presently covered by the *Clubs Award*. Any such determinations would have to comply with the statutory provisions relating to changing the coverage of modern awards and to the revocation of modern awards (ss.163 and 164 respectively). Such a course would obviously avoid the need to conduct any further Review proceedings in respect of the *Clubs Award*.

[998] Extending the coverage of the *Hospitality Award* and revoking the *Clubs Award* would also have the desirable outcome of rationalising the awards applying to the hospitality sector and providing greater consistency in the regulation of penalty rates in the sector. We would also observe that the ‘merger’ of the *Hospitality* and *Clubs Awards* is consistent with the ‘need to ensure a simple, easy to understand... modern award system’, which is one of the considerations we are required to make into account in determining whether a modern award meets the modern awards objective’ (s.134(1)(g) of the FW Act).

[999] Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.

[1000] It is our *provisional* view that option 1 has merit and warrants further consideration. As mentioned earlier, in the award modernisation process there was general support among employer and employee associations for a separate *Clubs Award*. The Award Modernisation Full Bench concluded that while it was possible to include clubs within the *Hospitality Award*, with some sector specific arrangements, it decided to make a separate clubs award – no doubt influenced by the consent position of the interested parties.

[1001] In the present proceedings, CAI sought to rely on Mr Tait’s evidence in order to distinguish the clubs industry from the rest of the hospitality sector:

‘Clubs, may be distinguished from other hospitality venues such as hotels, in that they are not-for-profit community based organisations whose central activity is to provide infrastructure and services for its members and the greater community. Clubs contribute to their local communities through employment and training, direct cash and in-kind social contributions, and through the formation of social capital by mobilising volunteers and providing a diverse and affordable range of services, facilities and goods.’⁸⁸⁷

[1002] We acknowledge that clubs have a number of characteristics which may be said to distinguish them from the types of enterprises covered by the *Hospitality Award* (such as hotels), namely:

- clubs are not-for-profit community based organisations; and
- clubs may be subject to a different regulatory environment in respect of their operations.

[1003] But while there are a number of differences between clubs and the enterprises presently covered by the *Hospitality Award* (such as hotels) we are not presently persuaded that those differences warrant a separate award. In particular, the fact that clubs are not-for-profit community based organisations does not mean that they warrant a separate award. A number of other modern awards cover both not-for-profit and for-profit enterprises, such as the *Clerks – Private Sector Award 2010* and the *Aged Care Award 2010*.

[1004] We would also observe that there is a high degree of commonality in the work performed by the employees covered by the *Clubs Award* and the *Hospitality Award*, as evidenced by the similarities in the classification levels and rates of pay (see below).

Table 39
Comparison of the *Clubs Award* and the *Hospitality Award's* Classifications

Provisions unique to Clubs shown in PURPLE				Provisions unique to Hospitality shown in GREEN			
17.2 Level	Club employees Classification	Minimum weekly wage \$	Minimum hourly wage \$	Level	Classification	Minimum weekly wage \$	Minimum hourly wage \$
	Introductory	672.70	17.70		Introductory	672.70	17.70
	Level 1	692.10	18.21		Level 1	692.10	18.21
	<ul style="list-style-type: none"> • Food and beverage attendant grade 1 • Guest service grade 1 • Kitchen attendant grade 1 				<ul style="list-style-type: none"> • Food and beverage attendant grade 1 • Guest service grade 1 • Kitchen attendant grade 1 		
	Level 2	718.60	18.91		Level 2	718.60	18.91
	<ul style="list-style-type: none"> • Child care worker grade 1 • Clerical grade 1 • Cook grade 1 • Doorperson/ Security officer grade 1 • Food and beverage attendant grade 2 • Front office grade 1 • Guest service grade 2 • Kitchen attendant grade 2 • Leisure attendant grade 1 • Maintenance and horticultural employee level 1 • Storeperson grade 1 				<ul style="list-style-type: none"> • Clerical grade 1 • Cook grade 1 • Doorperson/ Security officer grade 1 • Food and beverage attendant grade 2 • Front office grade 1 • Guest service grade 2 • Kitchen attendant grade 2 • Leisure attendant grade 1 • Gardener grade 1 • Storeperson grade 1 		
	Level 3	743.30	19.56		Level 3	743.30	19.56
	<ul style="list-style-type: none"> • Clerical grade 2 • Cook grade 2 • Food and beverage and gaming attendant grade 3 • Forklift driver 				<ul style="list-style-type: none"> • Clerical grade 2 • Cook grade 2 • Food and beverage and gaming attendant grade 3 • Forklift driver 		

<ul style="list-style-type: none"> • Front office grade 2 • Guest service grade 3 • Handy person • Kitchen attendant grade 3 • Leisure attendant grade 2 • Maintenance and horticultural employee level 2 • Storeperson grade 2 • Timekeeper/ Security officer grade 2 	783.30	20.61	<ul style="list-style-type: none"> • Front office grade 2 • Guest service grade 3 • Handy person • Kitchen attendant grade 3 • Leisure attendant grade 2 • Gardener grade 2 • Storeperson grade 2 • Timekeeper/ Security officer grade 2 	783.30	20.61
<p>Level 4</p> <ul style="list-style-type: none"> • Clerical grade 3 • Cook (tradesperson) grade 3 • Food and beverage attendant (tradesperson) grade 4 • Front office grade 3 • Guest service grade 4 • Leisure attendant grade 3 • Maintenance and horticultural level 3 (tradesperson) • Storeperson grade 3 	832.30	21.90	<p>Level 4</p> <ul style="list-style-type: none"> • Clerical grade 3 • Cook (tradesperson) grade 3 • Food and beverage attendant (tradesperson) grade 4 • Front office grade 3 • Guest service grade 4 • Leisure attendant grade 3 • Gardener grade 3 (tradesperson) • Storeperson grade 3 	832.30	21.90
<p>Level 5</p> <ul style="list-style-type: none"> • Child care worker grade 2 • Clerical supervisor • Cook (tradesperson) grade 4 • Food and beverage and gaming attendant grade 5 • Front office supervisor • Guest service supervisor • Maintenance and horticultural level 4 	854.60	22.49	<p>Level 5</p> <ul style="list-style-type: none"> • Clerical supervisor • Cook (tradesperson) grade 4 • Food and beverage supervisor • Front office supervisor • Guest service supervisor • Gardener grade 4 (tradesperson) 	854.60	22.49
<p>Level 6</p> <ul style="list-style-type: none"> • Cook (tradesperson) grade 5 • Club manager of a club with a gross annual revenue of less than \$500,000 	854.60	22.49	<p>Level 6</p> <ul style="list-style-type: none"> • Cook (tradesperson) grade 5 	854.60	22.49

<ul style="list-style-type: none"> • Child care worker grade 3 <p>Note: The Clubs Award provides for an additional 7 classification levels (levels 7-13), which correspond to various levels of managerial responsibility.</p>	
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[1005] We accept that there are differences between the two awards, for example in relation to annualised salary arrangements, overtime on Saturdays and in both the classification definitions and the range of classifications covered. But it seems to us that such differences may be accommodated by either appropriate transitional arrangements or the inclusion of clubs-specific sector arrangement within the *Hospitality Award*.

[1006] Option 1 would have the advantage of providing greater consistency between penalty rates within the hospitality sector. The Productivity Commission report concluded that:

‘There are grounds for greater consistency (short of uniformity) between penalty rates across the HERRC industries.’⁸⁸⁸

[1007] In support of this conclusion the Productivity Commission noted that:

‘Notwithstanding award modernisation, there appears to be many inconsistencies in penalty rate settings. Wide disparities in rates persist in industries with similar structural characteristics and employee skill levels...

Differences in rates create compliance costs and uncertainty for employers and employees.’⁸⁸⁹

[1008] In Chapter 7.2.6 we set out the changes we propose to make to Sunday penalty rates in the *Hospitality Award*. Table 40 below shows the differences between that weekend penalty rate regime and the current penalty rates in the *Clubs Award*.

Table 40

Penalty rate arrangements in *Hospitality* and *Clubs Awards*

	<i>Full-time or part-time employees</i>		<i>Casual employees</i>	
	<i>Percentage of base rate</i>		<i>Percentage of base rate</i>	
	Sat	Sun	Sat	Sun
	%	%	%	%
<i>Clubs Award</i>	150	175	150	175
<i>Hospitality Award (proposed)</i>	125	150	150	175

Note: As set out in Chapter 7.2.6 we propose to vary the *Hospitality Award* to reduce the Sunday penalty rate for full-time and part-time employees, from 175 per cent to 150 per cent.

[1009] We propose to provide an opportunity for interested parties to express a view as to the future conduct of this aspect of these proceedings. In particular, we will invite submissions on the two options set out above. We deal with the process for doing so in Chapter 12, Next Steps.

7.4 *Restaurant Industry Award 2010*

7.4.1 The Claims

[1010] Restaurant and Catering Industrial (RCI) and ABI made claims to reduce the penalty rates contained in clause 34 of the *Restaurant Industry Award 2010* (the *Restaurant Award*).

[1011] RCI proposes to amend clause 34.1 of the *Restaurant Award* such that full-time and part-time employees be paid 125 per cent of the minimum rate for work performed on a Sunday, rather than the current rate of 150 per cent. It also proposes that casuals who are engaged at Levels 3–6 be paid 150 per cent for work performed on a Sunday rather than 175 per cent as contained in the current award. RCI also seeks the deletion of clause 34.1A—Special condition regarding existing employees.

[1012] RCI also proposes that the additional payment for ordinary hours of work from 10 pm to midnight currently provided for at clause 34.2(a)(i) be removed and that the additional payment in clause 34.2(a)(ii) (for ordinary hours of work between midnight and 7.00 am) be reduced from 15 per cent to 5 per cent with a change to the span of hours for which the payment is made (to between midnight and 5.00 am).

[1013] RCI and ABI also seek reductions in the public holiday penalty rate. We deal later with that aspect of the claims.

[1014] The changes sought by RCI are set out below, in a marked up version of clause 34:

34. Penalty rates

34.1 Penalty rates for work on weekends and public holidays

An employee working ordinary time hours on the following days will be paid the following percentage of the minimum wage in clause 20—Minimum wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	150 125	250 150
Casual Introductory Level, Level 1, Level 2 (inclusive of 25% casual loading)	125	150	150	250 150
Casual Level 3 to Level 6 (inclusive of casual 25% loading)	125	150	175	250

~~34.1A Special condition regarding existing employees~~

~~No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of~~

~~the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.~~

~~**34.2 Additional payment for work done between the hours of 10.00 pm to 7.00 am on Monday to Friday**~~

~~(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours of 10.00 pm and midnight Monday to Friday inclusive, or between midnight and 7.00 am Monday to Friday inclusive, must be paid an additional amount per hour calculated according to the following:~~

~~(i) **Between 10.00 pm and midnight**~~

~~For each hour or part of an hour worked during such times—10% of the standard hourly rate per hour extra.~~

~~(ii) **Between midnight and 7.00 am**~~

~~For each hour or part of an hour worked during such times—15% of the standard hourly rate per hour extra.~~

~~(b) For the purposes of this clause midnight will include midnight Sunday.~~

34.2 Additional payment for work done between the hours of midnight and 5.00 am Monday to Friday

(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked.

(b) For the purposes of this clause midnight will include midnight Sunday.

[1015] If granted, RCI's proposed variation to clauses 34.1 and 34.2 would:

- reduce the penalty rates paid to full-time and part-time employees for work performed on a Sunday from 150 per cent of their minimum rate of pay to 125 per cent;
- reduce the penalty rates paid to Casual Level 3 to Level 6 employees from 175 per cent to 150 per cent;
- remove the special conditions applying to existing employees in clause 34.1A;
- delete the existing entitlement to a 10 per cent loading within the span of hours between 10.00 pm and midnight;
- adjust the span of hours in respect of which employees currently receive a 15 per cent loading (the loading would also reduce) from 'between midnight and 7.00 am' to 'the hours between midnight and 5.00 am'; and

- reduce the existing loading for ordinary hours of work after midnight from 15 per cent to 5 per cent.

[1016] The RCI and ABI claims are opposed by United Voice.

7.4.2 Background to the *Restaurant Award*

[1017] The background to the making of the *Restaurant Award* is extensively canvassed by the majority in the *2014 Restaurants Penalty Rates decision*⁸⁹⁰ and need not be repeated here. We address the 2014 decision later (at [1144]–[1153]).

7.4.3 The Cafes and restaurants industry

[1018] The ABS data of direct relevance to the Cafes and restaurants industry class is quite limited.

[1019] A paper⁸⁹¹ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Using this framework the *Restaurant Award 2010* is ‘mapped’ to the Cafes and restaurants industry class.

[1020] The Census is the only data source that contains all of the employment characteristics for Clubs (Hospitality). The most recent Census data is from August 2011.

[1021] The August 2011 Census data shows that there were around 144 000 employees in Cafes and restaurants. Table 41 compares certain characteristics of employees in the Cafes and restaurants industry class, with employees in ‘all industries’.

Table 41
Labour force characteristics of the Cafes and restaurants industry class,
ABS Census 9 August 2011

	Cafes and restaurants		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	59 509	41.3	4 207 586	50.8
Female	84 466	58.7	4 082 662	49.2
Total	143 975	100.0	8 290 248	100.0
Full-time/part-time status				
Full-time	48 301	35.5	5 279 853	67.8
Part-time	87 702	64.5	2 507 786	32.2
Total	136 003	100.0	7 787 639	100.0
Highest year of school completed				
Year 12 or equivalent	91 446	64.8	5 098 228	62.6
Year 11 or equivalent	16 387	11.6	885 404	10.9
Year 10 or equivalent	23 162	16.4	1 687 055	20.7
Year 9 or equivalent	6 209	4.4	317 447	3.9
Year 8 or below	3 025	2.1	141 973	1.7
Did not go to school	938	0.7	20 158	0.2
Total	141 167	100.0	8 150 265	100.0
Student status				
Full-time student	45 149	31.7	612 990	7.5
Part-time student	9 394	6.6	506 120	6.2
Not attending	87 886	61.7	7 084 360	86.4
Total	142 429	100.0	8 203 470	100.0
Age (5 year groups)				
15–19 years	34 237	23.8	547 666	6.6
20–24 years	35 227	24.5	927 865	11.2
25–29 years	22 259	15.5	1 020 678	12.3
30–34 years	13 976	9.7	933 827	11.3
35–39 years	9 928	6.9	934 448	11.3
40–44 years	8 336	5.8	938 386	11.3
45–49 years	7 407	5.1	911 739	11.0
50–54 years	5 880	4.1	848 223	10.2
55–59 years	3 824	2.7	652 190	7.9
60–64 years	2 114	1.5	404 470	4.9
65 years and over	786	0.5	170 718	2.1
Total	143 974	100.0	8 290 210	100.0
Average age	29.0		38.8	
Hours worked				
1–15 hours	43 323	31.9	875 554	11.2
16–24 hours	25 590	18.8	792 539	10.2
25–34 hours	18 787	13.8	839 694	10.8
35–39 hours	15 581	11.5	1 676 920	21.5
40 hours	11 782	8.7	1 555 620	20.0
41–48 hours	9 222	6.8	895 619	11.5
49 hours and over	11 715	8.6	1 151 693	14.8
Total	136 000	100.0	7 787 639	100.0

Source: ABS, *Census of Population and Housing*, 2011.

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[1022] The profile of Cafes and restaurants employees differs from the profile of employees in ‘All industries’ in 4 important respects:

- (i) around two-thirds (64.5 per cent) of Cafes and restaurants employees work part-time (i.e. less than 35 hours per week⁸⁹²), compared with only 32.2 per cent of all employees;
- (ii) almost one third (31.9 per cent) of Cafes and restaurants employees work 1–15 hours per week compared with only 11.2 per cent of all employees;
- (iii) almost half (48.3 per cent) of Cafes and restaurants employees are aged between 15 and 24 years compared with only 17.8 per cent of all employees; and
- (iv) almost 4 in 10 Cafes and restaurants employees are students (31.7 per cent are full-time students and 6.6 per cent study part-time) compared with 13.7 per cent of all employees.

[1023] The Lewis Report also included data on enterprises and employment in the Cafes and restaurant industry for 2014–15. Table 42 shows that:

- there were over 15 000 enterprises, employing approximately 155 000 people;
- casual employees accounted for around half of employees;
- wages accounted for 27.9 per cent of total expenses, which is higher than for Accommodation and food services (26.9 per cent) and all industries (18.7 per cent);⁸⁹³ and
- the profit margin of 8.6 per cent was the same as Accommodation and food services and lower than the profit margin for all industries (10.9 per cent).⁸⁹⁴

Table 42 ⁸⁹⁵
Cafes and restaurant industry, 2014–15

Enterprises	(No.)	15 251
Employment	(No.)	154 658
Working proprietors and partners of unincorporated businesses	(No.)	10 671
<i>Employees</i>		
Salaried directors of incorporated businesses	(No.)	11 135
Other		
Permanent full-time	(No.)	32 633
Permanent part-time	(No.)	26 910
Casuals	(No.)	73 308
Total	(No.)	132 851
Total	(No.)	143 987
Revenue	(\$m)	16 027.7

Expenses		
Rent	(\$m)	1661.6
Utilities	(\$m)	326.3
Depreciation	(\$m)	450.7
Other	(\$m)	1898.6
Wages	(\$m)	4089.2
Purchases	(\$m)	6225.5
Total	(\$m)	14 649.8
Industry Value Added	(\$m)	5916.4
Profit	(\$m)	1377.9
Profit Margin	(%)	8.6
Wages (% of expenses)	(%)	27.9
Wages (% of value added)	(%)	69.1

7.4.4 The Evidence

(i) RCI

[1024] RCI called 5 lay witnesses in support of the application to vary the *Restaurant Award*. The names, addresses and workplaces of these witnesses are the subject of a confidentiality order.⁸⁹⁶ We refer to these witnesses as RCI witness 1, RCI witness 2, etc.

[1025] RCI also called 3 witnesses who referred to survey data about the effect of penalty rates on the restaurant industry:

- John Hart: the Chief Executive Officer of RCI;⁸⁹⁷
- James Parker: Managing Director of Jetty Research;⁸⁹⁸ and
- Carlita Warren: Policy and Public Affairs Director RCI.⁸⁹⁹

[1026] It is convenient to deal first with RCI's lay evidence.

[1027] As mentioned, RCI led evidence from 5 lay witnesses who operate businesses covered by the *Restaurant Award*.

[1028] RCI Witness 1⁹⁰⁰ operates a restaurant and wine bar in Melbourne. At the time he made his supplementary statement the establishment employed 5 full-time and 14 casual employees. The 14 casual employees are classified as level 1 casuals under the *Restaurant Award*⁹⁰¹ and the number of casuals was 'basically constant' over the 2014 calendar year.⁹⁰² The business trades Monday to Sunday, 11.00 am to 11.00 pm.

[1029] In his witness statement RCI Witness 1 says:

'10. The business on many occasions has run at a loss on Sundays because of penalty rates under the Restaurant Award

11. If late night penalties were reduced under the Award we would consider extending our trading hours.

12. We would consider employing more casual staff if penalty rates were reduced on Sundays and public holidays.⁹⁰³

[1030] During the course of his cross-examination, RCI Witness 1 withdrew paragraph 11 of his statement:

‘Now, you say one of the things you describe as a possibility, is extending trading hours. I take it that- - -?---No, I didn’t want to extend trading hours, I just wanted to have more people to give better service.

Okay, so the paragraph 11 in your statement, we should remove, should we?---Yes. Yes, I’m quite happy with that.⁹⁰⁴

[1031] RCI Witness 1 also conceded that he had not calculated the extent of the reduction in wage costs if the RCI’s penalty rate proposal was implemented: ‘No, I didn’t do it, but I could see the potential of if the penalty rates were reduced, I could extend the facilities to the public.’⁹⁰⁵ The witness also said that a reduction would mean that the business could be run more economically and that he would like to extend the business’s facilities.⁹⁰⁶

[1032] It was also clear from RCI Witness 1’s cross-examination (set out below) that he was unaware of the fact that the *Restaurant Award* had been varied in 2014 to *reduce* the Sunday penalty for level 1 and 2 casual employees from 175 per cent to 150 per cent:

‘And all of your casuals? Those 14 casuals that are on level 1, yes?---Yes.

Are you aware that the penalty rates in that award were varied for casuals at the introductory level, level 1 and level 2, as of 1 July of 2014?---Yes.

That went from 175 down to 150, is that right?---I don’t know what it is, I have a bookkeeper, but we were informed that the rates went up and that was - I left it to her.

The rates went down, Mr [REDACTED]---They went down, did they? I just left it to her. To tell you the truth, I don’t even touch the wages.

So it’s really difficult for you to make an assessment of the impact of penalty rates in that case?---Of course, up to a point. If there’s penalty rates and you’re struggling in the first place and it’s going to go up, or if it can come down you have a sort of a rule of thumb that you say, right, if it comes down, I can do something else. If it goes up, you just don’t do it.

But I think your evidence is that that number of level 1 casuals stayed relatively - basically, I think you said - basically constant over 2014. That was despite the reduction from 175 to 150, is that right?---Hang on. What was - 175 to what?

The casual loading went from - in respect of a Sunday - - -?---Sorry. Don’t - don’t draw me into - into costs, I’m sorry. I’m a rule of thumb person. I leave it to staff to do the other.

...

Yes. To be fair to you, I just want to make it clear what I am talking about in respect of the change is that as of 1 July 2015 and as the result of the two-year review of the Restaurant Award, casual loading for casuals at introductory level, level 1 and level 2, inclusive of their casual loading, on a Sunday, went from 175 to 150. Are you aware of that?---No.⁹⁰⁷

[1033] In the present proceedings RCI is not proposing any change to the Sunday penalty rate applicable to level 1 or level 2 casual employees.

[1034] We place very little weight on the witness's statement that he 'would consider employing more casual staff if penalty rates were reduced on Sundays' given that he was unaware of the fact that the Sunday penalty rate applicable to level 1 and 2 casual employees was reduced from 175 per cent to 150 per cent in 2014 and, if implemented, the RCI claim would not result in a change to Sunday penalty rates for level 1 and 2 casual employees (i.e. the level of casual employees employed by RCI Witness 1's business). We also note that RCI Witness 1 said that despite the reduction in penalty rates in 2014, the number of casual employees in his establishment remained constant.⁹⁰⁸

[1035] RCI Witness 2⁹⁰⁹ is the owner of a licensed coffee shop/café in Queensland. At the time she made her supplementary statement, the business employed 16 casual employees, 14 of whom are level 1 or 2 casuals under the *Restaurant Award* and the other 2 are employed in higher classifications.⁹¹⁰ The business does not employ any full-time or part-time employees. The café is a 7-day-a-week operation, trading 7.30 am to 5.00 pm weekdays and 7.30 am to 5.00 pm on weekends.

[1036] In her witness statement RCI Witness 2 says:

'The labour costs of running this cafe are high sometimes 45%- totally unsustainable. The cause -penalty rates over weekends and public holidays. In particular the public holiday penalty rates make trading totally unprofitable for us.

Closing the business is not an option under the terms of our lease, negotiated prior to penalty rates being applied under the *Restaurant Award*. We are finding the current wage terms unsustainable for us.

These high rates require that I restrict my staff numbers thus staff work really hard to cover the load and customer service can be compromised.'⁹¹¹

[1037] The statement that the business' lease was 'negotiated prior to penalty rates being applied under the *Restaurant Award*' was the subject of cross-examination and the witness acknowledged that the *Restaurant Award* took effect on 1 January 2010 and she signed the lease almost 3 years later, on 4 December 2012. The witness also conceded that she 'knew very well what the penalty rate regime was under the *Restaurant Award*' when she signed the lease.⁹¹²

[1038] RCI witness 2 was aware of the changes sought by RCI and conceded that she had not calculated the impact of the proposed reduction in penalty rates.⁹¹³ The witness also gave evidence about the impact of the reduction in penalty rates for level 1 and 2 casual employees that took effect on 1 July 2014:

'Just some last questions in relation to those casual employees. If you just concentrate on the 14 of them that are level 1 and level 2, did their penalty rate for a Sunday change on 1 July of last year, 2014?---Yes, it did.

Is it your understanding that casual employees at level 1 and level 2 inclusive of their casual loading, their penalty rate on Sunday went from 175 to 150?---Yes, I am.

But I think your evidence is despite that, your workforce was consistent over - the total numbers of casuals were broadly consistent for the calendar year of 2014. Is that right?---Yes, correct.⁹¹⁴

[1039] It is notable that RCI Witness 2 gave no evidence as to what the business' response would be to a reduction in penalty rates. It was not suggested that there would be any service improvements or additional staff employed as a consequence of any reduction in penalty rates. Further, the number of casuals employed in the Café did not change following the 1 July 2014 reduction in Sunday penalty rates.

[1040] RCI Witness 3⁹¹⁵ is the owner of a pizzeria in Canberra which employs 9 casual employees and trades Tuesday to Friday from noon to 2.00 pm and from 5.30 pm to midnight, and from 5.30 pm to midnight on a Saturday. It does not trade on Sundays.

[1041] In his witness statement RCI Witness 3 comments on the impact of late night and Sunday penalty rates. As to the late night penalties he says:

‘The late night penalty of 10% between 10PM and Midnight under the Restaurant Award is a commercial disincentive for the business to keep additional staff on as it curtails profits during these hours. If customer demand was present and the 10% late night penalty was abolished we would extend the hours employed by our staff on weeknights.’⁹¹⁶ (emphasis added)

[1042] During the course of cross-examination the witness conceded that there was less customer demand after 10.00 pm on Monday to Thursday.⁹¹⁷

[1043] The proposition that the business would offer more hours to its staff if the late night penalty was abolished is subject to the qualification as to customer demand.

[1044] As to Sunday penalty rates RCI Witness 3 says:

‘We do not currently trade on Sundays, however, if the current penalty rate was reduced to the Saturday rate for all staff we would consider opening the business for Sunday trading’⁹¹⁸

[1045] As mentioned earlier, the pizzeria employs 9 casuals, no full-time or part-time employees. Of those 9 employees, 7 are level 1 casuals and the other 2 are level 2 casuals.⁹¹⁹ The number and level of employees has been ‘fairly consistent’ over time, at least since 2014.

[1046] The witness was cross-examined on his statement that he would consider trading on Sundays if the Sunday penalty rate was reduced to the Saturday rate:

‘And you know, don’t you, Mr [REDACTED], what the penalty rates are on Sundays under the Restaurants Award?---Yes.

And you know that for level 1 and level 2 casuals they’re actually the same as they are on Saturday, that’s right, isn’t it?---Yes, I believe that is correct.

So where you say at paragraph 12 of your statement that you don’t currently trade on Sundays but if the current penalty rate was reduced to Saturday rate for all staff you’d consider opening on Sundays, you could do that right now, couldn’t you?---I guess the sense of – to answer that

question and the reason for my appearance is that the fact that – well actually let me backtrack – the rate for Sunday for level 1's and 2 you're saying is the same as Saturday?

That's right.---Because I don't believe that's correct.

I asked you just a minute ago if you knew what the rates for Sundays were for casuals - - -?--- Yes, that's where I'd like to go back. I'd like to go back to that question. So I do believe that Saturday and Sunday rates differ during the day.

If you're wrong about that, does that mean that you would withdraw paragraph 12 of your statement?---Yes, that would be withdrawn, or more accurately it would be re-phrased more accurately.

I think there's a limit on re-phrasing, but I'll let others deal with that.---Yes, well let's leave it at – yes, if the Sunday rates are different to Saturday day rates then – which I wasn't aware of, that paragraph 12 would be withdrawn.⁹²⁰

[1047] As a consequence of the concessions made during cross-examination, we place no weight on that part of the witness' statement referring to the likelihood of trading on Sunday if the Sunday penalty rate was reduced.

[1048] RCI Witness 4⁹²¹ is the owner of a restaurant in NSW and has worked in the hospitality industry for 15 years. When it was initially opened the restaurant provided breakfast, lunch and dinner, 7 days a week. At the time the witness made her statement the restaurant was open Wednesday to Sunday for lunch and dinner, with breakfast available on the weekends. The restaurant also caters for 'high tea, functions and corporate events'. The restaurant employs 6 full-time employees (5 of whom are on annualised salaries) and 8 casual employees (6 are level 2 casuals and the other 2 are level 1 casuals). The number of staff employed had been 'pretty consistent' over the 18 months prior to the witness giving evidence.⁹²²

[1049] At paragraph 6 of her statement, the witness says:

'The company would be prepared to employ more casual staff on weekends and public holidays if penalty rates were significantly reduced'(emphasis added)

[1050] The witness was cross-examined as to what she meant by 'if penalty rates were significantly reduced':

'So my question was then what is the significant reduction to the penalty rates on weekends that would enable you to make the changes that you say you want to make?---Ideally? Ideally, no penalty rates would be great.

You know what amendments the Restaurant & Catering Association are seeking?---They're seeking for a reduction. I think it's to have it the same as Saturday rates.⁹²³

[1051] The witness was familiar with the RCI claim and conceded that she had not calculated the 'actual dollar figure' which would result from the reduction in penalty rates sought by RCI, as the business looks 'at the percentage of the labour cost to what we are currently earning'.⁹²⁴

[1052] The witness was aware of the fact that the Sunday penalty rate for level 1 and 2 casuals had been reduced to 150 per cent (inclusive of the 25 per cent casual loading) on 1 July 2014.⁹²⁵ But despite the reduction in the Sunday penalty rate the number of casuals employed on a Sunday (and the hours they work) had not changed.⁹²⁶

[1053] As to the impact of the current early morning penalty the witness said, at paragraph 7 of her statement:

‘The company would reconsider opening for breakfast Monday to Friday again if the 15% penalty rate did not apply up to 7am’

[1054] This aspect of the witness’ evidence was not challenged in cross-examination.

[1055] RCI Witness 5⁹²⁷ operates a café in regional NSW. The café trades 7 days a week, from 7.00 am to 3.00 pm Monday to Friday and 8.00 am to 2.00 pm on weekends. The café employs 14 employees, 5 full-time (2 of whom are on salary), 1 part-time and 8 casual employees (all of whom are either level 1 or 2 casuals).⁹²⁸

[1056] The witness was aware of the reduction in Sunday penalty rates that took effect on 1 July 2014, but there has been no increase in overall staff numbers since that time.⁹²⁹

[1057] At paragraphs 10, 12 and 13 of his statement, the witness refers to the impact of penalty rates on the business:

‘Weekend penalty rates increase the ratio of wages to sales to approximately 60% for those days, if we employ adult employees, making it necessary to staff weekends with a high proportion of junior staff.

We currently reduce trading hours on weekends because of the ratio of wages to sales, we are usually unable to open on public holidays because we are unable to operate profitably after paying penalty rates.

The excessive wage rates and associated penalties can have a deleterious effect on customer service, because we are unable to appropriately staff the business during peak period.⁹³⁰

[1058] The cross-examination of RCI Witness 5 cast some doubt on the accuracy of the 60 per cent figure referred to above,⁹³¹ but the essence of his evidence is that the current penalty rate regime restricts the business’s weekend trading hours and adversely affects customer service on weekends because a lower than optimal proportion of senior staff are rostered at that time in order to reduce labour costs.

[1059] We note that RCI Witness 5’s evidence does not particularise the impact of Sunday penalty rates (referring only to weekend penalty rates) and nor does the evidence canvass the likely impact of a reduction in the Sunday penalty rate on employment levels and service.

[1060] In summary, 2 of RCI’s 5 lay witnesses were unaware of the fact that on 1 July 2014 the *Restaurant Award* was varied to reduce the Sunday penalty rate for level 1 and 2 casuals from 175 per cent to 150 per cent. Both of these witnesses were RCI members and we assume that RCI informed its members of the award variations.

[1061] Further, none of the RCI lay witnesses suggested that there had been any positive employment effect (either in overall numbers of employees or in hours worked) as a consequence of the previous reduction in the Sunday penalty rate.

[1062] There was some evidence as to the impact of existing weekend and public holiday penalties on operating hours and staffing composition (with a higher than optimal level of junior staff being rostered on weekends). But there was a paucity of evidence about the likely impact on employment levels and service of a reduction in the Sunday penalty rate as sought by RCI.

[1063] We now turn to RCI’s survey evidence. The evidence concerns three surveys:

- a survey by Elections Australia Pty Ltd of RCI Members (the EA Survey);
- a survey by Jetty Research (the Jetty Survey); and
- a restaurant and catering benchmarking survey conducted by RCI in 2014 (the Benchmarking Survey).

The EA Survey

[1064] Attached to Mr Hart’s statement is a document from Elections Australia Pty Ltd setting out the results of a survey that the organisation conducted of RCI members in mid-2015 (the ‘EA Survey’). The survey asked three questions:

1. To the closest whole number, what is the percentage of total labour costs to revenue (include all on costs such as payroll tax, workers compensation and superannuation)	% _____
2. A recent survey found that, on average, an additional 3 staff would be engaged if penalty rates on Sunday were lowered. In order to achieve this outcome what type of change would you require? (click on one option)	<input type="radio"/> a: Reduce Sunday rates to Saturday for all <input type="radio"/> b: Reduce Sunday rates to Saturday for casuals <input type="radio"/> c: Extend the 150% rate for casuals for Sunday to Grade 3 and above <input type="radio"/> d: Other please specify below
2d: Other	
3. What additional percentage daily turnover would result from such a change?	% _____

[1065] The raw data from 335 survey respondents is provided in Attachment A to Mr Hart’s statement. No analysis of the data is provided.

[1066] In its written submissions RCI concedes that ‘the survey in the form in which it has been filed, provides no information about the approach and methodology relating to the survey’ and, ‘for this reason, RCI accepts that the probative value is reduced’. RCI goes on to submit:

‘However, it is helpful at a more general level in indicating the views of restaurant owners and managers, particularly to the extent that such views are consistent with the lay evidence and survey and expert evidence before the Full Bench.

In particular, a focus of the survey was gauging the percentage of total labour costs to revenue. Based on the responses provided, the average percentage was calculated to be 41.4%. This is also consistent with the benchmarking survey conducted by Ms Warren of RCI which indicated labour costs to be 43.7%⁹³²

[1067] RCI only expressly refer to the responses to survey question 1 (labour costs: revenue %). We note that the responses to this question vary substantially – from 20 to 95 per cent. There is also significant variation in the responses to questions 2 and 3. The responses to question 3 (what additional percentage daily turnover would result from the suggested change in penalty rates) range from 0 to 115 per cent. A suggested increase in turnover of 115 per cent frankly lacks credibility and finds no support in the expert evidence, the lay evidence or other survey evidence.

[1068] As acknowledged by RCI, the EA survey evidence provides no information about the approach and methodology adopted. We would add that the wording of survey questions 2 and 3 is problematic and there is little or no analysis of the data (in particular, there is no analysis or interpretation of the responses to questions 2 and 3). Further, and contrary to RCI's submission, the evidence is not 'helpful at a more general level' as the views presented in the data in response to questions 2 and 3 are not consistent with the lay evidence.

[1069] As we observe later, the assessment of survey evidence is not necessarily a binary task (i.e. you either accept or reject the evidence). The methodological problems associated with some survey evidence may mean that rather than dismissing the evidence the results are accepted as indicative or anecdotal, rather than definitive. But the EA survey evidence is so flawed that it is of no assistance.

The Jetty Survey

[1070] RCI commissioned Jetty Research to undertake a random national telephone survey of 1000 restaurant and café owners and managers. The survey respondents were randomly chosen from a list (supplied by RCI) of 18 268 restaurant and cafes and, while some were members of RCI, Jetty Research was not informed of which business were members.⁹³³

[1071] The survey was conducted on weekdays between Wednesday 22 April 2015 and Monday 4 May 2015. Data from the ABS Counts of Australian Businesses survey for June 2014 showed that there were 26 728 restaurants and cafes employing staff.⁹³⁴ The sample of 1000 respondents was achieved from 67 per cent of businesses contacted and eligible to participate.

[1072] Around 85 per cent of survey respondents opened on Sundays, increasing to 90 per cent that opened on Sundays and/or public holidays.⁹³⁵

[1073] The survey found that the main reasons that businesses opened on Sundays and/or public holidays were:

- to keep customers happy (31 per cent);
- busy/busiest days (30 per cent); and
- profitable day (23 per cent).⁹³⁶

[1074] These businesses were also asked if opening on Sundays and/or public holidays make them more or less profitable overall. Around half (51 per cent) responded that it made them more profitable, while almost one quarter (24 per cent) responded that it made them less profitable. Larger businesses (more than 20 employees) were more likely to respond that it was more profitable than small businesses (fewer than 10 employees).⁹³⁷

[1075] Businesses that opened on Sundays and/or public holidays were then asked what changes they would make to their business if penalty rates were reduced. They were provided with the following four options:

- use the savings to improve your business (78 per cent);
- use the savings to invest in training (68 per cent);
- put on additional staff (52 per cent); and
- open for longer hours (41 per cent).⁹³⁸

[1076] For businesses that did not open on Sundays and/or public holidays, the main reason given by 70 per cent of respondents was ‘penalty rates/too expensive/can’t make a profit’⁹³⁹. Over half (54 per cent) of these businesses responded that they would be more likely to open on Sundays and public holidays if penalty rates were reduced.⁹⁴⁰

[1077] Combining the responses to both questions, Jetty Research concluded that 52 per cent of respondents would be likely to take on more staff and 42 per cent would likely open for longer hours.⁹⁴¹

[1078] Jetty Research used these data to suggest an aggregate estimate of the additional number of staff and opening hours, based on the questions asking for a “rough estimate” of the additional staff that these businesses would recruit for a typical Sunday/public holiday and additional hours they would be open. The survey found an average of an extra 3.15 staff per day would be employed, with a higher average for larger businesses and businesses not currently opening on those days.⁹⁴² The average number of extra opening hours was 5.07 per day, with little difference by business size. RCI extrapolated the Jetty Survey results to contend that reducing penalty rates could result in approximately ‘39,800 extra staff being employed nationally on any given Sunday or public holiday’.⁹⁴³

[1079] Mr Parker, the Managing Director of Jetty Research, gave some limited evidence about the data collection process. We note that Mr Parker is not a qualified practicing market researcher under the scheme established by the Australian Market and Social Research Society (AMSRS).⁹⁴⁴

[1080] Mr Parker was aware of the Australian standard for market, social and opinion research (AS ISO 20252), but his evidence was that it was not something he turned his mind to as part of the conduct of the survey⁹⁴⁵ and that the ISO standard was not applied to the Jetty Survey.⁹⁴⁶ Further, the database from which Mr Parker’s sample was selected, was provided to him by his client, the RCI. He was not responsible for the collection of that database and was unable to provide any reliable evidence as to its source.

[1081] Mr Parker’s statement attached the results of the Jetty Survey, including (at Appendix 1) the questionnaire used. As submitted by United Voice, the questionnaire has a number of

significant deficiencies when considered in the light of the proposals being advanced by the RCI in this Review, including:

- (i) In relation to a number of the questions it was impossible to disaggregate the answer. For example when recipients were asked “Why do you choose to trade on Sundays and/or public holidays?” Mr Parker accepted that it was not possible to attribute the reason to one or other or both of those days.⁹⁴⁷ Likewise when recipients were asked “Do you believe that opening on Sundays and/or public holidays makes your business more or less profitable?” it was not possible to attribute the answer to one or other or both of those days.⁹⁴⁸
- (ii) Recipients were asked questions about “weekend penalty rates” without any distinguishing or clarification of those questions related to Saturday or Sunday penalty rates. Mr Parker accepted “The answer will not tell you anything as between Saturday and Sunday”.⁹⁴⁹
- (iii) Where questions sought to elicit answers about the effect of a reduction in penalty rates they did not identify the level of that reduction.⁹⁵⁰
- (iv) A number of the questions prompted answers. For example, the question that sought to elicit what respondents might do in the event that “weekend penalty rates” were to reduce prompted only four options, those being:
 - (a) “put on additional staff”;
 - (b) “open for longer hours”;
 - (c) “use the savings to improve your business”;
 - (d) “use the savings to invest in training”.

[1082] We also note that a significant number of the relevant questions only had small to modest numbers of responses, further undermining their reliability.⁹⁵¹

[1083] The Productivity Commission considered the reliability of the Jetty Survey given the survey design and achieved sample sizes. The Productivity Commission concluded that a ‘major deficiency’ of the survey was that it asked for employers’ views about the impact of a hypothetical reduction in penalty rates without specifying the actual magnitude (point (iii) in paragraph [1081] above), and as a result the responses ‘would reflect different judgments by respondents on the magnitude of the hypothetical change’, and would likely overstate any impacts.⁹⁵²

[1084] Further, the Productivity Commission also noted businesses that opened on Sundays and/or public holidays were only provided with a set of responses to how they would respond to a reduction in penalty rates and could provide no additional responses, including no change (point (iv) in [1081]). The Productivity Commission concluded that this would also likely overstate any impacts.

The Benchmarking Survey

[1085] RCI also tendered and relied upon an RCI survey described as the “restaurant and catering Australia benchmarking survey” from 2014 (the 2014 benchmarking survey). The

survey was attached to the statement of Ms Carlita Warren, the Policy and Public Affairs Director of RCI.

[1086] The survey was conducted electronically and forwarded to a list of 2,760 members and non-members' of RCI. Ms Warren was unable to say how many of the survey recipients were RCI members and how many were non-members.⁹⁵³ Ms Warren confirmed that the recipient list was 'generated from the RCI's data base that had previously received communications from the RCI'.⁹⁵⁴ Of the 2,760 recipients, 340 responded to at least some part of the survey⁹⁵⁵ and of those only 121 completed all of the survey.⁹⁵⁶

[1087] During the course of cross-examination, Ms Warren was directed to the criticisms of a previous 'benchmarking survey' conducted by RCI, made by the majority of the Full Bench in the Transitional Review of the *Restaurant Award*. In that review the Full Bench (majority) stated at paragraph [113]:

'for example, the RCI conducted a survey of its members in 2011 concerning a large range of issues of relevance to the industry. One question in the survey was "what has been the impact on weekend penalty rates being enforced through the restaurant industry?"'

[1088] The Full Bench said of that question:

'that question is curiously phrased, in particular the impact of "enforced" is not entirely clear. The intermingling of weekend penalty rates and public holiday rates in the question also reduces the value of the survey response for our purposes.'

[1089] Ms Warren accepted that a similar question appeared in the 2014 benchmarking survey⁹⁵⁷ and acknowledged that the criticism made by the Transitional Review Full Bench (majority) had not been drawn to her attention. Ms Warren also acknowledged that the survey questions from 2011, 2012 and 2013 are 'pretty much the same'.⁹⁵⁸

[1090] As with the Jetty Survey questionnaire, the questions put as part of the Benchmarking Survey had a number of significant deficiencies, including:

- (i) Questions seeking reasons for not opening on Sundays/public holidays prompted respondents with answers.
- (ii) Answers were not able to be disaggregated to determine whether answers related to Sunday or a public holiday or both.
- (iii) Respondents were restricted in the number of answers for several questions, for example if they had more than one reason they were forced to choose one of the prompted responses.
- (iv) Questions that relevantly identified "reduced penalty rates on the weekend" making a "difference to running your business successfully", did not in any way quantify the level of reduction that was being described.

[1091] As to the proper process for survey data collection, and the conduct of surveys more generally, United Voice relied upon the expert evidence of Ms Helen Bartley.⁹⁵⁹ Ms Bartley is

a qualified practicing market researcher with the AMSRS and is also an accredited statistician with the Statistical Society of Australia.

[1092] Ms Bartley was asked to provide evidence about the necessary pre-requisites for the establishment and conducting of a survey from which reliable conclusions may be drawn. In respect of data collection Ms Bartley gave evidence that she would expect such data to be collected “in accordance with accepted market and social research industry standards, such as the ISO International Standard for Market, Social and Opinion Research (AS:ISO 20252) which is the international standard for access panels in market opinion and social research.”

[1093] Ms Bartley considered the following pre-requisites for the establishment and conduct of a survey from which reliable conclusions may be drawn:

- A clear aim and objectives for the survey;⁹⁶⁰
- Clear definitions of concepts such as a well-defined target population, scope and timeframe;⁹⁶¹
- A questionnaire that is relevant, contains meaningful and relevant questions that are unbiased and easy to answer, has response options that are mutually exclusive and follows a logical sequence;⁹⁶²
- An unbiased sample design and selection process that maximises the survey response where respondents are randomly selected from the target population and from a current and accurate sampling frame and a sufficiently large sample to draw results that are statistically accurate;⁹⁶³ and
- The consequences of any limitations with the survey to be considered.⁹⁶⁴

[1094] United Voice relied on these points to respond to the Jetty Survey⁹⁶⁵ and submitted that the survey did not meet these standards and therefore the results are not reliable.⁹⁶⁶ A similar submission was made in relation to the Benchmarking Survey.⁹⁶⁷

[1095] The Productivity Commission characterises the test of reliability proposed by Bartley as ‘overly stringent’ and goes on to make the following observation:

‘Evidence is always imperfect, and few conclusions about anything in the social sciences could be reached if only those studies that met the full set of conditions set by Bartley were given any weight’.⁹⁶⁸

[1096] The Productivity Commission explained that all of these business surveys would fail the “stringent” tests suggested by Bartley⁹⁶⁹ and argued that only surveys from the ABS would be considered reliable if these tests were applied. Instead, the Productivity Commission contended that, while the results “should be treated as suggestive more than definitive”, they should not be disregarded as evidence is “always imperfect”.⁹⁷⁰ Further, the Productivity Commission stated that “few conclusions about anything in the social sciences could be reached if only those studies that met the full set of conditions set by Bartley were given any weight”.⁹⁷¹

[1097] We agree with the above observation. The assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. Most survey evidence has methodological limitations – be it sample related the nature of the questions put or the response rate. The central issue is the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data.

[1098] Given the limitations in the Jetty Survey and the Benchmarking survey, and consistent with the view expressed by the Productivity Commission, we propose to treat the data from these surveys as suggestive or anecdotal, rather than definitive. We expressly reject the proposition advanced by RCI that the results of the Jetty Survey can be extrapolated to all businesses covered by the *Restaurant Award* and that an estimate can be made of the aggregate employment effect of reducing penalty rates.

[1099] RCI also relies on the ‘Final Report of the Visitor Economy Taskforce: A Plan to Double Overnight Visitor Expenditure to NSW by 2020’⁹⁷² (the Taskforce Report). The Taskforce Report expresses the view that:

‘The penalty rates currently imposed by the Fair Work Act 2009 curtail the financial viability of business operating in visitor economy sectors such as food, retail and accommodation. Many businesses are unable to stay open during peak periods (such as public holidays, evenings and weekends) due to the current penalty rates imposed under the Fair Work Act 2009, leaving demand unmet and benefit from visitor expenditure lost.

Inadequate service levels, due to insufficient staffing at peak periods, result in a failure to retain customers, but may also drive away potential future customers through negative online reviews posted on the websites used so much by visitors to inform their dining, shopping and accommodation choices.

Easing the impact of penalty rates under the Fair Work Act 2009 will give employers the flexibility to hire staff during high-demand periods and allow NSW to fully capture the revenue potential of discretionary visitor spend.’⁹⁷³

[1100] Recommendation 15 in the Taskforce Report is relevant for present purposes:

‘Call upon the Commonwealth Government to review the Fair Work Act 2009 to remove those provisions for penalty rates which significantly increase labour costs and deter businesses in the visitor economy from operating at times/days of the week when the tourism and hospitality sector faces peak demand (see also Food and Wine recommendations).’⁹⁷⁴

[1101] Eight actions are identified to implement the recommendations made. Relevantly, action 15A states:

‘Call upon the Commonwealth Government to review the Fair Work Act 2009, including to require an employee to work five days during the working week before being entitled to receive penalty rate wages for any subsequent shifts during the weekend.’⁹⁷⁵

[1102] We note that if adopted the proposed amendment to the FW Act ‘to require an employee to work five days during the working week before being entitled to receive penalty rate wages for any subsequent shift during the weekend’, would have the practical effect of eliminating weekend penalty rates in the retail and hospitality sectors. The Commonwealth has not acted on the recommendation.

[1103] It is also relevant to observe that no employer party in these proceedings has sought to vary any of the modern awards before us in a manner consistent with action 15A in the Taskforce Report.

[1104] Finally, we would also observe that the Taskforce Report is dated June 2012. In other words it predates the July 2014 reductions in Sunday penalty rates in the *Restaurant Award*.

(ii) *United Voice*

[1105] United Voice relied on the evidence of 4 lay witnesses each of whom was employed under the *Restaurant Award*:

- William King, Food and Beverage Attendant and Bar Manager Level 3 at Mestizo Cocina Peruvina Restaurant;⁹⁷⁶
- Angus Lonergan, barista at The Place;⁹⁷⁷
- Jennifer Miller, chef at Oscar's on the Yarra;⁹⁷⁸ and
- Alexandra Kindness, kitchen hand at Demedios café.⁹⁷⁹

William King

[1106] Mr King has worked in the hospitality sector for over 20 years and since August 2014 he has been employed as a casual level 3 Food and Beverage Attendant and Bar Manager at Mestizo Cocina Peruvina Restaurant in South Australia.

[1107] Mr King works about 30 hours per week. He works shifts on Wednesdays, Thursdays and Fridays. On Saturdays he starts work at 2.00 pm and finishes around 10.00 pm, sometimes later. At the time he made his statement he did not work on Sundays, though he did when he was initially employed at the restaurant.

[1108] As to the impact of working on weekends and public holidays Mr King's evidence is as follows:

‘As a result of regularly working Saturdays, some Sundays and public holidays I have missed many events with my family and close friends. These included attending engagement parties, birthday parties and celebrating my own birthday. These events are usually celebrated on the weekend. Occasionally, if I provide enough notice, I can get time off work to attend weddings.

I recently spent some time coaching my step-daughters netball team on Saturday mornings. I would quite often work late on a Friday night, and when I couldn't sleep in on Saturday morning because of netball I was unable to properly rest. I would still be tired when I went to work early in the afternoon. I found I could not commit for a second season because I was too exhausted from working in the evenings.

I felt like I was missing out. My daughter is getting into her middle teenage years, and does not want to play netball anymore. I feel like I have missed part of her life. Even when I was able to coach her team, I would miss a lot of her life. After the game, I would not see her until Sunday afternoon. I would wake up around twelve, and that was when I could see her.⁹⁸⁰

[1109] Mr King deals with the impact of a reduction in penalty rates as proposed by RCI at paragraphs 21–27 of his statement, in particular:

‘In the event that I am required to work Sundays and public holidays, if the penalty rates were reduce, I would be disadvantaged financially. I live week to week and have done for a long time. If I earned any less money, and I would need to work more. I do not think I would be offered more work at my current workplace, their staffing needs are pretty set. I do not believe

I could find more work elsewhere. The key nights for hospitality are Fridays, Saturdays and Sundays, and there is a lot of competition for those shifts.⁹⁸¹

[1110] In his statement Mr King did not specifically refer to the impact of Sunday work on his social and family interactions. During his oral evidence he was questioned about whether there was a difference between Saturday and Sunday work in terms of the level of intrusion into his social life. The essence of his evidence in respect of this issue was:

- It depends on when a particular social event is scheduled: ‘If I’ve got friends that are having a nice casual barbecue and it happens to be on a Sunday afternoon then that’s going to intrude on my social life more than if it was a party on a Saturday night’.⁹⁸²
- As to the timing of particular social events, most birthday celebrations predominantly occurred on Friday or Saturday night.⁹⁸³
- In respect of family events and whether they occurred more commonly on a Saturday or Sunday: ‘Maybe 50-50 or more leaning towards the Saturday’.⁹⁸⁴
- He drew no distinction between the level of intrusion associated with working on a Saturday or Sunday evening.⁹⁸⁵

[1111] In response to a question about whether he had factored possible increases in working hours into the calculation of loss from reductions in penalty rates, Mr King said that there would be no more hours. There are currently two people rostered to work both days and nights on Saturdays and Sundays and that is all that is required to handle a 45 seat restaurant. In response to the proposition that he could look for additional work with another establishment, Mr King said:

‘If I could find somewhere in hospitality that wanted you to work for them not including Friday, Saturday nights, then, yes, I could. However finding something like that in my experience, is, I’m going to say, very little to none.’⁹⁸⁶

Angus Lonergan

[1112] Mr Lonergan has worked in hospitality for about 10 years, most recently as a barista. He currently works as a casual employee for about 20 to 25 hours per week. He regularly works on the weekend and has worked on public holidays in the past.

[1113] Mr Lonergan gave evidence about the impact of working on weekends and public holidays and, in particular, the adverse impact on the time he is able to spend with his partner and friends:

‘I have trouble making time to see friends who work during the week, and it is very rare that I will see my friends as a group. I am often unable to attend birthday parties and other celebrations because I am working and they are held on the weekend. If they are during the day, I am normally working. If they are at night, I will probably have to leave early so that I am not tired for my shift the next day.’⁹⁸⁷

[1114] As to Mr Lonergan's evidence that he was 'often unable to attend birthday parties', during the course of his oral evidence he said that these events were often on Friday or Saturday evening.⁹⁸⁸ In the course of cross-examination Mr Lonergan was asked whether there was any difference between Saturday and Sunday work in terms of the level of intrusion into his social life. He replied: 'not particularly, no'.⁹⁸⁹

[1115] Mr Lonergan deals with the impact of reduction in penalty rates as proposed by RCI, at paragraphs 43 to 46 of his statement, in particular:

'I have calculated that if penalty rates are reduced in this way, then I will lose approximately \$153.00 to \$122.00 when I work a 7 hour public holiday shift.

While I would be able to work additional hours, the impact of doing so would mean that I would have less time to search for full-time work.⁹⁹⁰

Jennifer Miller

[1116] Ms Miller has worked in the hospitality industry 'on and off' for about 30 years and since December 2014 as a casual Commis Chef at 'Oscars on the Yarra' in regional Victoria (a level 4 Cook Grade 3). Her hours fluctuate on a weekly basis, from 2 to 47 hours per week, spread across all of the days of the week. The majority of her shifts are between Thursday and Sunday and she works on public holidays, from time to time. A lot of Ms Miller's shifts are "split" or double shifts whereby she works a breakfast or lunch shift and then comes back to work a dinner shift.⁹⁹¹

[1117] As to the impact of weekend and public holiday work Ms Miller's evidence is as follows:

'When I work mornings, I leave home before my son goes to work. When I work nights, he's usually already asleep when I come home. When I work nights, I can't phone friends up and talk to them because when I get home, they're already asleep. On weekends and in the evenings, when my friends are all out socialising, I'm usually at work.

If I want to see my grandchildren, I have to nip in and do it between shifts, which is difficult.

The entire time I have worked in hospitality, I have had to miss family functions, including weddings and birthdays, because I have had to work. I still miss those events.

I can't think of any positive benefits for me from working the hours that I work, except for the penalty rates. A lot of the time when I've had to work public holidays and miss out on time with my family and extended families, I've been able to console myself by thinking that at least I'm getting paid penalty rates.

Previously, I have worked Christmas Day, Christmas Eve and Boxing Day. The first time I worked Christmas Day, I had to explain it to my children who were upset. That was awful. When I worked on Christmas Day, I had to get my family to save me some of Christmas lunch, or they would have to wait until I finished worked. By the time I got home, everyone had opened their presents and I had missed out on the day. I always felt very sad working on those days.⁹⁹²

[1118] During the course of her oral evidence Ms Miller acknowledged that working weekends 'goes with the [restaurant] industry'⁹⁹³. Ms Miller was also asked whether there

was any difference between Saturday and Sunday work in terms of the level of intrusion into her social life. She replied:

‘I feel Sunday is worse for me, because we have a lot of small children in our family and its usually Sundays that they have parties and picnics and things like that.’⁹⁹⁴

[1119] Ms Miller deals with the impact of a reduction in penalty rates as proposed by RCI at paragraphs 30–39 of her statement and estimates that she will lose about \$65 when working a 15 hour split shift on Sundays and between \$140.25 and \$175.47 on a public holiday (depending on whether the RCI or ABI proposal is adopted). As to the impact of such a reduction in her earnings Ms Miller says

‘If penalty rates are cut as proposed by the RCI, then I would have to work more to earn the same amount of money, or find ways to reduce my household expenditure. My household expenses are already tight and there are some months when I don’t make enough to meet my monthly expenses and have to go without. Losing \$260 a month would be very stressful. I don’t know what else I could give up.

While I would be able to work some additional hours, the impact of doing so would mean that I would spend even less time with family, and have even less leisure time. Also, I do not know if I will be offered additional hours by my employer. If I am not, I would have to find a second job.

...

Even if I could find a second job, it is extremely difficult to balance two jobs, because both employers might want me to be available all of the time, even if they weren’t rostering me on for that day. It would mean a lot of juggling, which would not be manageable.’⁹⁹⁵

[1120] Under cross-examination Ms Miller maintained that while it would be possible for her to get a second job on days she was not working for her current employer, the second employer would also require her to be flexible. In this regard, Ms Miller said:

‘That is very possible, however, they require you to be flexible and work most days. Be available seven days a week. And if I’m already working in a job that have permanent hours on Friday, Saturday and Sunday, that’s contradictory. I can’t sort of say: ‘I can’t work for you this day because I’m working for this other person.’ You have to be available all the time.’⁹⁹⁶

[1121] In response to the proposition that she could work in a second job on days when her primary employer did not require her to work, Ms Miller said that most restaurants did not need employees on the days when she currently does not work and want employees on weekends and that she had found this out by making inquiries.⁹⁹⁷

Alexandra Kindness

[1122] Ms Kindness has worked in the hospitality industry since about 2007. In 2008 she started work as a permanent part-time kitchen hand in a café (a level 2 kitchen hand under the *Restaurant Award*) and consistently works on Saturdays, Sundays and evenings each week. The café does not open on public holidays. Ms Kindness works a little less than 30 hours per week on the following roster:

Tuesday: on call
Wednesday: 6:30 pm to 9:30 pm
Thursday: at the very least a lunch shift
Friday: 12:30 pm to 2:30 pm and 6:30 pm to 9:30 pm
Saturday: 11:30 am to 2:30 pm and 6:30 pm to 9:30 pm
Sunday: 11:00 am to 3:00 pm

[1123] As to the impact of working on weekends Ms Kindness' evidence is as follows:

'Most of my friends and relatives work between the hours of 9.00am to 5.00pm, Monday to Friday. Working weekends and evenings has a significant impact on my social life. For example, in May 2015, my mother and brother invited me to attend a classic car show in Emu Park. Despite having a great desire to spend quality time with my family, I had to turn down the invitation, as I had been rostered to work that weekend. This is not unusual, and when it occurs I feel disconnected from my family and friends. I virtually have no social life.

I study remotely, so working evenings and weekends is of no benefit in terms of freeing up my weekday days.'⁹⁹⁸

[1124] As with the previous lay witnesses called by United Voice, Ms Kindness, was cross-examined about whether the level of social intrusion differed between Saturday and Sunday work:

'Can I ask you to think about, in your mind, is the level of that social intrusion different between a Saturday or a Sunday, or you view it in the same way? - - - I have found that people who work 9 to 5 jobs, Monday to Friday will tend to – they might organise a social thing for a Saturday evening, however if it is a Sunday thing it will be during the day, when I'm working. It will not be an evening event because obviously they have to work the next day...

Do you think that level of intrusion into your social life is the same on Saturdays and Sundays? Do you think its more or less on one of those particular days? I'm just asking to see if you draw any comparison or whether generally you view it as the same level of intrusion into your social life? - - - It's the same.'⁹⁹⁹

[1125] Ms Kindness deals with the impact of a reduction in penalty rates as proposed by RCI at paragraphs 21 to 27 of her statement, in particular:

'I have calculated that if penalty rates were reduced in this way, then I would lose approximately \$20 per week from my weekly take home pay, which would cause me financial hardship.

Other than cancelling my gym membership, I have no luxury costs that can be removed from my budget.

If penalty rates are reduced in the way proposed by the RCI, I would have to work more to make up the loss of pay. I am already studying a reduced course-load, and struggling to balance work with study. I could reduce the number of subjects I am studying this semester, but I would then take longer to finish my degree.

Further, I would lose my education allowance from the Department of Veterans Affairs if I studied less than full-time.

Since it is difficult to balance work and study while working the hours that I work, I would have to seriously consider reducing discontinuing my degree so I could work enough hours to make enough money to get by. Discontinuing study would drastically limit my career prospects.¹⁰⁰⁰

7.4.5 Consideration

(i) *The late night penalty*

[1126] It is convenient to deal first with the claim in respect of the late night penalty.

[1127] RCI seeks to vary the late night penalty in the *Restaurant Award* and the *Fast Food Award*, in the same terms. A common submission was advanced in respect of both awards. The essence of the submission put was that shortening the span of hours which attract a penalty rate and keeping a uniform penalty rate, ‘achieves a level of consistency and ease of application’. This submission was the subject of some elaboration during the course of RCI’s closing oral submissions:

‘... the change which is sought there, at the heart or at the core of that is really to streamline and create administrative ease, if you like, in the application of the rates.

So while the figure of 5 per cent is put forward, the Restaurant & Catering Industrial isn’t necessarily wedded to that number, but what, in its proposal, it is seeking to do is to try and streamline the rate that applies to that so a small operator or a business owner doesn’t have to worry about factoring different rates at different hours for different employees...’

[1128] In support of its position, RCI relied on a report by the Fair Work Ombudsman dated June 2015 – ‘National Hospitality Industry Campaign Restaurants, Café’s and Catering (Wave 2)’ (‘the FWO Wave 2 Report’). The FWO Wave 2 Report reveals a high level of non-compliance (58 per cent), RCI referred to the following extract from the FWO Wave 2 Report:

‘The most commonly identified errors were employers providing flat rates of pay for all hours worked with many employers advising they had adopted this practice to simplify their payroll process. In many cases the hourly rate paid was not enough to cover hours attracting penalties, loadings or overtime. In respect of pay slips and record-keeping, the most common errors related to insufficient information being recorded on payslips, with employers commonly advising they weren’t aware which information was required to be included.’

[1129] The essence of RCI’s submission is that varying clause 34.2 such that it only provides for a 5 per cent loading for work between midnight and 5.00 am would make the award simpler and improve compliance. It is not submitted (at least not expressly) that the variation proposed would lead to an increase in the operating hours of fast food businesses, or to an increase in employment. Nor is there much direct, probative evidence to support such a contention.

[1130] The proposition that a variation in the terms sought would increase compliance is only given limited support by the FWO Wave 2 Report. That report identified the most common source of non-compliance as the underpayment of hourly rates, whereas errors in the application of weekend penalty rates and loadings only accounted for 17 per cent of instances

of incorrect payment. The FWO Wave 2 Report makes no direct reference to non-compliance in relation to the application of the late night penalty in clause 34.2.

[1131] We acknowledge that the variation proposed would make the award simpler and easier to understand, consistent with one of the s.134 considerations (s.134(1)(g)). But the same may be said about the abolition of the evening work penalty. Simplicity is a laudable objective, but it is only one of the matters we are required to take into account – the central question is whether the award term provides ‘a fair and relevant minimum safety net’.

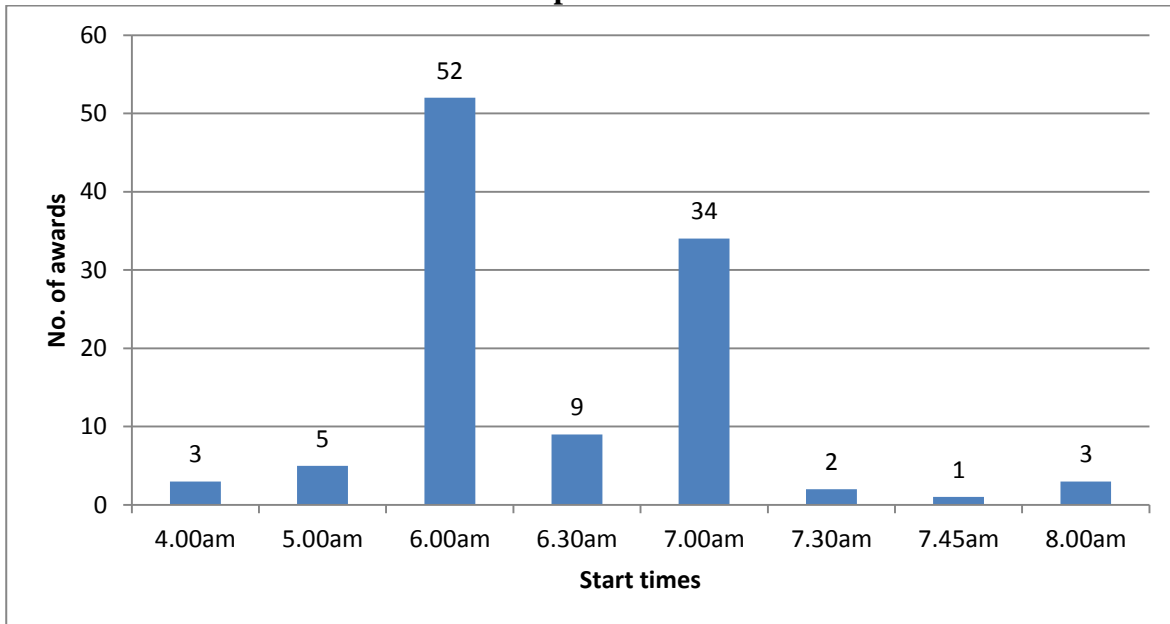
[1132] We do not propose to vary the late night penalties in the *Restaurant Award* in the manner proposed by RCI. A sufficient merit case has not been advanced to support the extent of the changes proposed.

[1133] We are however persuaded to vary the span of hours prescribed in clause 34.2(a)(ii). At present the award provides an additional payment of 15 per cent of the standard hourly rate for work performed between midnight and 7.00 am.

[1134] In our view the span of hours attracting the 15 per cent additional payment should be amended to ‘between midnight and 6.00 am’. In the context of this award the provision of an additional payment for work performed between 6.00 am and 7.00 am does not achieve the modern awards objective. Such a term does not provide a ‘fair and relevant minimum safety net’, because it overcompensates employees for work performed between 6.00 am and 7.00 am (and hence is not ‘fair’, to employers) and is not suited to the contemporary circumstances prevailing in the industry covered by the modern award (and hence is not ‘relevant’). Common experience suggests that many cafes are often open from 6.00 am, particularly in capital and regional cities.

[1135] We note that of the 109 modern awards which specify a spread of hours (or a penalty payment applying to work before a nominated early start time) the majority provide for a start time of 6.00 am or earlier (as shown by Chart 35 below).

Chart 35
Modern awards with spread of hours – start times¹⁰⁰¹



[1136] In deciding to vary clause 34.2(a)(ii) in the manner set out above, we have taken into account the s.134 considerations and note that:

- a substantial proportion of award-reliant employees covered by the *Restaurant Award* are low paid and the variation will reduce the earnings of those employees, but not to a significant extent. The variation will only apply to those employees who work between 6.00 am and 7.00 am and will only reduce their earnings for that hour of work (s.134(1)(a));
- the variation will not *encourage* collective bargaining (s.134(1)(b));
- the variation may lead some employers to open earlier (as suggested by one of the RCI lay witnesses) but is unlikely to have significant employment effects (s.134(1)(c)); and
- s.134(1)(da) requires that we take into account, relevantly, the need to provide additional remuneration to employees working ‘unsocial’ hours. In the context of this industry we do not consider that working between 6.00 am and 7.00 am constitutes ‘unsocial’ hours such as to warrant additional remuneration.

[1137] The considerations set out in s.134(1)(d), (e), (f), (g) and (h) are not relevant to the variation proposed.

(ii) *Sunday penalty rate*

[1138] As mentioned earlier, RCI proposes to reduce the Sunday penalty rate for full-time and part-time employees, from 150 per cent to 125 per cent. RCI also proposes that the Sunday penalty rate for casual level 3 to level 6 employees be reduced from 175 per cent to 150 per cent. The effect of the proposed variations would be to align the penalty rates for Saturday and Sunday work, at 125 per cent (with the casual loading added for casual employees, to provide a payment of 150 per cent for Saturday and Sunday work).

[1139] RCI submits that the current penalty rates within the *Restaurant Award* are not meeting the modern awards objective and that the variations proposed are aimed at ‘adjusting the awards so that they operate in a manner consistent with the prevailing operational requirements: employer characteristics; and the changing demographics of the workforce in those industries’. RCI further submits that such changes will, having regard to the views expressed by expert witnesses and operators and managers of cafes and restaurants, facilitate increased trade and employment levels and also ease the regulatory burden on predominantly small and owner-operated businesses within the restaurant and fast food industries. In doing so, it said that the variations proposed will assist in the achievement of the modern awards objective.¹⁰⁰²

[1140] RCI does not contend that the proposed variations will achieve certain positive outcomes, as a matter of fact, but rather emphasises the importance of removing disincentives and barriers which exist.

[1141] As mentioned earlier, proposed variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. The variations proposed to weekend penalties by RCI constitute significant changes to the modern award. Such changes should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

[1142] The RCI lay witness evidence was of limited assistance. There was some evidence as to the impact of existing weekend and public holiday penalties on operating hours and staffing composition (with a higher than optimal level of junior staff being rostered on weekends). But there was a paucity of evidence about the likely impact on employment levels and service of a reduction in the Sunday penalty rate as sought by RCI.

[1143] The methodological issues associated with RCI’s survey evidence significantly limits the utility of that evidence, and the weight we attribute to it.

[1144] A central problem with the case advanced by RCI is that it fails to adequately address or deal with the consequences of the *2014 Restaurants Penalty Rates decision*. That decision reduced the Sunday penalty rate for level 1 and 2 casual employees only, and rejected an application to reduce Sunday penalty rates for full-time and part-time employees and level 3–6 casuals. As we mention in Chapter 3 as a general proposition previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so (see [253]–[255] above).

[1145] In the course of closing argument, counsel for RCI did not suggest that the *2014 Restaurants Penalty Rates decision* was wrong, but simply that its task was more confined

than the task we are undertaking.¹⁰⁰³ We accept that the Review is broader in scope than the Transitional Review, but it does not appear from its decision that the Full Bench adopted a narrow approach to its task. In particular, as we have already mentioned, the Full Bench in the *2014 Restaurants Penalty Rates decision* rejected the proposition that the proponent of an award variation has to establish a material change in circumstances since the making of the modern award. Further, the submission put by RCI ignores the fact that the 2014 Full Bench expressly rejected essentially the same case that is being put to us and it is plain from a reading of the *2014 Restaurants Penalty Rate decision* that the issue of Sunday penalty rates was fully ventilated.

[1146] ABI's alternative application in the earlier Transitional Review proceedings was in substantially the same terms in these proceedings.¹⁰⁰⁴ Further, as in these proceedings, in the Transitional Review case, RCI presented survey evidence and relied on lay evidence and expert evidence from Professor Lewis in support of the proposed variations to weekend penalty rates. Indeed, in terms of the lay evidence presented the applicants in the Transitional Review case presented a more substantive evidentiary case – adducing evidence from 20 restaurant operators and 2 catering operators.¹⁰⁰⁵ United Voice also presented lay and expert evidence in the Transitional Review proceedings.

[1147] In the Transitional Review the application to vary the *Restaurant Award* was rejected at first instance.¹⁰⁰⁶ Permission to appeal was granted. In the course of granting permission to appeal, the Full Bench (majority) said:

[90] The Full Bench in the Modern Awards Review 2012 decision identified a “significant change in circumstances which warrants a different outcome” as being an example of “cogent reasons” which might justify a departure from a previous Full Bench decision. However, it is clear that there might be other cogent reasons why a Full Bench decision might not be followed in the conduct of a modern award review. These might include that the evidence demonstrates that the modern award has not operated in practice in the way intended by the Full Bench in its earlier decision, or that a matter critical to the proper operation of the modern award was not raised before the Full Bench and consequently not considered, or that the Full Bench made a patently demonstrable error. For the purpose of the two-yearly review, if a party cogently demonstrates that for any reason an award is not achieving the modern awards objective and/or is not operating effectively, without anomalies or technical problems arising from the award modernisation process, then that must be taken into account in the conduct of the review under item 6(2) regardless of whether circumstances have changed since the Full Bench decision which resulted in the making of the modern award.

[91] In paragraph [247] of the Decision (which we have earlier set out), the Deputy President concluded that cogent reasons had not been established because the “grounds on which they [the 18 applicants] seek the variations do not identify a significant change in circumstance; rather they are largely merits considerations which existed at the time the Award was made”. That conclusion, with respect, appears to have established a criterion for the determination of the penalty rates case, namely “a significant change in circumstance”, which was not derived from item 6 of Schedule 5 of the Transitional Act...

[92] The 18 applicants ran a case before the Deputy President, supported by a considerable volume of evidence, that the existing weekend penalty rates provisions in the Restaurant Award were not meeting the modern awards objective and were not operating effectively. The case was not confined to or even significantly concerned with any change in circumstances since the Restaurant Award was first made; the 18 applicants relied upon a range of matters including that penalty rates were inhibiting restaurant operators from opening and/or

employing persons on weekends, thereby suppressing business turnover and job creation, and that the level of penalty rates on Sundays was too high given that the disability associated with working Sundays was no higher than Saturdays and higher than was necessary to attract persons to work on Sundays. Those matters were raised in connection with the alternative penalty rates application as well as the primary case. Although the Deputy President made some findings about these aspects of the applicants' case, her adoption of "a significant change in circumstance" as the apparent criterion for variation (including at paragraph [226] in relation to the specific issue of "disabilities associated with working unsociable hours") meant that the alternative case was not considered in accordance with the requirements of item 6 of Schedule 5 of the Transitional Act and that the exercise of the discretion was artificially confined and thereby miscarried. Although we recognise there are several possible ways of reading the Deputy President's reasoning process in the Decision, we have taken the view, on balance, that the approach adopted by the Deputy President was attended by appellable error.¹⁰⁰⁷ (emphasis added)

[1148] The Full Bench proceeded to quash the decision subject to appeal insofar as it determined the alternative penalty rates application and to rehear and make a further order in relation to that alternative application based on the evidence before the Member in the proceeding at first instance. As we have mentioned, the alternative application considered by the Transitional Review Full Bench is, in substance, the same as the variation sought by RCI in these proceedings.

[1149] The Full Bench (majority) then considered the evidence and submissions (at [95]–[137]) and concluded (at [138] and [140]–[144]):

‘[138] None of this evidence would cause us to conclude that a total Sunday penalty rate of 50% is too high. For career restaurant industry workers, the disability associated with working on Sundays which we have earlier described clearly applies. Even for transient and lower-skilled casual employees working primarily on weekends, that disability exists, as in the retail industry. However, we consider that for this latter category of primarily younger workers, the superimposition of the casual loading of 25% in addition to of the Sunday penalty of 50%, resulting in a total loading of 75%, would tend to overcompensate them for working on Sundays and is more than is required to attract them to work on that day. That raises an issue as to whether the Restaurant Award is meeting the modern awards objective in s.134.’ ...

[140] The appropriate course to address this issue is to vary the Restaurant Award to provide, in respect of the class of employees in question, that the Sunday penalty rate together with the casual loading should not exceed 50% in total. We consider that varying the Restaurant Award in this manner would be consistent with the modern awards objective in s.134 and, to the extent relevant, the minimum wages objective in s.284...

[141] The difficulty then is to find a mechanism by which to separate the class of transient and lower-skilled casual employees from career restaurant industry employees, recognising that the latter category of employees is also likely to include persons employed on a casual basis, working regular and/or full-time hours. We consider that the distinction should be made on the basis that, for casual employees employed in the Introductory Level classification or in any classification falling within the Level 1 and Level 2 pay grades, the Sunday penalty rate together with the casual loading should not exceed 50% in total (that is, the 25% casual loading and in addition a further 25%). We have chosen those classification levels because, for Food and Beverage Attendant Grade 3, Cook Grade 2, Clerical employee Grade 3 and Storeperson Grade 3 (all of which classifications fall within the Level 3 pay grade), an "appropriate level of training is required"...

[142] The completion of the training requirements described above would be a strong indicator, we consider, that an employee intends to pursue a career in the restaurant industry and is not a transient and low-skilled worker. Such employees are not intended to be affected by the change to the Restaurant Award we propose to make.

[143] In making this change, we do not intend as far as possible to affect the take-home pay of existing employees, noting that we are dealing with low-paid employees. Therefore we consider that the variation should include a requirement that no existing employee classified as Level 3 or above be moved down to Levels 1 or 2 or be discriminated against in the allocation of work as a result of this variation.

[144] The variation shall take effect on 1 July 2014.^{7 1008}

[1150] In substance the RCI now seeks to vary the outcome of the *2014 Restaurants Penalty Rates decision*. But seeks to do so without addressing the reasons for the earlier decision, or indeed even contending that the earlier decision was wrong.

[1151] Further, there is no material before us which would enable us to assess the impact of the variation proposed by RCI. We have no data about the numbers of full-time and part-time employees covered by the *Restaurant Award* or the numbers of Level 3 to Level 6 casual employees. Nor do we know what proportion of the employees are Level 1 and 2 casuals. Absent this evidence we are unable to make any useful assessment as to the effect of varying the award in the manner sought. The limited lay evidence before us suggests that the proportion of such employees is quite high, suggesting that the benefits of the variation proposed by RCI – in terms of employment and service improvements – would be very modest, yet the detriment to the employees affected would be significant.

[1152] Nor is there any evidence of positive employment effects or service improvements as a consequence of the reduction in Sunday penalty rates introduced by the *2014 Restaurants Penalty Rates decision* on 1 July 2014. Indeed, 2 of RCI's 5 lay witnesses were unaware of the fact that on 1 July 2014 the *Restaurant Award* was varied to reduce the Sunday penalty rate for level 1 and 2 casuals from 175 per cent to 150 per cent. Both of these witnesses were RCI members and we assume that RCI informed its members of the award variations.

[1153] Further, none of the RCI lay witnesses suggested that there had been any positive employment effect (either in overall numbers of employees or in hours worked) as a consequence of the previous reduction in the Sunday penalty rate.

7.4.6 Conclusion

[1154] At present the Restaurant Award provides for a 15 per cent loading for work performed between 'midnight and 7.00 am'. For the reasons given we have decided to vary the span of hours prescribed in clause 34.2(a)(ii) so that the additional 15 per cent loading applies between 'midnight and 6.00 am'.

[1155] As to the claims in respect of the Sunday penalty rate, on the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, RCI has not established a merit case sufficient to warrant the granting of the claim.

[1156] If these were simply *inter partes* proceedings we would dismiss the RCI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.

[1157] We propose to provide RCI (and any other interested party) with a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a ‘fair and relevant minimum safety net’. In the event that a party wishes to take up this opportunity, it will need to address the deficiencies in the case put to date, as set out above. In particular, any such case will need to:

- provide material which would enable us to assess the impact of the variations proposed (see [1151]);
- provide evidence as to the effects (in terms of employment and service levels of the reductions in Sunday penalty rates consequent on the *Restaurants 2014 Penalty Rates decision* (see [1152]–[1153]);
- provide a cogent argument as to why we should depart from the *Restaurants 2014 Penalty Rates decision* in respect of Sunday penalty rates; and
- address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.

[1158] In relation to the provision of additional evidence as to the effects of the 2014 reduction in Sunday penalty rates, we are not suggesting that quantitative evidence (or ‘natural experiment’ evidence) as to the impact of these changes is required. However we do expect significantly more extensive lay evidence as to this issue than was presented in these proceedings.

[1159] In relation to the last point, in the event that we were persuaded to depart from the Transitional Review Full Bench decision we put any applicants on notice that the outcome of any further proceedings may result in the acceptance of the Productivity Commission submission such that Sunday penalty rates are varied so that all casuals receive both the Sunday penalty rate applicable to full-time and part-time employees *and* the casual loading.

[1160] We deal with the future conduct of this aspect of these proceedings in Chapter 12, Next Steps.

7.5 The Fast Food Industry Award 2010

7.5.1 The Claims

[1161] Ai Group seeks to vary clause 25.5 of the *Fast Food Industry Award 2010* (the *Fast Food Award*) by adjusting the span of hours in respect of which employees receive a 10 per cent loading for ‘evening work’, and by reducing the penalty rate for Sunday work, from 150 per cent to 125 per cent. The changes sought are set out below, in a marked up version of clause 25.5:

25. Hours of work

...

25.5 Penalty rates

(a) Evening work Monday to Friday

- (i) A loading of 10% will apply for ordinary hours of work within the span of hours between ~~9.00 pm~~ 10.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.
- (ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(b) Saturday work

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.

(c) Sunday work

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

[1162] The NRA has made a claim to similar effect, though it proposes the deletion of clauses 2.5(b) and (c) and the insertion of a provision in the following terms:

‘(b) Weekend work

A loading of 25% will apply for ordinary hours of work within the span of hours on Saturday and Sunday, and for casual employees an additional 25% on top of the casual rate.’

[1163] The NRA also proposes an amendment to clauses 26, Overtime, as follows:

‘The rate of overtime shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half. ~~Casual employees shall be paid 275% on a Public Holiday.~~’

[1164] RCI also seeks a reduction in the penalty rate for Sunday work (from 150 per cent to 125 per cent) but proposes a more substantial change in respect of evening work. RCI proposes the deletion of the existing ‘evening work Monday to Friday’ provision (clause 25.5(a)) and the insertion of the following term:

Additional payment for work done between the hours of Midnight and 5.00 am Monday to Friday

An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked. For the purposes of this clause midnight will include midnight Sunday.

[1165] If granted, RCI's proposed variation to clause 25.5(a) would:

- delete the existing entitlement to a 10 per cent loading within the span of hours between 9.00 pm and midnight;
- adjust the span of hours in respect of which employees currently receive a 15 per cent loading (the loading would also reduce) from 'after midnight' to 'the hours between midnight and 5.00am'; and
- reduce the existing loading for ordinary hours of work after midnight from 15 per cent to 5 per cent.

[1166] The NRA and RCI also seek reductions in the public holiday penalty rate. We deal later with that aspect of those claims.

7.5.2 Background to the *Fast Food Award*

[1167] The Award Modernisation Full Bench designated the Retail and Hospitality industries as priority industries in the award modernisation process in the decision issued on 20 June 2008 and determined that the fast food industry would be considered as part of the retail industry, rather than in the hospitality industry¹⁰⁰⁹. Initially the Full Bench rejected proposals by the SDA, ARA and NRA that there should be a separate award covering the fast food industry:

'... In particular, at least at this stage, we do not intend to exclude community pharmacies, fast food outlets or hairdressing services...Obviously the precise scope of a modern retail award cannot be determined at this stage but we intend to include a broad range of awards in our consideration to maximize the potential for rationalisation of award coverage'¹⁰¹⁰

[1168] Ai Group subsequently submitted a separate draft fast food award which provided that ordinary hours could be worked on any day Monday to Sunday. The draft award contained a 20 per cent penalty for working between 1.00 am and 5.00 am on any day and a 200 per cent penalty for work on public holidays¹⁰¹¹. In the accompanying submission Ai Group submitted that loaded rates, rather than separately identified penalties were a feature of enterprise awards and agreements in the fast food industry.¹⁰¹²

[1169] The SDA filed a draft general retail industry award, which included the fast food industry within its scope.¹⁰¹³ The draft provided for loadings of 25 per cent and 100 per cent for work performed on Saturdays and Sundays, respectively.¹⁰¹⁴ Public holidays attracted loadings of 150 per cent and 175 per cent for permanent and casual employees, respectively.¹⁰¹⁵

[1170] An exposure draft of a modern award for the general retail industry was published on 12 September 2008. The coverage of the exposure draft extended to the fast food industry and provided for penalty rates which reflected those proposed by the SDA.¹⁰¹⁶ In the accompanying Statement, the Full Bench did not specifically address the issue of the penalty rates contained in the exposure draft.¹⁰¹⁷ Following the publication of the exposure draft submissions were filed by interested parties.

[1171] Ai Group objected to the inclusion of fast food within the broader retail award on the basis that the penalty rates proposed in the draft retail award would add considerable costs to employers and ‘could have the effect of penalising the Fast Food industry from operating at times and on days when they are in most demand’.¹⁰¹⁸

[1172] After written and oral submissions from a range of interested parties, and taking into account the diversity of provisions across the broader sector, the Full Bench decided to make a separate award covering the fast food industry:

‘The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a “swings and roundabouts” approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.

We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies...

In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.¹⁰¹⁹

[1173] The *Fast Food Award* which was then published, provided lower penalty rates for ordinary hours worked on a Sunday than in the draft Retail award.¹⁰²⁰ Under the *Retail Award* the penalty rate for work on a Sunday was 200 per cent, while the *Fast Food Award* provided a penalty rate of 175 per cent for all work by full-time, part-time and casual employees on a Sunday.

[1174] In a Statement issued on 26 June 2009, the Commission provided parties an opportunity to apply to vary modern awards created in earlier stages that had not yet come into operation.¹⁰²¹ An application was made on 27 October 2009 by the NRA and Ai Group in [AM2009/41](#) to vary penalty rates in the *Fast Food Award*, including a claim to reduce the

rates payable on weekends to 125 per cent for all ordinary hours worked on Saturdays and Sundays, and to vary the time when the evening loading was payable.

[1175] The Commission subsequently granted the change in relation to the evening loading and reduced the penalty rate for full-time and part-time employees on a Sunday from 175 per cent to 150 per cent¹⁰²². The rate for casual employees working on a Sunday remained unchanged at 175 per cent. In its decision issued on 29 January 2010, the Commission stated:

‘[26] We have reconsidered the level of this loading having regard to the Sunday penalty rates in relevant pre-reform awards and NAPSAs and in particular the penalties now applicable in the restaurant industry. In all the circumstances we consider that a loading of 50% for full-time and part-time employees and 75% for casuals is fair and appropriate.’¹⁰²³

[1176] During the present proceedings the SDA and Ai Group made submissions about the extent to which penalty rates under the *Fast Food Award* were considered during the award modernisation proceedings.

[1177] Ai Group contend that the material shows that:

- ‘(a) the focus in the award modernisation process was rationalising the number of awards that operated in relation to the fast food industry;
- (b) the principal concern of the employer parties was the inappropriateness of the National Fast Food Award being used as the new safety net and, if was to be used, the increased costs for employers in the fast food industry associated with the terms of that Award;
- (c) although some material (in the form of statutory declarations) was relied upon by the employer parties, that material was not tested in cross-examination;
- (d) the material (in the form of statutory declarations) relied upon by the employer parties did not relate to the extent of disutility or disability associated with Sunday work in the fast food industry;
- (e) the material (in the form of statutory declarations) relied upon by the employer parties did not relate to the issue of the level of disutility or disability of Sunday work in comparison to Saturday work in the fast food industry;
- (f) the former Commission did not address the extent of disutility or disability associated with Sunday work in the fast food industry;
- (g) the former Commission did not address the level of disutility or disability of Sunday work in comparison to Saturday work in the fast food industry;
- (h) the former Commission did not address the increasing prevalence of Sunday trading and 24/7 trading in the fast food industry;
- (i) the former Commission did not address the overall relevance of the Sunday penalty rate; and
- (j) the former Commission did not address the overall fairness of the Sunday penalty rate.’¹⁰²⁴

[1178] Contrary to Ai Group's submission, the SDA submit that the issue of penalty rates was extensively considered during the award modernisation process. In outlining the process that led to the making of, and subsequent variation to the *Fast Food Award*, the SDA submit:

'... there was substantial submission and argument from interested retail parties which focused on the appropriate Sunday rate...the NRA/ANRA provided lengthy submissions on detailed costings and a number of witness statements ...

The AIG likewise filed extensive and detailed submissions seeking to emphasise the claimed unique features of the fast food industry and examined the history of industrial regulation in the industry in support of the proposition that the NFFR Award was an unsatisfactory instrument for the purposes of determining a modern award to reflect the fast food industry as a whole.¹⁰²⁵

[1179] The SDA also referred to various proceedings before the Award Modernisation Full Bench, including hearings on 5 November 2008 where rosters and costings were analysed.

[1180] The SDA contend that in making the *Fast Food Award* the Commission explicitly directed itself to the issue of evening and weekend penalties,¹⁰²⁶ and that:¹⁰²⁷

- The question of appropriate penalty rates for evening and weekend work was a central controversy during the award modernisation process and was addressed by extensive submissions and evidence;
- the provisions of the award dealing with penalty rates were not only considered and determined, but subsequently reconsidered and reduced by a Full Bench of the Commission; and
- the current provisions in the award have been described by the Commissions as "fair and appropriate.

[1181] We agree with the submissions advanced by the Ai Group.

[1182] While the application made by the NRA and Ai Group during the award modernisation process sought to reduce the Sunday penalty rate, it appears from the 29 January 2010 decision (see [1175]) that the penalty rates in the *Fast Food Award* were primarily set on the basis of the rates in the various pre-modernisation instruments.

[1183] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. It is apparent from an examination of the relevant decisions that the Award Modernisation Full Bench did not undertake a detailed or considered review of the penalty rates in the *Fast Food Award*. Rather, understandably enough in view of the time constraints on the award modernisation process, the Full Bench gave effect to the existing penalty rates in the preponderance of pre-reform instruments.

7.5.3 The Evidence

(i) Overview

[1184] Ai Group called 13 witnesses in support of its application to vary the *Fast Food Award*:

- Nicola Agostino: a Director of Agostino Group Holdings which operates three franchised McDonald's restaurants in Western Australia;¹⁰²⁸
- Adam Dando: a Director of Jasie Pty Ltd which operates eight franchised McDonald's outlets in Queensland;¹⁰²⁹
- Patricia Deasy: Principal Consultant, Australian Survey Research Group Pty Ltd;¹⁰³⁰
- Marcus Dunn: sole Director of Jamadu (Qld) Pty Ltd which operates five franchised McDonald's restaurants on the Gold Coast in Queensland;¹⁰³¹
- David Eagles: a Director of Eyrie Holdings Pty Ltd which operates two franchised McDonald's restaurants in Bunbury, Western Australia;¹⁰³²
- Gina Feast: State Human Resources Manager for Hungry Jack's Pty Ltd;¹⁰³³
- Ayman Haydar: a Director of Haydar Pty Ltd which operates four franchised McDonald's restaurants in Perth, Western Australia;¹⁰³⁴
- Marek Kopias: National Training and Human Resources Design Consultant for McDonald's Australia Limited;¹⁰³⁵
- Mallika Krishnamurthy: Director of Consumer and Business Insights for McDonald's;¹⁰³⁶
- Krista Limbrey: Human Resources Business Partner for NSW/ACT of McDonald's;¹⁰³⁷
- Domit Makhoul: Human Resources Manager, Victoria and Tasmania of Hungry Jack's Pty Ltd;¹⁰³⁸
- Dr Andrew Pratley: Statistical Consultant and Director of Dr Andrew Pratley Pty Ltd and Adjunct Lecturer of the University of Sydney Business School;¹⁰³⁹ and
- Julie Toth: Chief Economist for Ai Group.¹⁰⁴⁰

[1185] RCI called two witnesses in support of its application to vary the *Fast Food Award*:

- RCI fast food witness 1: operator hamburger restaurants.¹⁰⁴¹
- RCI fast food witness 2: operator of nine shopping centre food outlets.¹⁰⁴²

[1186] The NRA did not adduce any evidence in support of its claim.

[1187] The SDA called an expert witness – Ms Helen Bartley – who gave evidence in relation to the Ai Group employee survey.

[1188] The ACTU called an expert witness – Dr Martin O’Brien – who gave evidence about the earnings and household circumstances of the national fast food workforce.

[1189] It is convenient to deal first with the Ai Group employee survey.

(ii) *The Ai Group employee survey*

(a) *General*

[1190] Ai Group engaged Australian Survey Research Group Pty Ltd (ASR) to design an online employee survey to be administered to employees of McDonald’s Australia Limited (McDonald’s) and Hungry Jack’s Pty Ltd (Hungry Jack’s).

[1191] The McDonald’s survey was made available to all McDonald’s employees classified as Level 2, 3 or 4 under the *McDonald’s Australia Enterprise Agreement 2013*. (Note: there is no classification level 1 under the enterprise agreement and level 2 in the agreement is equivalent to level 1 in the *Fast Food Award*). The survey was made available to employees to complete online via a link on the McDonald’s intranet. Employees were able to complete the survey at various times in the period from 26 June 2015 until the survey finally closed on 27 July 2015. At the time the survey closed 101,201 employees had access to the survey.¹⁰⁴³

[1192] The Hungry Jack’s survey was made available to all Hungry Jack’s employees who were classified as ‘Crew Members’. The survey was made available to employees to complete online. Employees were able to complete the survey at various times in the period from 23 June 2015 until the survey finally closed on 27 July 2015. At the time the survey closed 13,564 Crew Members had access to the survey.¹⁰⁴⁴

[1193] After the exclusion of duplicate and incomplete survey responses, there were 944 valid responses for Hungry Jack’s employees and 20,635 valid responses for McDonald’s employees.¹⁰⁴⁵ Hence the response rate to the McDonald’s employee survey was 20.4 per cent (20,635 divided by 101,201)¹⁰⁴⁶ and the response rate to the Hungry Jack’s survey was 7.0 per cent (944 divided by 13,564).¹⁰⁴⁷

[1194] The data entered by the survey respondents was stored by ASR in a data collection software package known as ‘SurveyManager’ and was then analysed by ASR staff using a software package known as ‘Statistical Package for the Social Sciences’ (SPSS). The analysis produced frequency distributions and various cross tabulations. A report of the survey results is set out in Annexure PAD 3 to Ms Deasy’s Amended First Affidavit.¹⁰⁴⁸ We will return to the survey results shortly.

[1195] Evidence in respect of the development and administration of the survey was given by:

- Marek Kopias - National Training and HR Design Consultant at McDonald’s;¹⁰⁴⁹

- Gina Feast - State Human Resources Manager at Hungry Jack's;¹⁰⁵⁰ and
- Patricia Deasy - Principal Consultant for ASR.

[1196] Ms Deasy developed the survey and a copy of the survey questions is set out in Annexure PAD-2 to her Amended First Affidavit.¹⁰⁵¹ Online survey links were distributed to McDonald's and Hungry Jack's in June 2015. Mr Kopias was the survey administrator for McDonald's and Ms Feast performed the same role for Hungry Jack's.

[1197] Two experts also gave evidence in respect of the Ai Group employee survey. Dr Andrew Pratley,¹⁰⁵² called by Ai Group, and Ms Helen Bartley,¹⁰⁵³ called by the SDA.

[1198] Three broad issues were raised in respect of the Ai Group employee survey:

- (i) non-response bias;
- (ii) consolidation of the results in the 'weighting issue'; and
- (iii) the extent to which the survey results can be extrapolated beyond McDonald's and Hungry Jack's (the 'representativeness issue').

[1199] We also note that there is a dispute about the reliability of the survey results on the basis of the response rates and about the effect of the options provided in answering certain survey questions. As to the last point, the issue concerns the questions which ask 'What impact does working on a [Saturday or Sunday] have on spending time with your friends and family?' There was some criticism of the fact that the suite of possible answers to these questions did not include 'I don't know'. Ms Deasy was cross-examined in respect of this issue.¹⁰⁵⁴ Ms Deasy responds to the criticism made and specifically rejects the proposition that the responses to these questions were not reliable because they do not capture all of the potentially valid responses.¹⁰⁵⁵ We accept Ms Deasy's evidence in respect of this issue.

[1200] There is also a dispute regarding the impact of the response rates on the reliability of the survey results. Ms Bartley describes the response rates for the McDonald's and Hungry Jack's surveys, 20.4 per cent and 7 per cent respectively as 'low to very low'¹⁰⁵⁶ which 'could significantly affect the validity of any conclusions sought to be drawn about the populations of fast food industry employees from the responses received'.¹⁰⁵⁷ The response rates are also relevant to the issue of non-response bias. In respect of this issue Ms Bartley says that 'the survey non-response was large and possible differences between the survey participants and non-respondents could affect the results'.¹⁰⁵⁸ We deal with the issue of non-response bias and the 'representativeness issue' shortly.

[1201] Both Dr Pratley¹⁰⁵⁹ and Ms Deasy¹⁰⁶⁰ reject Ms Bartley's characterisation of the response rates as low and very low. Further, Ms Deasy rejects the proposition that the response rates may affect the validity of the conclusions which can be drawn about the survey population.¹⁰⁶¹

[1202] We prefer the evidence of Dr Pratley and Ms Deasy in respect of this issue. We are satisfied, subject to one caveat, that the Ai Group employee survey is representative of the views and circumstances of the McDonald's and Hungry Jack's employees who were

surveyed. The caveat relates to the survey results in respect of employment status (i.e. full-time, part-time or casual) and we deal with that issue later (at [1223]–[1228]). We now turn to the issue of non-response bias.

(b) Non-Response Bias

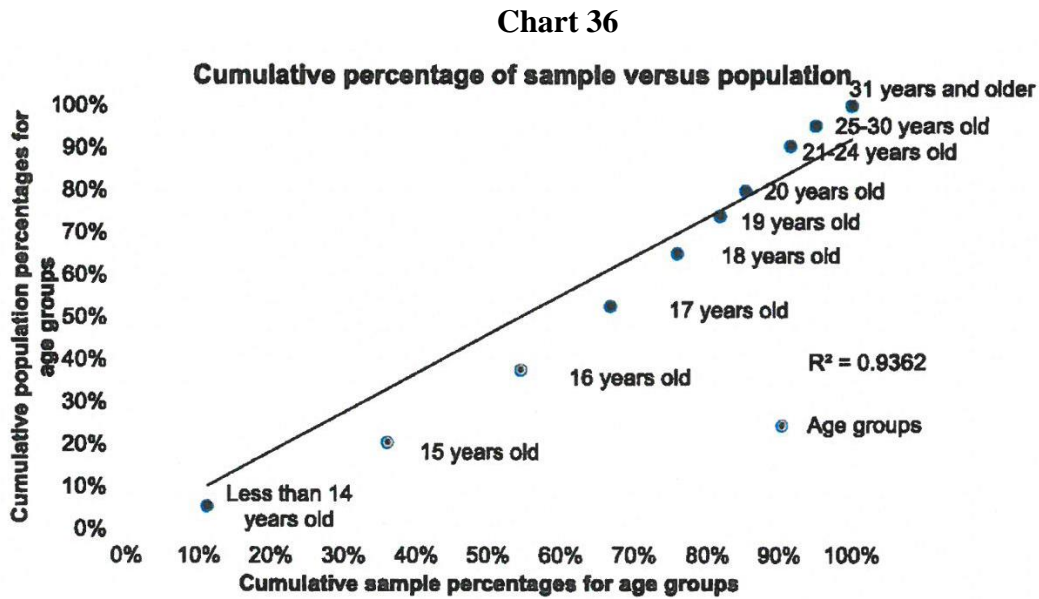
[1203] As we have mentioned, not all employees responded to the survey. The response rates to the McDonald’s and Hungry Jack’s surveys were 20.4 per cent and 7.0 per cent respectively. Non-response bias refers to the potential for answers given by those who responded to the survey to be different from the answers that would have been given by those employees who did not complete the survey, had they done so. Non-response bias may mean that the responses of the survey respondents are not representative of the survey population.

[1204] The survey asks a number of questions which call for the expression of an individual’s opinion. For example: What days do you prefer to work? Would you work some or more hours on a Sunday if you were offered those hours? The critical question is the nature and effect of non-respondent bias on the aggregate survey responses and whether non-respondents have characteristics or views which might be different to those of the respondents in respect to the matters at issue in the survey - centrally, in the context of the Ai Group claim, the impact of weekend work on employees.

[1205] In her expert report Ms Bartley expresses the following opinion in respect of the Ai Group employee survey and non-response bias:

‘... the survey non-response was large and possible differences between the survey participants and non-respondents could affect the results ... due to the low response rates to the surveys, the achieved samples may be biased and I cannot be confident that the samples are unbiased.’¹⁰⁶²

[1206] In an expert report prepared in reply to Ms Bartley’s report, Dr Pratley compares certain characteristics of the survey respondents against the survey population. One measure of bias would be if there was a difference between the demographic profile of the sample (the survey respondents in this case) and the total population (i.e. all of the McDonald’s and Hungry Jack’s employees who had access to the survey). Chart 36 below plots the cumulative percentage by sample age group compared to the population age group.



[1207] How close the sample data fits the population data is measured by the coefficient of determination (R^2). Values near to one indicate a close fit; values nearer to zero indicate a poor fit. If all the percentages in the sample and population data were exactly equal, the coefficient of determination would be one. In the case of Chart 36, the R^2 value is 0.9362, which reflects a strong positive correlation between the ages of the sample group and the total survey population.¹⁰⁶³

[1208] Dr Pratley also compared the sample and population groups, by location. He found that all sample values for the number of locations were within +/- 4 per cent of the population values.¹⁰⁶⁴

[1209] Dr Pratley's conclusion in respect of the bias issue is set out at paragraph 122 of his reply report:

‘Based on the data in Figure 1 and no specific evidence of bias within the sample, I conclude that the sample is representative of the population (McDonald's and Hungry Jack's).’¹⁰⁶⁵

[1210] In the course of her oral evidence Ms Bartley was asked to comment on Dr Pratley's conclusion and responded as follows:

‘The statement is reasonable with respect to the variable age because that's what he made the comparison between, the same and – or in his analysis that's presented in paragraphs 109 to 121, but we don't know with respect to the questions that were asked what the answers would have been of the non-response, so we don't know whether the achieved sample is representative of the overall population because we don't know what the answers would have been to those who didn't respond ... ultimately it's the answers that those people would have given if they had've responded, in a theoretical sense, that make the difference ...

The survey was about people's attitudes and perceptions and so on. We don't know – and there may well be differences between the people who choose to participate and provide opinions on all this sort of stuff than those who didn't. We're talking about the opinions, and that's what really matters if we're trying to make an assessment of the representativeness of the sample...

... my general conclusion is that I cannot be confident that there's no bias. I'm not saying there is and I'm not saying there isn't. I'm saying I cannot be confident.¹⁰⁶⁶

[1211] It is agreed – by Dr Pratley and Ms Bartley – that non-responses do not necessarily introduce bias.¹⁰⁶⁷ Further, as is apparent from the extract set out above, Ms Bartley is *not* positively asserting that the employee surveys are affected by non-response bias (or any other form of bias). Ms Bartley's general conclusion is that she cannot be confident – one way or the other (i.e. either there is, or there is not, bias) – in respect of this issue. This may be contrasted with Dr Pratley's evidence.

[1212] Dr Pratley acknowledged the theoretical possibility of non-response bias, in the course of his oral evidence:

'So theoretically, it's entirely possible that there is some form of response bias but I saw no evidence within the data that I analysed or within the question set that I looked at that would indicate there would be a form of response bias. But I can't rule out that theoretically it might be possible under some circumstances that it could have occurred...

But simply mentioning it because some people didn't participate by default the conclusion is that the results are biased, wrong or unrepresentative would call into question all research that's ever been conducted in this country...

It is the logical undertaking that if you cannot see bias within the sample, that the survey results therefore would not be biased and that therefore there would be a correlation, a very strong correlation between the preferences and views of those that responded and the preferences and views of those in the population. Unfortunately, I'm not able to test any of that directly.¹⁰⁶⁸

[1213] On the basis of his comparison of certain demographic characteristics (i.e. age and location) of the survey respondents and the survey population (i.e. age and location), Dr Pratley concludes that the sample is representative of the population.

[1214] Hence the expert evidence is to the effect that non-responses do not necessarily introduce bias however non-response bias is theoretically possible, but the fact and effect of non-respondent bias could not be tested. We note that non-response bias is theoretically possible in any survey without a 100 per cent response rate.

[1215] Given the similarity between the characteristics of the survey respondents (in respect of their age profile and location) and the absence of any contrary evidence indicative of bias, we accept Dr Pratley's opinion in respect of this issue.

(c) *The Weighting Issue*

[1216] The results of the two surveys were pooled for the purpose of analysis and reporting, that is, the responses from Hungry Jack's employees were simply added to those from McDonald's employees.¹⁰⁶⁹ The results from the two surveys were not weighted to reflect the relative proportions of the McDonald's and Hungry Jack's survey populations within the combined total population.¹⁰⁷⁰ In her expert report, Ms Bartley expresses the opinion that the data should have been weighted, because:

‘The McDonald’s population of employees is much larger than the Hungry Jack’s employee population. This means that in pooling the results of the two surveys, they should be weighted to reflect the correct proportions of employees from each organisation, so that the pooled results are not biased in favour of the McDonald’s employee survey results.

The McDonald’s employee survey response rate was much greater for the McDonald’s employee survey (20%) than the Hungry Jack’s employee survey (6%). The weighting would also help address this issue.’¹⁰⁷¹

[1217] The issue of potential bias due to a failure to weight the survey results was also addressed by Ms Bartley during her oral evidence:

‘Now if there was a difference between the results obtained from McDonald’s employees and Hungry Jack’s employees the feedback from McDonald’s employees was going to outweigh in a biased way the feedback from the Hungry Jack’s employees. So really what should happen is if the population percentages were 90/10, McDonald’s/Hungry Jack’s, in the sample you would part weight the data so that the sample was 90/10 as well. So that is my point around that issue.’¹⁰⁷² (emphasis added)

[1218] It is apparent from the above extract that Ms Bartley’s concern about potential bias was predicated upon there being a difference in the responses provided by McDonald’s employees and Hungry Jack’s employees. This is an important point and we return to it shortly.

[1219] The real question is whether the failure to weight the responses made any difference, specifically was there a difference in the McDonald’s versus Hungry Jack’s employees’ responses, such that the underrepresentation of Hungry Jack’s employees would affect the aggregate survey outcome.

[1220] The ‘weighting issue’ was also addressed by Ms Deasy. In the course of cross-examination, Ms Deasy rejected the proposition that ‘the survey results pooled together are necessarily biased in favour of McDonald’s respondents’.¹⁰⁷³ Ms Deasy’s evidence is to the effect that the responses as between McDonald’s and Hungry Jack’s employees were materially the same:

‘I don’t agree with that statement, that they were biased. McDonald’s results made a greater contribution to the frequency distribution but in my scanning of the separate results, where there were questions around behaviours or opinions, the results were similar to within .1 in some cases, of a per cent, or 1 per cent. So I saw no difference in the proportional answers to questions with the different samples. So while McDonald’s would have a greater contribution in some answers, the answers proportionally between the two samples were so similar that there was no need to weight.’¹⁰⁷⁴ (emphasis added)

[1221] Further, Ms Deasy’s evidence was that she had scanned the separate results of each survey and was ‘stunned by how similar they were’.¹⁰⁷⁵

[1222] Given the evidence as to the similarity in the answers given by the two groups of survey respondents we are satisfied, subject to one caveat, that the failure to apply a weighting to the results did not introduce any bias.

[1223] The caveat to our general conclusion in respect of the ‘weighting issue’ relates to employment status. At paragraph 17 of the ‘Fast Food employee survey report’ it is said that:

‘Two thirds of employees are employed casually (67.4%), while only 4.7% are employed as permanent full-time employees and 20.2% are employed as permanent part time.’¹⁰⁷⁶

[1224] Further, paragraph 4 of the ‘Additional analysis report’ dated 23 September 2016 says:

‘chart 200 below ... clearly indicates that as employees age, their employment status moves from predominantly casual to predominantly part time.’¹⁰⁷⁷

[1225] It is apparent from a comparison of the Limbrey affidavit of 23 September 2016¹⁰⁷⁸ and the Makhoul affidavit of the same date¹⁰⁷⁹ that there are significant differences between McDonald’s and Hungry Jack’s in terms of the proportion of employees engaged on a part-time or casual basis. The relevant data is summarised below.

Table 43
McDonald’s and Hungry Jack’s – employee by level and status

Award Classification level	McDonald’s				Hungry Jack’s			
	Total	F/T	P/T	Casual	Total	F/T	P/T	Casual
Level 1	91 107	1 938	14 127	75 042	13 470	477	12 881	112
Level 2	3 239	915	1 418	906	1 339	1 112	226	1
Level 3	4 565	4 002	563	-	355	347	12	-

[1226] In both businesses most employees are classified at level 1 (92 per cent of McDonald’s employees and 88 per cent of Hungry Jack’s employees), but at Hungry Jack’s level 1 employees are usually engaged on a part-time basis (96 per cent), whereas at McDonald’s level 1 employees are usually casuals (82.4 per cent). Similarly, at level 2 most Hungry Jack’s employees (83 per cent) are engaged on a full-time basis whereas at McDonald’s only 28 per cent of level 2 employees are full-time, 44 per cent are part-time and 28 per cent are casuals. The differences between the two businesses are less marked among level 3 employees.

[1227] It is apparent that the statements set out at [1223]–[1224] are not true insofar as Hungry Jack’s is concerned.¹⁰⁸⁰

[1228] Given the differences between the two businesses in respect of the employment status of the employees surveyed and the absence of weighting, the survey results do not accurately represent the employment status of Hungry Jack’s employees. Nor do we think it reasonable to extrapolate the survey results in relation to employment status beyond the employees surveyed.

[1229] We note that there are also some differences in the age profile of McDonald’s employees and Hungry Jack’s employees. Some 53.6 per cent of McDonald’s employees are younger than 18 years of age, compared to 43.3 per cent of Hungry Jack’s employees. But these differences do not alter our finding (at [1273]) that a typical Fast Food employee is likely to be aged between 14 and 24 years. We note that 90 per cent of both McDonald’s and Hungry Jack’s employees are aged between 14 and 24 years.¹⁰⁸¹

[1230] Subject to the caveat in respect of employment status, we reject the SDA's general submission that because of the structural differences between McDonald's and Hungry Jack's workforces the results of the Ai Group survey cannot be extrapolated beyond the survey respondents. We now turn to deal with the representative issue.

(d) *The Representativeness Issue*

[1231] The central issue here is the extent to which the results of the Ai Group employee survey can be extrapolated beyond McDonald's and Hungry Jack's employees.

[1232] In their closing submission the SDA contends that the case advanced by Ai Group is 'fundamentally misdirected' in that:

'... the Ai Group has not adduced sufficient evidence to enable the Commission to make findings of the type proposed in respect of the industry and workforce covered by the Fast Food Award. The Ai Group's evidentiary case is overwhelmingly directed at the workforce of two employers, McDonald and Hungry Jack's, which form part of a much larger industry. There is insufficient evidence before the Commission to enable it to find that the characteristics of McDonald's and Hungry Jack's businesses and their employees are typical or characteristic of the fast food industry generally.'¹⁰⁸²

[1233] The above proposition is further developed later in the SDA written submission (at paragraphs [659]–[667]). The SDA's argument can be distilled into three points:

1. At best, Ai Group's evidence 'arguably supports ... findings in relation to that part of the fast food industry and workforce comprised of McDonald's and Hungry Jack's. In its submissions however, the Ai Group has elided McDonald's and Hungry Jack's with the fast food industry as a whole'.¹⁰⁸³ In short, the SDA contends that the Ai Group employee survey results are not representative of the views of *all* employees in the Fast Food industry.

2. As McDonald's and Hungry Jack's collectively represent a small minority of the total number of fast food establishments across Australia, the SDA submits that:

'It would be unsound and unsupported by the evidence for the Commission to assume that 95% of fast food operators (and their employees) bear the same characteristics, experiences of the award and preferences as McDonald's and Hungry Jack's (and their employees)'.¹⁰⁸⁴

3. The employees of McDonald's and Hungry Jack's are covered by various enterprise agreements and on that basis the SDA submits:

'The effect then of the Ai Group's submission is to invite the Commission to undertake its statutory function in the 4 yearly modern award review by reference not only to a small minority of fast food operators, but operators whose employees' terms and conditions of employment are not determined by the Fast Food Award ... for that further reason, the evidence relating to McDonald's and Hungry Jack's and their employees is inherently of less relevance or weight to the Commission's task in the four yearly review.'

[1234] It is convenient to deal with the second and third points first.

[1235] The third point is unpersuasive. The fact that an enterprise agreement applies to the survey respondents does not mean that this evidence is ‘inherently of less relevance or weight to the Commission’s task in the four yearly review’. Three short points may be made in this regard:

- (i) The fact that the survey respondents are subject to enterprise agreements does not cause them to be unrepresentative of the characteristics of employees in the industry to which the modern award relates (i.e. the fast food industry).
- (ii) It is not known whether these employees will continue to have their terms and conditions of employment regulated by an enterprise agreement into the future (i.e. beyond the expiration of the nominal terms of the current enterprise agreements). Further, the modern award serves as the comparator for the purpose of applying the BOOT to any replacement enterprise agreement.
- (iii) The FW Act – and in particular the modern awards objective – does not exclude a consideration of the circumstances of employees whose terms and conditions of employment are set by an enterprise agreement.

[1236] For completeness, in relation to (i) above, we note that earlier (see [957]), we decided to attach little weight to the evidence of Mr Cox, partly because an enterprise agreement remained in operation at the particular enterprise in respect of which he gave his evidence. Our consideration of the evidence of Mr Cox is to be distinguished from the issue here, which is directed at the preferences of employees and hence the existence of an enterprise agreement does not impact on our consideration in the same way.

[1237] The submission referred to in the second point advanced by the SDA is based on the fact that the McDonald’s and Hungry Jack’s businesses collectively represent only ‘a small minority of fast food establishments across Australia’¹⁰⁸⁵ and that ‘Ai Group has not adduced any evidence ... about the operations of the remaining 95% of fast food operators which collectively employ about 50% of the fast food industry workforce’.¹⁰⁸⁶

[1238] We accept that in 2015 the Fast Food industry consisted of 24,564 enterprises across Australia and that the industry is characterised by ‘high competition amongst the businesses which participate in it offering a wide range of different fast food options’.¹⁰⁸⁷ We also accept that there are about 1000–1300 McDonald’s and Hungry Jack’s establishments, which is about 5 per cent of the total number of enterprises in the industry.

[1239] However, it seems to us that the SDA’s submission misses the point. Ai Group is *not* contending that the characteristics of five per cent of the business operators in the Fast Food industry (i.e. McDonald’s and Hungry Jack’s establishments) are representative of the remaining 95 per cent of business operators in the industry. Ai Group’s central contention is that the survey responses (by McDonald’s and Hungry Jack’s employees) are representative of 86 per cent of employees in the Fast food industry (i.e. they are representative of the persons employed by the ‘Major chains’).

[1240] In light of the case presented by Ai Group, the relevant characteristics to be examined by the Commission are the characteristics of the employees in the Fast food industry, *not* the number and characteristics of the businesses of the employers in the industry. We agree with

Ai Group's characterisation of the SDA's emphasis on the characteristics of business operators as 'a straw man argument' – a claim erected by the SDA (which is not part of the case of Ai Group) in order to allow the SDA to knock down the claim.¹⁰⁸⁸ The real issue is the extent to which the survey results are representative of other *employees* in the Fast Food industry. This is the issue raised in the first of the SDA's points (see [1233] above).

[1241] As to the first point, we agree with the proposition that the results of the Ai Group survey are not necessarily representative of the views and circumstances of *all* employees in the Fast Food industry. The survey population was not a stratified random sample of all Fast Food industry employees – it was a survey of certain categories of McDonald's and Hungry Jack's employees. The difficulty in applying conclusions from the survey to *all* Fast Food industry employees is accepted by Dr Pratley:

'If you could turn to page 60 of your report, at paragraph 184, and you repeat what you say earlier; you state your conclusion that the survey only has limited representativeness to the minor chains, and in the next paragraph you conclude that it has very little representativeness of the independents. Then in paragraph 186 you say that based on these conclusions you disagree with the statement by Ms Bartley that it's not possible to draw any reliable conclusions about the population of all fast food employees. Dr Pratley, I don't follow that reasoning, and can I suggest to you that if in light of your conclusions that the survey results are only of limited or very limited representativeness in respect of minor and independents, one can't draw reliable conclusions about the population of all fast food employees, do you accept that?--I accept from my statements in those paragraphs that once we consider all employees, the strongest conclusions that can be drawn will be very limited, but I wouldn't say that nothing can be concluded.'¹⁰⁸⁹ (emphasis added)

[1242] As we have mentioned, we are satisfied that the survey is representative of the views and circumstances of the McDonald's and Hungry Jack's employees surveyed, save for the issue of employment status. Importantly, this survey population is a significant proportion of the total population of Fast Food industry employees. It is common ground that there were 214,265 employees in the Fast Food industry in 2014.¹⁰⁹⁰ At the time it closed, on 27 July 2015, some 114,765 McDonald's and Hungry Jack's employees were able to access the survey. Hence, the survey population was 114,765 employees. We do not know how many Fast Food industry employees there were in July 2015, but using the available data, for 2014, (that is, 214,265 employees) the survey population amounts to just over half (53.6 per cent) of all Fast Food industry employees.

[1243] The next question is to what extent can the survey results be extrapolated beyond McDonald's and Hungry Jack's employees? Can the survey results be said to be representative of the views of any other Fast Food industry employees (i.e. other than McDonald's and Hungry Jack's employees)? In considering this question it is important to pay close regard to the evidence in respect of this issue. We begin with Dr Pratley's evidence.

[1244] In his 'First Report'¹⁰⁹¹ Dr Pratley expresses the following opinion:¹⁰⁹²

'Based on the design of the survey and the implementation by McDonald's and Hungry Jack's, I conclude that the data is representative of the population of fast food employees.'

[1245] This general proposition is then subject to the following qualification:

‘A number of McDonald’s stores operate 24/7. Where questions in the employee survey specifically relate to working hours outside of normal fast food trading hours, the conclusions will not have the same validity across the fast food industry as those questions which are independent of working hours.’¹⁰⁹³

[1246] The conclusion to Dr Pratley’s First Report states:

‘... I conclude that the employee survey of McDonald’s and Hungry Jack’s is representative of the fast food industry employees, except in the circumstances where questions specifically relate to hours outside that of standard trade within the fast food industry.’¹⁰⁹⁴

[1247] In her expert report of 26 October 2015¹⁰⁹⁵ Ms Bartley sets out her opinions in respect of Dr Pratley’s ‘First Report’. Paragraph 12 of Ms Bartley’s report is relevant for present purposes:

‘I understand that neither the McDonald’s nor Hungry Jack’s organisations were selected by chance from a population of fast food franchise operators, using cluster sampling, or any other probability sampling approach. It is not possible to draw any reliable conclusions about the population of all fast food industry employees for data obtained from surveys of two deliberately selected organisations.’

[1248] Dr Pratley’s reply report to Ms Bartley’s report is set out at Annexure AP-5 to Exhibit Ai Group 17. Dr Pratley deals with the representativeness issue at paragraphs 154–176 and modifies the conclusion expressed in his ‘First Report’.¹⁰⁹⁶

[1249] In summary terms, Dr Pratley’s evidence is that:

- there are four categories of stores in the Fast Food industry:
 - (i) major chains that operate (some stores) 24/7;
 - (ii) major chains that do not operate any stores 24/7;
 - (iii) minor chains;
 - (iv) independents.¹⁰⁹⁷

Note: A ‘major chain’ has more than 50 stores; a ‘minor chain’ has less than 50 but more than 15 stores; and an ‘independent’ has less than 15 stores.

- data on employee numbers was available for 9 of the 17 major chains¹⁰⁹⁸ namely Chicken Treat, Dominos Pizza, Hungry Jack’s, KFC, McDonald’s, Oporto, Pizza Hut, Red Rooster and Subway. These 9 major chains employed 184,315 employees¹⁰⁹⁹ which represents 86 per cent of all employees in the Fast Food industry.¹¹⁰⁰
- the McDonald’s/Hungry Jack’s survey *is representative* of other employees employed by major chains that operate (some stores) 24/7 and *is representative* of other employees employed by major chains that do not operate 24/7, except where questions specifically relate to the 24/7 nature of the operation.¹¹⁰¹
- the McDonald’s/Hungry Jack’s survey ‘only has limited representativeness to the minor chains’,¹¹⁰² and

- the McDonald's/Hungry Jack's survey 'would have very limited representativeness of the independents'.¹¹⁰³

[1250] Importantly, Dr Pratley clearly expresses the opinion that the survey results can be extrapolated beyond the employees of McDonald's and Hungry Jack's to all employees of the major chains (subject to reservation in respect of questions specifically relating to the 24/7 nature of the operation).

[1251] Dr Pratley's cross-examination in respect of this aspect of his reply report was confined to the following exchanges:

'And in paragraph 159 you've categorised the stores between major chains that operate 24/7 - some stores, major chains that do not operate any stores 24/7, minor chains and independents. Is that a taxonomy or a method of categorisation that you devised?---No, as per paragraph 157 I base that on the Food Industry Foresight breakdown.

I see, thank you. Yes, and you go on to say in paragraph 161 that table 1 is an extract showing the breakdown, I follow. If I could ask you to move to paragraph 171, you say that based on the data collected the nine companies have approximately 184,315 employees representing 86 per cent of all employees in the fast food industry, and the nine companies to which you there refer are the nine companies listed in table 2 in respect of which a number appears in the right-hand column, is that right?---That's correct.

I see. Beyond the information that you obtained from the Food Industry Foresight Fast Food in Australia 2013 which is set out in your report, you haven't had regard to any other information in identifying the nature or composition of other operators in the fast food industry?---I'm not sure exactly what that question is asking.

I'll rephrase it. Your statement in paragraph 172, the opinion you there express, is based upon two things; one is your view that there was no evidence of bias, that's right?---That's correct.

And secondly, it's based upon what you've set out above about the numbers of employees?---In 172, the second part is reference to the fact that the stores in the sampling frame operate some of their stores 24/7.

I see?---Not with regards to the other major chains.

In preparing your report you did not have any other information at hand or instructions provided to you beyond what you refer to in this report in relation to the make up, composition or operations of other major chains in the food industry?---That is correct.

Thank you. You've assumed – would this be correct, you've assumed that the other major chains have the same operations, workforce composition as McDonald's and Hungry Jack's?--I would use the word similar.

And you, can I suggest to you, have no basis to assume that there is any such similarity between any of these other chains and McDonald's and Hungry Jack's? Do you accept that?---No, I would disagree.¹¹⁰⁴

[1252] Dr Pratley was taken to the last answer above during re-examination:

'Then in respect of paragraph 172 of your report, where you were asked about organisations of the representative nature of the survey in the major chains that operate some stores 24:7 and

you said that you disagreed that there was no basis for the assumption that underpinned that opinion?---Sorry, could you please clarify that?

I understood your evidence, it was put to you that you assumed that the other majors had the same operations, or similar operations to those conducted by McDonald's and Hungry Jack's and that assumption was challenged and I understood your evidence to be that you disagree that there was no basis for your assumption underpinning your conclusion?---Yes.

Why did you disagree?---I disagreed primarily based on a number of factors. The first is that one of the leading companies in the space of collecting data logically groups these companies together. So it's not an opinion I hold that the major chains are similar, it's an opinion held by food industry foresight that they're similar and that they report data together in that group as per Table 1. So that's the first part of that. The second part of that is that with regards to when I look at how those stores operate when I look at their geographic dispersion, when I look at the nature of their operations, they strike me as very similar in their nature. I could go down to a level of a statistical analysis and prove, based on something as obscure as response time from order to delivery that in fact they are very similar, but that was not something required of me to do that.¹¹⁰⁵

[1253] In the course of her oral evidence, Ms Bartley made it clear that she had read Dr Pratley's reply report¹¹⁰⁶ but, importantly, Ms Bartley was asked no questions – and gave no evidence – directly related to Dr Pratley's conclusion that the survey was representative of the employees of all major chains.

[1254] So, in essence, we are left with Dr Pratley's evidence. Dr Pratley was asked about the basis for his conclusion and he provides a response. There is no evidence which, in terms, challenges this aspect of Dr Pratley's evidence.

[1255] The SDA challenges the representativeness of the Ai Group survey on a number of grounds. It contends that the data only represents a small proportion of the workers and fast food establishments covered by the *Fast Food Award* and, further, contends that the characteristics of the surveyed employees cannot be said to be representative of the views and circumstances of all Fast Food industry employees. We also note that the SDA contends that the fact that the employees in the survey are covered by Enterprise Agreements is a limiting factor. We deal with this issue at [1235]. Ai Group addressed the substance of the SDA's challenge, in its written submission in reply at paragraph 15:

‘Contrary to the submissions of the SDA (see SDA Submissions, par 658(a)), the Ai Group has led sufficient evidence to establish the characteristics of the employees in the fast food industry:

(a) First, the characteristics of employees of McDonald's and Hungry Jack's represent the characteristics of 53 per cent of employees in the fast food industry (see Ai Group Submissions, par 63; see also SDA Submissions, par 234).

(b) Secondly, the characteristics of employees of McDonald's and Hungry Jack's are representative of the characteristics of the major participants in the fast food industry which represent 86 per cent of employees in the fast food industry (see Pratley Affidavit (Exhibit AiG 17), Second Report, p41, pars 13, 14, 15; p59, par 171; Pratley Cross Examination, 5 November 2015, PN21518; Pratley Re Examination, 5 November 2015, PN21661).

(c) Thirdly, the characteristics of employees of McDonald's and Hungry Jack's have limited representativeness for the balance of workers (that is, the remaining 14 per cent) in the fast food industry (see Pratley Affidavit (Exhibit AiG 17), Second Report, p41, pars 16, 17; Pratley Cross Examination, 5 November 2015, PN21523, PN21604, PN21605, PN21609).¹¹⁰⁷

[1256] That is, the Ai Group contends – based on Dr Pratley's evidence – that the survey was representative of the views and circumstances of the employees of the major fast food chains (which collectively represent 86 per cent of all Fast Food industry employees).

[1257] This issue was also raised in the supplementary submissions filed by the SDA¹¹⁰⁸ and Ai Group¹¹⁰⁹ which addressed Confidential Exhibit Ai Group 34 – 'Food Industry Foresight – Fast Food in Australia 2013'. The exhibit provides information about the number, type and growth in restaurant, café and fast food outlets across Australia in the period 2005 to 2013 and, in relation to fast food outlets, it distinguishes between three different categories:

- Quick Service Restaurants (QSR);
- Snack Food Chains; and
- Independent Fast Food.

[1258] Within the QSR category there are 'QSR Major Chains' (more than 50 outlets) and 'QSR Minor Chains' (less than 50 outlets).

[1259] Confidential Exhibit Ai Group 34 is referred to in paragraph 157 of Annexure AP-5 to Dr Pratley's affidavit of 3 November 2015.¹¹¹⁰ The SDA submits that Dr Pratley's evidence inaccurately describes the Fast Food industry as he makes no reference to snack food chains. The submission put was not put to Dr Pratley in cross-examination and the SDA did not seek to recall Dr Pratley. Nor was this matter the subject of any comment by the SDA's expert witness, Ms Bartley. In these circumstances we do not propose to have regard to the submissions put. We note, however, that even if the point advanced by the SDA was accepted, it would not alter our conclusion as to the representativeness of the Ai Group employee survey.

[1260] The SDA submits that Exhibit Ai Group 34 confirms the varied and heterogeneous character of the Fast Food industry. The SDA submission highlights the number of outlets in each part of the Fast Food industry and submits:

'In the Review, the Commission did not receive *any* evidence from:

- (a) employers in the Independent Fast Food category – of which there were 8,734 outlets in 2013; or
- (b) employers in the Snack Food chains category (including juice bars) – of which there were 1,975 outlets in 2013; or
- (c) the other 15 employers in the Quick Service Restaurant major chains category beyond Hungry Jacks and McDonalds which collectively represent approximately 79% of the total number of outlets of major chains...

10. The case advanced by the Ai Group is constructed wholly around evidence given in relation to Hungry Jacks and McDonalds. Yet Exhibit Ai Group 34 confirms that they represent merely 7% of the total number of fast food outlets across Australia. This is

consistent with the SDA's previous submission that Hungry Jacks and McDonalds collectively represent only between approximately 4% and 6% of the total number of fast food establishments across Australia.

11. The Ai Group's case rests upon two unsubstantiated assumptions of homogeneity: First as between the workforce of Hungry Jacks and McDonalds; and secondly as between the operations and workforce of those two chains and the rest of the fast food industry.

12. The falsity of the first assumption was revealed in the evidence given by Mr Makhoul, Human Resources Manager (Victoria and Tasmania) for Hungry Jacks, and Ms Limbrey, People Insights and Recruitment Manager for McDonalds. That evidence established that the workforces of McDonalds and Hungry Jacks were materially different in two key respects - age and employment status. Mr Makhoul gave evidence that "[G]enerally speaking, Hungry Jack's corporate stores do not employ many casual employees". His evidence further disclosed that the majority of Hungry Jacks employees were adults and working part-time. Conversely, the evidence of Ms Limbrey was that the majority of McDonalds employees were juniors employed on a casual basis. As conceded by Ms Deasy, her finding from the survey of the McDonalds and Hungry Jacks workforces that employment status moved from predominantly casual to predominantly permanent as employees increased in age, was not accurate in relation to the Hungry Jacks workforce.

13. As to the second claim of homogeneity, the Commission does not have before it any evidence to enable a finding that the operations of McDonalds and Hungry Jacks and the claimed preferences of their respective workforces are representative of the rest of the fast food industry. The differences between McDonalds and Hungry Jacks themselves noted in the previous paragraph strongly suggest otherwise. Exhibit Ai Group 34 confirms, in detail, the varied and heterogeneous character of the fast food industry.¹¹¹¹ (references omitted)

[1261] As mentioned earlier, we agree with the proposition that the Ai Group survey is not necessarily representative of the views and circumstances of *all* employees in the Fast Food industry. We have also dealt with the differences between Hungry Jack's and McDonald's in relation to the employment status and age profile of their employees (see [1229]–[1230]).

[1262] But, for the reasons given earlier, the SDA's focus on the number of *operators* in each sector of the Fast Food industry is misconceived. The real issue is the extent to which the survey results are representative of the other *employees* in the Fast Food Industry.

[1263] Dr Pratley's unchallenged evidence is that nine of the QSR major chains employ 184,315 employees¹¹¹² of the 214,265 employees in the Fast Food industry.¹¹¹³ Hence the vast majority of employees in the Fast Food industry (86 per cent) are employed by the QSR Major chains.

[1264] We accept Dr Pratley's evidence that the survey results are representative of the employees of the major chains (subject to the reservation in respect of questions specifically relating to the 24/7 nature of the operation). This aspect of Dr Pratley's evidence was not the subject of any direct challenge by Ms Bartley. Dr Pratley's cross examination did not undermine this aspect of his evidence and he explained the basis for his conclusion during the course of his oral evidence.

7.5.4 The Fast Food industry

[1265] The Fast Food industry can be broadly characterised as involving the production of non-preservable items in that the food produced is for immediate consumption, rather than stored for later use or sale.¹¹¹⁴ The *Fast Food Award* defines the ‘fast food industry’ as:

‘... the industry of taking orders for and/or preparation and/or sale and/or delivery of:

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

[1266] The industry is comprised of about 24,600 establishments¹¹¹⁵ which operate in a number of industry sub-sectors (see [1350]). In terms of employee numbers the industry is dominated by the QSR major chains which employ about 86 per cent of the 214,265 Fast Food industry employees. Just under half (98,911 employees; 46 per cent) of Fast Food industry employees are employed in McDonald’s outlets.¹¹¹⁶

[1267] The standard hours of operation of most fast food outlets include Saturdays and Sundays, reflecting customer demand for the purchase and consumption of fast food. In McDonald’s stores, the peak period of sales was usually regarded as Friday to Sunday¹¹¹⁷ with 17 per cent of the weekly revenue is earned on a Saturday¹¹¹⁸ and 14 per cent of weekly revenue is generated on a Sunday.¹¹¹⁹ In some McDonald’s stores, Sunday sales were 25 to 30 per cent greater than on the average weekday.¹¹²⁰

7.5.5 Fast Food industry employees

(i) Profile of a ‘typical’ Fast Food industry employee

[1268] The ABS data of direct relevance to the Fast Food industry is quite limited.

[1269] A paper¹¹²¹ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Using this framework the *Fast Food Award* is ‘mapped’ to the Takeaway food services industry class, which is at the ANZSIC 4 digit level.

[1270] The ABS Labour Force survey is the usual source for data on employment, however data on employed persons by industry is only available at the 3 digit or industry group level. The relevant industry group is ‘Cafes, restaurants and takeaway food services’. In addition to ‘takeaway food services’ this industry group also includes persons employed in cafes and restaurants (where consumption occurs on the premises) and catering services (where services are provided at specified locations or events).

[1271] The ABS Census of Population and Housing (Census) is the only data source with information on employment at Takeaway food services level. The most recent Census data is from August 2011 and we deal with that data later.

[1272] The August 2011 Census data shows that there were around 175 000 employees in Takeaway food services. Table 44 compares certain characteristics of employees in the takeaway food services sector, with employees in 'all industries'.

Table 44
Labour force characteristics of the Takeaway food services industry class,
ABS Census 9 August 2011

	Takeaway food services		All industries	
	(no.)	(%)	(no.)	(%)
Gender				
Male	76 365	43.5	4 207 586	50.8
Female	99 167	56.5	4 082 662	49.2
Total	175 532	100.0	8 290 248	100.0
Full-time/part-time status				
Full-time	33 484	20.3	5 279 853	67.8
Part-time	131 539	79.7	2 507 786	32.2
Total	165 023	100.0	7 787 639	100.0
Highest year of school completed				
Year 12 or equivalent	84 144	48.9	5 098 228	62.6
Year 11 or equivalent	29 339	17.1	885 404	10.9
Year 10 or equivalent	38 507	22.4	1 687 055	20.7
Year 9 or equivalent	15 844	9.2	317 447	3.9
Year 8 or below	3 578	2.1	141 973	1.7
Did not go to school	512	0.3	20 158	0.2
Total	171 924	100.0	8 150 265	100.0
Student status				
Full-time student	88 934	51.1	612 990	7.5
Part-time student	7 809	4.5	506 120	6.2
Not attending	77 215	44.4	7 084 360	86.4
Total	173 958	100.0	8 203 470	100.0
Age (5 year groups)				
15–19 years	91 312	52.0	547 666	6.6
20–24 years	33 506	19.1	927 865	11.2
25–29 years	14 422	8.2	1 020 678	12.3
30–34 years	8 117	4.6	933 827	11.3
35–39 years	6 460	3.7	934 448	11.3
40–44 years	6 175	3.5	938 386	11.3
45–49 years	5 491	3.1	911 739	11.0
50–54 years	4 510	2.6	848 223	10.2
55–59 years	3 085	1.8	652 190	7.9
60–64 years	1 766	1.0	404 470	4.9
65 years and over	688	0.4	170 718	2.1
Total	175 532	100.0	8 290 210	100.0
Average age	24.1		38.8	

	Takeaway food services		All industries	
	(no.)	(%)	(no.)	(%)
Hours worked				
1–15 hours	81 900	49.6	875 554	11.2
16–24 hours	30 005	18.2	792 539	10.2
25–34 hours	19 636	11.9	839 694	10.8
35–39 hours	14 017	8.5	1 676 920	21.5
40 hours	9514	5.8	1 555 620	20.0
41–48 hours	4671	2.8	895 619	11.5
49 hours and over	5283	3.2	1 151 693	14.8
Total	165 026	100.0	7 787 639	100.0

Source: ABS, Census of Population and Housing, 2011.

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[1273] The profile of Fast Food employees differs from the profile of employees in ‘All industries’ in 4 important respects:

- (i) almost 80 per cent of Fast Food employees work part-time (i.e. less than 35 hours per week¹¹²²), compared to only 32.2 per cent of all employees;
- (ii) about half (49.6 per cent) of Fast Food employees work 1–15 hours per week and just over two-thirds (67.8 per cent) work 1–24 hours per week, compared to only 11.2 per cent respectively of all employees;
- (iii) over half (52 per cent) of Fast Food employees are aged between 15 and 19 years, and 71.1 per cent are aged between 15 and 24 years, compared with only 6.6 per cent and 17.8 per cent respectively of all employees; and
- (iv) over half (55.6 per cent) of Fast Food employees are students (51.1 per cent are full-time students and 4.5 per cent study part-time) compared to 13.6 per cent of all employees.

[1274] The 2011 Census data is broadly consistent with the results of the 2015 Ai Group employees survey – in terms of the differences between the characteristics of Fast Food employees compared with employees generally. Table 45 below captures some of the key demographic results from the Ai Group employee survey and compares them to the July 2015 ABS data for all industries.

Table 45¹¹²³
Comparison between Ai Group employee survey and all industries from the
ABS Labour Force survey, July 2015

Ai Group employee survey	(%)	ABS Labour Force Survey (July 2015) – all industries	(%)
Total employed			
1. Full time/part time			
Permanent full time	5.1	Full time	69.3
Casual/permanent part time	94.9	Part time	30.7
2. Hours worked			
1–15 hours	70.1	1–19 hours	15.4
1–25 hours	88.7	1–29 hours	27.6
3. Age			
14–19 years	81.6	15–19 years	5.5
14–24 years	91.5	15–24 years	15.6
4. Student status			
Full-time student	67.4	Full-time student	7.5
Part-time student	10.5	Part-time student	6.7
Not a student	22.1	Not a student	85.8

Note: The Labour Force Survey has no information on people aged 14 years and under as the scope of the survey only includes people aged 15 years and over.

In the Labour Force Survey, full-time employed are defined as employed persons who usually worked 35 hours or more a week (in all jobs) and those who, although usually working less than 35 hours a week, worked 35 hours or more during the reference week. Part-time employed are defined as employed persons who usually worked less than 35 hours a week (in all jobs) and either did so during the reference week, or were not at work in the reference week.

For student status, data from the August quarter 2015 are presented as these data were only available quarterly.

[1275] On the basis of the data in Table 45 a ‘typical’ Fast Food employee is likely to be:

- a student (full-time or part-time);
- aged between 14 and 24 years;
- employed on a part-time basis (in the sense that they are not a full-time employee and may be engaged on either a casual or part-time basis); and
- working between 1 and 24 hours per week.

[1276] The report by Dr O’Brien (the O’Brien Report)¹¹²⁴ deals with the earnings and household circumstances of Fast Food industry employees. Much of the earnings data cited in the O’Brien Report is only available at the ANZSIC 3 digit level, for the ‘Accommodation and food services’ (‘AFS’) division, which includes ‘Takeaway food services’. The 2011 Census is the only source of earnings data at the 4 digit takeaway food services level. The 2011 Census data shows that takeaway food services employees are a relatively low paid group within the AFS division.¹¹²⁵ The ABS data for AFS employees shows that:

- Average weekly earnings for AFS employees in the May Quarter of 2015 were \$556.30 compared to \$1136.90 for employees in all industries.¹¹²⁶

- The relatively low earnings of employees in the AFS division are affected by the number of hours they work. About a third of the earnings differential is accounted for by the difference in hours worked.¹¹²⁷

[1277] Using the benchmark of two-thirds of median hourly earnings to define ‘low paid’ and half of median hourly earnings to define ‘very low paid’, Dr O’Brien concludes that ‘at least thirty per cent of AFS are low paid and at least ten per cent are very low paid’.¹¹²⁸ Based on the 2011 Census data Dr O’Brien concludes that ‘the percentage of low paid full-time workers [in takeaway food services] is in the vicinity of fifty to sixty per cent ... [and] the percentage of very low paid ... in the vicinity of twenty five to thirty per cent of employees’.¹¹²⁹

[1278] Dr O’Brien also concludes¹¹³⁰ that a high proportion of takeaway food services employees are dependent students within a household (35.8 to 37.4%, depending on the data source) and that:

‘Further analysis of household related data showed FBS employees were more likely to reside in households in lower household income brackets, in lower socioeconomic areas, rent rather than own their own homes, rely on various forms of social security benefits to supplement their income, and ... experience financial difficulties in relation to paying utility bills, heating their home, paying their rent or mortgage, and their ability to raise money in an emergency situation.’¹¹³¹

[1279] In terms of renting and financial hardship indicators, Table 46 from the Dr O’Brien Report compares the circumstances of FBS employers with employees in all industries:

Table 46¹¹³²
Renting Situation and Financial Hardship (%)

	FBS	All Industries
Renting	41.5	28.1
Financial Situation - dissatisfied	18.2	11.6
Could not pay elect/gas/phone on time	13.0	9.3
Could not pay mortgage/rent on time	6.8	4.3
Pawned or sold something	3.7	2.9
Went without meals	3.4	1.9
Was unable to heat home	1.4	1.4
Asked for financial help - family/friends	10.6	8.9
Asked for financial help - welfare/community org	2.1	1.5
Difficulty raising \$3000 - drastic measures	15.6	7.9
Difficulty raising \$3000 - couldn't	17.6	7.3

Source: HILDA (2013a)

[1280] The incidence of weekend work is also a distinguishing characteristic of the Fast Food industry. ABS data shows that for all industries only around one quarter of employees work on weekends.¹¹³³

[1281] The Ai Group employee survey provides some additional data about the working hours of Fast Food employees:

- about 80 per cent of respondents work the same shift, or a similar shift, each week¹¹³⁴ and work a similar number of hours each week;¹¹³⁵ and
- some 81 per cent of respondents work on weekdays; 64 per cent on Saturdays and 58 per cent on Sundays (the total is greater than 100 per cent as they may work any combination of these categories).¹¹³⁶

[1282] Finally, Ai Group contends that Fast Food industry employees can be categorised as career or non-career employees. As a general proposition we accept that the employees of the QSR major chains can be so categorised and, as mentioned earlier, the employees of the QSR major chains account for 86 per cent of all Fast Food industry employees.

[1283] Ms Limbrey – McDonald’s HR Business Partner NSW/ACT – categorises the following types of employees as ‘career employees’:

- Full-time crew members (level 1 under the *Fast Food Industry Award 2010*)
- Shift supervisors (level 2 under the *Fast Food Industry Award 2010*); and
- Shift managers (level 3 under the *Fast Food Industry Award 2010*).

[1284] Ms Limbrey categorised casual crew members and most part-time crew members as ‘non-career employees’.¹¹³⁷

[1285] Similar observations were made by Mr Makhoul in relation to Hungry Jack’s.¹¹³⁸

(ii) **Employee experiences and preferences in the Fast Food industry**

(a) ***Experiences with weekend work***

[1286] The employee respondents to the Ai Group survey who said they worked on a Saturday or a Sunday were asked about the impact working on that day had on spending time with their family and friends. The responses for Saturday and Sunday work were similar, as shown by Charts 37 and 38 below:

Chart 37¹¹³⁹
Impact of working on a Saturday on spending time with family/friends
 % choosing answer n= 13,714

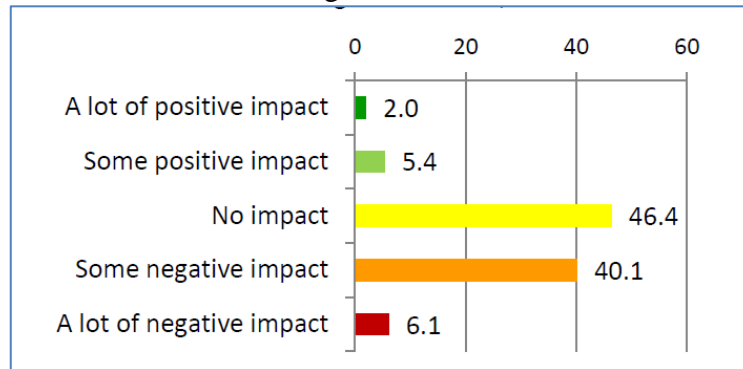
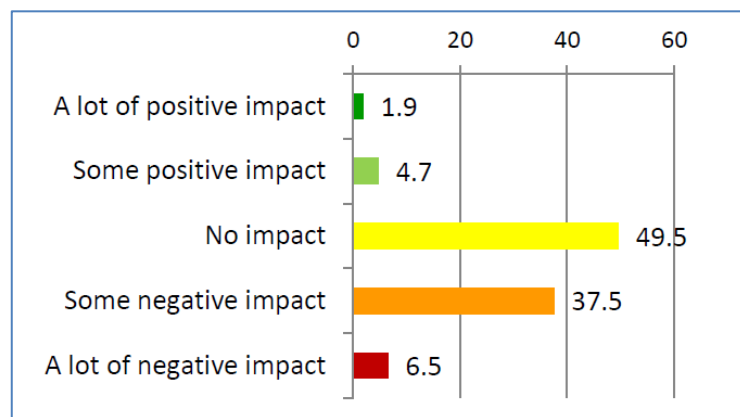


Chart 38¹¹⁴⁰
Impact of working on a Sunday on spending time with family/friends
 % choosing answer n=12,316



[1287] Slightly more Saturday workers (46.2 per cent) reported some or a lot of negative impact on spending time with their family and friends, compared to Sunday workers (43.9 per cent).

[1288] The proportion of employees who worked on a Sunday and experienced some or a lot of negative impact on spending time with their family and friends, increased with age.

Chart 39 ¹¹⁴¹
Impact of working on Saturdays on spending time with family/friends by age (group brackets)

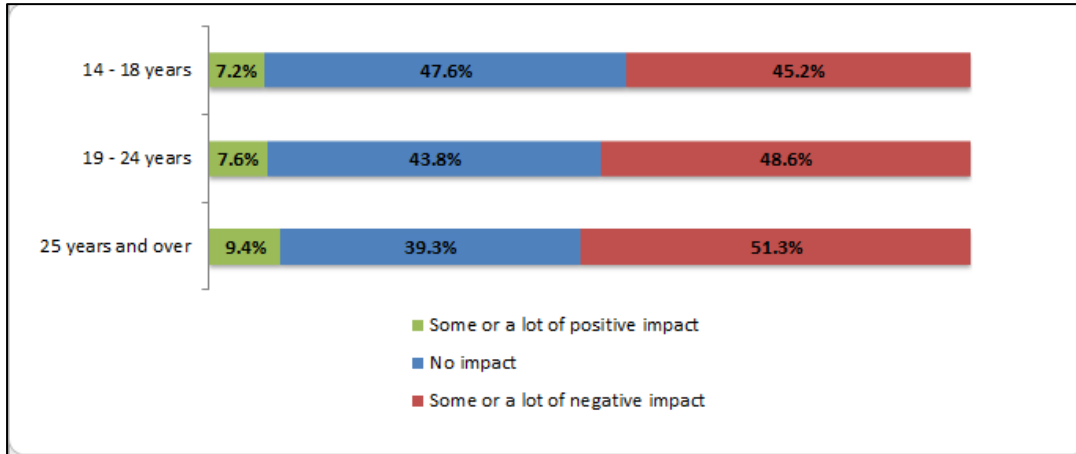
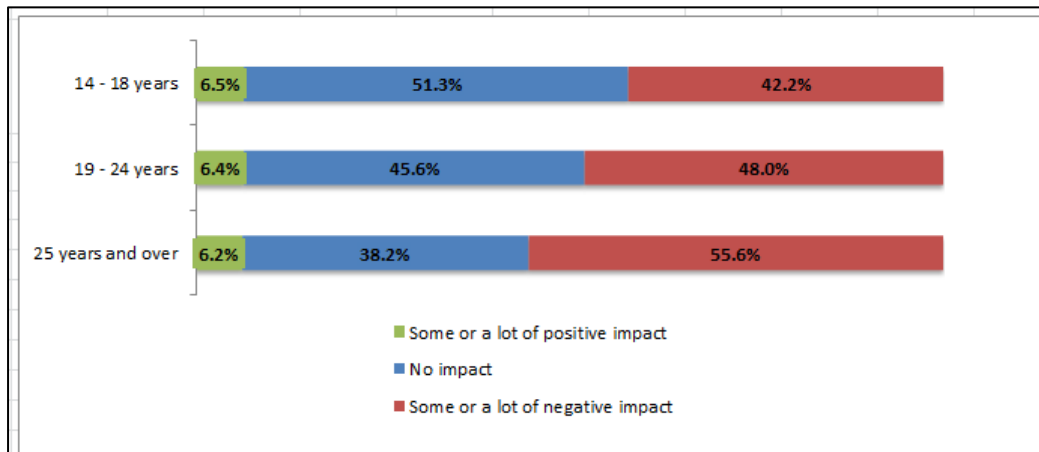
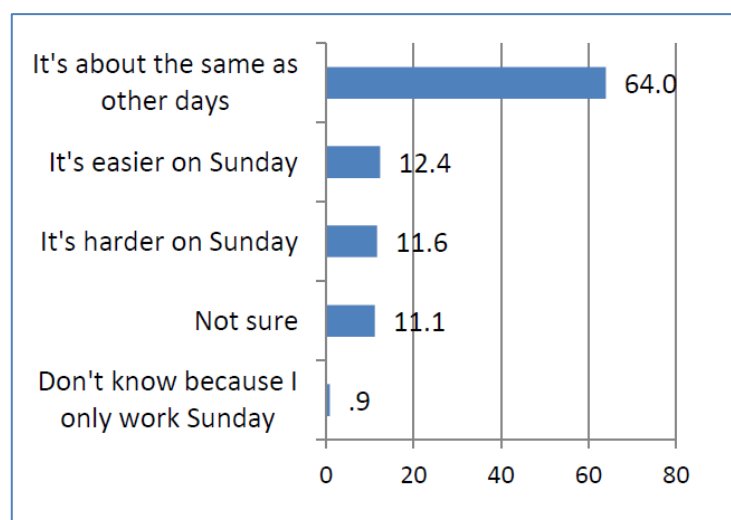


Chart 40 ¹¹⁴²
Impact of working on Sundays on spending time with family/friends by age (group brackets)



[1289] Those respondents who said they worked on Sundays were asked about travelling to work on Sunday compared to other days of the week. As shown by Chart 41 below, most respondents (64 per cent) thought it was about the same, 12.4 per cent said it was easier and 11.6 per cent said it was harder.

Chart 41 ¹¹⁴³
How travelling to work on a Sunday compares to other days of the week
 % choosing answer n=12,380



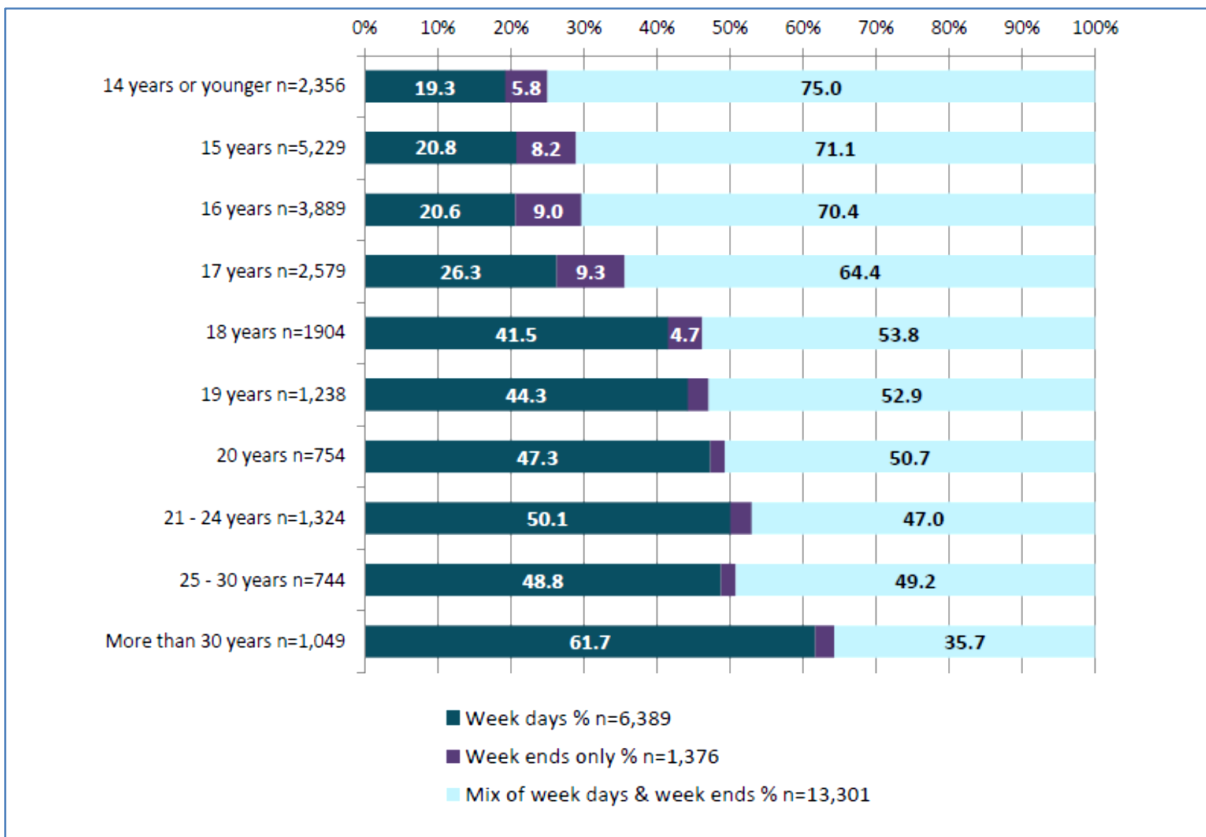
(b) Employee preferences

[1290] The Ai Group employee survey also provides data on employee preferences.

[1291] Most employees (63.2 per cent) preferred to work a mixture of weekdays and weekends: 30.4 per cent preferred to work weekdays (Monday to Friday) *only* and 6.5 per cent preferred to work *only* on weekends.¹¹⁴⁴ As shown by Chart 42 below, generally speaking, the preference for working only weekdays increased with age: 61.7 per cent of those aged 30 years and over only want to work weekdays, compared to 19.3 per cent of 14 year olds. The preference to only work weekdays can also be seen as a preference *not* to work on weekends.

[1292] Survey respondents were also asked what day they would *prefer* to work on a weekend. Most (44.7 per cent) preferred to work *both* Saturday and Sunday, with 28.6 per cent preferring Saturday only and 26.7 per cent preferring Sunday only.

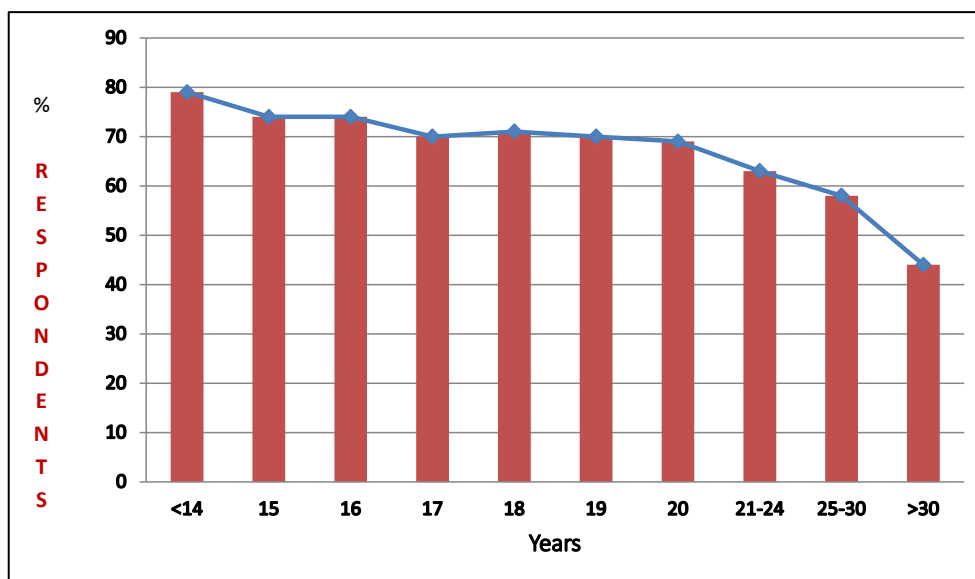
Chart 42 ¹¹⁴⁵
Preferred days to work by age (individual brackets)



[1293] All respondents, irrespective of when they actually worked or preferred to work, were asked if they would work some or more hours on a weekend, if offered. Some 72.3 per cent said they would work some or more hours on a Saturday if offered and 70.5 per cent said they work some or more hours on a Sunday if offered.¹¹⁴⁶ Interest in working more hours, on either a Saturday or Sunday, was highly correlated with age.¹¹⁴⁷

[1294] In relation to Sunday work, 79 per cent of respondents aged 14 years and under expressed a willingness to work some or more hours on a Sunday. This proportion falls to 63 per cent of those aged 21 to 24 years and to 44 per cent for those over 30 years of age, as shown by Chart 43 below.

Chart 43 ¹¹⁴⁸
Willingness to work some or more hours on a Sunday, if offered
 % respondents within an age group



[1295] The above data on employee preferences is particularly significant because under the enterprise agreements which apply to the employees surveyed a loaded hourly rate is paid for *all* ordinary hours and ordinary hours can be worked at any time Monday to Sunday. In other words, the expressed preferences for working some or more hours on a Sunday have not been influenced by the payment of any additional remuneration for Sunday work.

[1296] The Ai Group employee survey did not ask respondents to record their classification level, hence there is no direct measure of employee preferences by classification level. In response to a Statement and Directions dated 8 September 2016¹¹⁴⁹ Ai Group tendered evidence setting out the number of McDonald’s and Hungry Jack’s employees by, among other things, classification level and age. McDonald’s and Hungry Jack’s each have three employee classification levels – those levels and the equivalent classification in the *Fast Food Industry Award 2010*, are set out below:

<i>Fast Food Industry Award 2010</i>	
McDonald’s ¹¹⁵⁰	
Crew Member	Level 1
Shift Supervisor	Level 2
Shift Manager, Trainee Manager or Manager	Level 3
Hungry Jack’s ¹¹⁵¹	
Crew Member	Level 1
Assistant Manager	Level 2
Restaurant Manager	Level 3

[1297] At about the time the Ai Group employee survey was conducted there were 98,911 persons employed in McDonald’s restaurants¹¹⁵² and 15,168 Hungry Jack’s employees¹¹⁵³

employed in corporate owned stores. The number of McDonald's¹¹⁵⁴ and Hungry Jack's¹¹⁵⁵ employees by award classification level was:

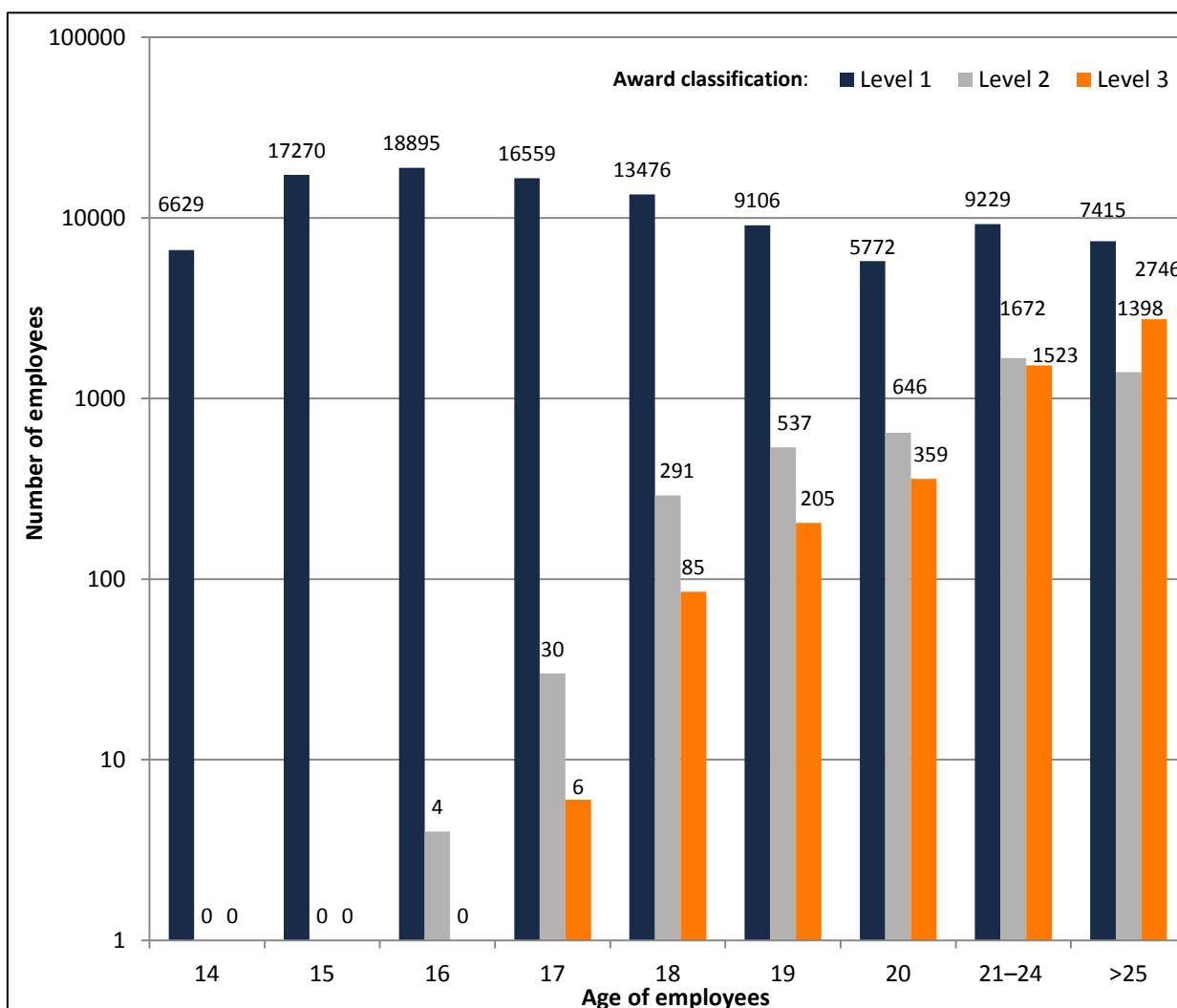
Level 1: 104 577
 Level 2: 4 578
 Level 3: 4 924

[1298] The number of employees by age and award classification level is set out in Table 47 and Chart 44 below.

Table 47
Number of McDonald's¹¹⁵⁶ and Hungry Jack's¹¹⁵⁷ employees by age and classification

No. of employees by age	Award Classification Level			
	Total	Level 1	Level 2	Level 3
14	6 629	6 629	-	-
15	17 270	17 270	-	-
16	18 899	18 895	4	-
17	16 595	16 559	30	6
18	13 852	13 476	291	85
19	9 848	9 106	537	205
20	6 777	5 772	646	359
21-24	12 424	9 229	1 672	1 523
>25	11 559	7 415	1 398	2 746
	113 853	104 577	4 578	4 924

Chart 44¹¹⁵⁸
Number of McDonald's and Hungry Jack's employees by age and classification



Note: The vertical axis uses a logarithmic scale where the logarithms of the original values are used to determine the height of the columns, such that each increment on the axis increases by a multiple of 10. This is done for ease of interpretation as it compresses the larger numbers to be comparable with the smaller numbers.

[1299] Ai Group submits that the age of a McDonald's/Hungry Jack's employee can be used as a proxy for the classification level at which the person is employed. We agree, despite the SDA's submission to the contrary.¹¹⁵⁹ Based on the data in Table 47, most employees classified at level 1 (i.e. 84.1 per cent) are under 21 years of age; whereas about two-thirds (67.1 per cent) of level 2 employees and most (86.7 per cent) level 3 employees, are 21 years of age or older.

[1300] Using age as a proxy for classification level it can be inferred that the reported experiences and preferences of employees aged 14–20 years can be attributed to level 1 employees and the reported experiences and preferences of those aged 21 years and over can be attributed to level 2 or 3 employees.

[1301] We accept that age is an imperfect proxy for an employee's classification level – there are level 1 employees who are 21 years of age or older and there are level 2 and level 3 employees who are younger than 21 years of age. But given the age distribution at each classification level it is a reasonable to adopt age as a proxy for an employee's classification.

[1302] As we have mentioned, the survey results show a marked difference in the willingness to work some or more hours on a Sunday based as age (see Chart 43). Almost three in four respondents (73 per cent) aged under 21 years of age were willing to work some or more hours on a Sunday, compared to just over half (56 per cent) employees aged 21 years or older.

[1303] The responses to a number of other, related, survey questions also show a strong correlation to the age of the respondent, namely:

- *Preferred day to work:* generally speaking, the preference for working only weekdays (i.e. Monday to Friday) – and by inference the preference to *not* work on weekends – increased with age. Twice as many respondents aged 21 years and over (54 per cent) preferred not to work on weekends compared to those aged 14 to 20 years (26 per cent).¹¹⁶⁰
- *Negative impact of Sunday work:* a significantly higher proportion of respondents aged 21 years and over (55.1 per cent) reported some or a lot of negative impact of working on Sundays on spending time with family and friends, compared to respondents aged 14 to 20 years (42.3 per cent). Almost three times as many employees aged 21 years and over (15.4 per cent) reported a lot of negative impact, compared to those aged 14 to 20 years (5.2 per cent). Similarly, just over half (51.2 per cent) of respondents aged 14 to 20 years reported 'no impact of working on Sundays on spending time with family and friends, compared to 39 per cent of respondents aged 21 years and over.¹¹⁶¹

[1304] It is also likely that the correlation between the reported experiences and preferences and age is influenced by the student status of the employee respondent. In this regard we note that 73.4 per cent of full-time students indicated that they would work some or more hours on a Sunday, if offered.¹¹⁶² Full-time students also indicated a much stronger preference for working a mix of weekdays and weekends (70.3 per cent) than non-students (41.7 per cent). Further, almost 80 per cent of full-time students preferred to work either weekends or a mix of weekdays and weekends, compared to 44 per cent of non-students.¹¹⁶³

[1305] It seems to us that there is a clear distinction between the reported preferences and experiences of level 1 employees (using those aged 14 to 20 years as a proxy), from classification level 2 or 3 employees. In terms of reported preferences, level 1 employees (compared to level 2 or 3 employees) are *more likely*:

- to express a preference for weekend work (either weekends only or a mix of weekdays and weekends); and
- to express a willingness to work some or more hours on a Sunday.

[1306] In terms of their reported experiences, level 1 employees (compared to level 2 or 3 employees) are *less likely*:

- to report some or a lot of negative impact from working on Sundays on spending time with family and friends;

and are *more likely*:

- to report no impact of working on Sundays on spending time with family and friends.

[1307] A number of McDonald's franchises gave evidence about the duration of weekend shifts worked by employees at award classification levels 1, 2 and 3. That evidence supports a finding that, for most award level 1 employees who worked on a weekend, the duration of their shift (for Saturdays and Sundays) was between 4 and 5 hours,¹¹⁶⁴ whereas most award level 2 and 3 employees who worked on a weekend worked an eight hour shift.¹¹⁶⁵

[1308] We also note that there is a difference between the duration of weekend shifts worked by award level 1 McDonald's employees, compared to award level 2 and level 3 McDonald's employees.

[1309] Ms Limbrey referred to an 'Hours Worked Report' in her evidence. The Hours Worked Report relates to 11971 award level 1 employees at 164 restaurants operated by McDonald's. The report shows the actual times worked by each award level 1 employee who worked at a company restaurant on a weekend during the period 5 April 2015 to 26 April 2015. Based on the Hours Worked Report Ms Limbrey's evidence is that the average shift length worked by award level 1 employees in company restaurants during this period was:

- 5.38 hours for Saturdays; and
- 5.28 hours for Sundays.¹¹⁶⁶

[1310] The rationale for rostering these employees for these shift durations was explained by Dunn at paragraphs [30] and [33] of his affidavit (Exhibit Ai Group 1):

'For each of my restaurants the optimal shift lengths for Level 2 employees on a Saturday is 4.5 hours. Labour laws require crew working more than 5 hours to be given a 30 minute unpaid break. If I need 9 hours covered from 8am to 5pm, for example, I could cover this with one person but I am short during the paid break and I also run the risk that this crew person could call in sick and leave me 9 hours short. If I use two crew people for 4.5 hours each, I have the whole shift covered and also should one of them call in sick I have the possibility of asking one person if they want to stay late or the other if they would like to come in early. When I have many crew on at a time with many different start and finish times it is quite easy to arrange four or five people to cover an hour or so each and cover a whole shift without the manager having to spend time cold calling crew to work....

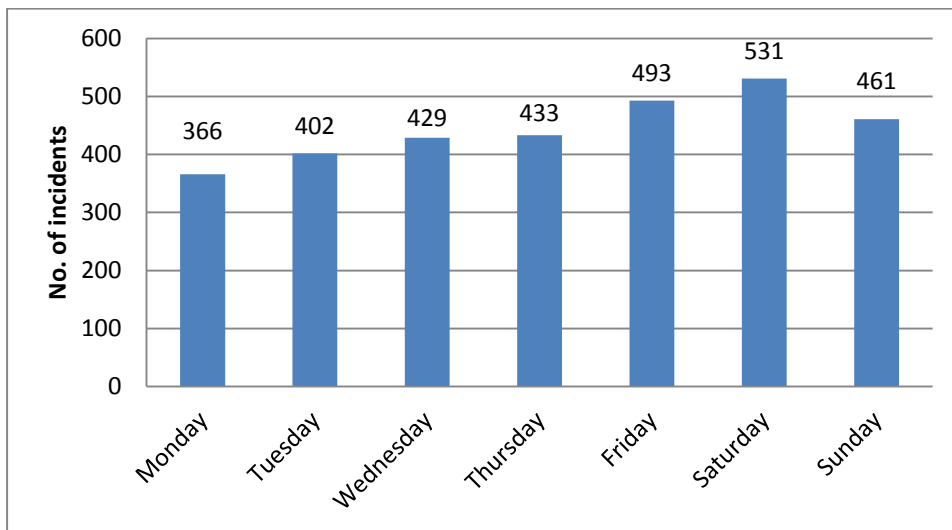
In my view, for each of my restaurants the optimal shift lengths for Level 3 employees on a Saturday is eight hours. It is my opinion based on experience and observation, that eight hours is the right amount of time for a Level 3 shift. It takes considerable time for the Level 3 employee to set up their shift and position crew for a successful shift. It then takes considerable time to prepare the shift for handover. I believe shifts of less than 8 hours may result in less productivity. I also want to keep these highly trained staff for as long as possible

(there is considerably more investment in the training of employees to level 3 level than training employees to a Level 2). Based on experience and observation, staff who get enough hours have adequate pay to keep them from looking for alternative employment.’

(iii) The health impact of weekend work

[1311] McDonald’s has a system for reporting and recording injuries and safety incidents relating to its employees (whether employed directly by McDonald’s or by a franchise).¹¹⁶⁷ McDonald’s Workplace Safety team prepared a report setting out the frequency of reported incidents by day of the week in the period from 1 May 2014 to 17 May 2015.¹¹⁶⁸ Chart 45 sets out the number of incidences by the day of the week on which the incident occurred in this period:

Chart 45
Reported Incident Data by Day of the Week: 1 May 2014 to 17 May 2015



[1312] As shown by Chart 45, the number of reported incidents progressively increases from Monday through to Saturday and then declines on Sundays. In her evidence, Ms Limbrey comments on this data and notes that:

‘This pattern reflects the sales patterns of restaurants set out in Confidential Exhibit KTL3. In my experience as a Restaurant Manager, on days of higher sales restaurants need to roster a higher number of employees to work a greater number of hours.’¹¹⁶⁹

[1313] The evidence in the proceedings supports a finding that, in the Fast Food industry, Sunday work is *not* associated with a higher rate of safety incidents (i.e. number of reported incidents divided by number of employees working).¹¹⁷⁰

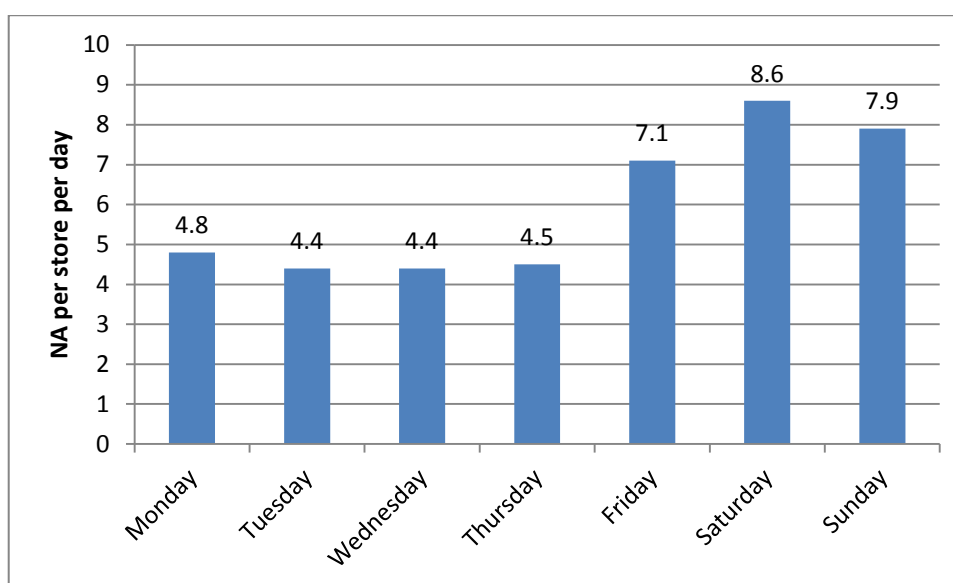
(iv) Employees are rostered to work within the parameters of their stated availability

[1314] In addition to the preferences and availability data the data on temporary unavailability and employee complaints is also relevant to the assessment of the relative disutility of Sunday work.

[1315] At McDonald's, temporary unavailability – for example to deal with a social commitment on a particular day – is recorded in a book at each restaurant which is set up like a diary and usually referred to as the 'NA book'. The employee simply writes their name on the date that they are unavailable.¹¹⁷¹

[1316] Dando was asked to produce the NA books in relation to the eight franchised restaurants operated by Jasie Pty Ltd for the period 1 May 2015 to 31 July 2015.¹¹⁷² The chart below sets out the average number of employees that appear on each day of the week in the NA book.

Chart 46
NA book numbers by day of the week
Jasie Pty Ltd 1 May 2015 – 31 July 2015



[1317] The most number of entries in the NA book was in relation to Saturday, followed by Sunday and then Friday. Dando's evidence was that the chart accorded with his experience in managing the business.¹¹⁷³

[1318] A similar pattern emerges in relation to the five restaurants operated by Jamadu;¹¹⁷⁴ the two franchised restaurants operated by Eyrie Holdings Pty Ltd¹¹⁷⁵ and the three franchised restaurants operated by Agostino Group Holdings Pty Ltd.¹¹⁷⁶

[1319] We note that Haydar's evidence is different in that in the course of cross-examination he agreed with the proposition that 'the greatest preponderance of when people call in sick or have other commitments such that they become temporarily unavailable is on Sundays'.¹¹⁷⁷ No extracts were produced from the NA books at the four franchised restaurants operated by Haydar Pty Ltd.

[1320] As to the complaint data, McDonald's employees have a number of means by which they can make complaints. These include, raising concerns with the management team at the restaurant or Licensee, or by contacting the Human Resources Department or by raising concerns via the PAL (Personal Action Letter) program available to all employees on *metime* (the PAL System). The PAL System is a way for employees to contact the Human Resources

Team directly without the employee's manager or anyone else knowing, regarding concerns that they have. These methods are communicated to employees as part of their orientation when they begin employment with McDonald's.

[1321] The PAL System has been electronic and available to employees online since 2014.¹¹⁷⁸ Limbrey is familiar with the PAL System and in her first affidavit she states:

'Since the PAL System has been online I am not aware of complaints about weekend or evening work being made as employees are able to set their own availabilities when they apply for work at McDonald's and to make adjustments to those availabilities once employed.'¹¹⁷⁹

[1322] Limbrey's evidence is consistent with the evidence of the McDonald's franchisees.¹¹⁸⁰ For example, in his first affidavit Dunn states:

'Jamadu maintains a system for receiving complaints from employees and/or for employees to raise concerns with their supervisor.

There are letters in the crew room that can be sent to McDonald's anonymously but I am not aware of them ever needing to be used. We have received no complaints from McDonald's. I observe Jamadu's workforce to have an excellent culture. There is an employment index questionnaire that crew can answer to give feedback about the restaurant in a number of areas. McDonald's would address any complaints with me. Jamadu maintains many levels of management and fosters an 'open door' policy. In my observation, if a crew person or a manager has a problem they tell somebody they trust and that person brings the concern to me or my General Manager. As to complaints specifically concerning weekend work, full time managers are required to work weekends in my business. This doesn't suit everybody and we do have managers who leave to work in another industry that offers 9-5 Monday to Friday. Most Managers love that shift work provides them with flexibility. If a Manager wants specific days off they are almost always honoured. Part time and casual crew simply work the hours that they choose to be available for.'¹¹⁸¹

[1323] The observation that some managers (award level 3) express their dissatisfaction with weekend work by leaving the industry is consistent with the preference data for level 3 employees referred to earlier (see [1302]–[1306]).

7.5.6 Consideration

(i) *The late night penalty*

[1324] It is convenient to deal first with the claims in respect of the late night penalty. To place the claims in context it is necessary to say something about the background to the current provision.

[1325] As we have mentioned, the *Fast Food Award* was one of the 'priority awards' made on 19 December 2008. In making the award the AIRC attached significant weight to the terms of the pre-reform award, the *National Fast Food Retail Award 2000*. At the time the *Fast Food Award* was made, clause 26.2(a) provided as follows:

‘(a) Evening work Monday to Friday (excluding shiftwork)

A loading of 10 % will apply for ordinary hours of work within the span of hours between 6.00 pm and midnight, and for casual employees an additional 25 % of the rate on top of the casual rate.’

[1326] In 2009 a joint NRA and Ai Group application sought to vary the *Fast Food Award* in a number of respects, including the penalty rate for evening work. It was proposed that clause 26.2(a) be replaced by the following:

‘A loading of 10 % will apply to full time and part time employees for ordinary hours of work within the span of hours between 9.00 pm and midnight’

[1327] In its decision of 29 January 2010 the Award Modernisation Full Bench decided to vary clause 26.2(a), for the following reasons:

‘Since making this award the Commission has reviewed the penalty payments applying in the restaurant industry. Those penalty payments are found in the Restaurant Industry Award 2010. For fast food operations that open into the evening there is logic in adopting a similar approach to penalty payments. We have decided to vary cl 26.2(a) to provide for a 10% loading to be payable after 9.00 pm and a 15% loading to be payable after midnight. Casual employees are to receive the relevant loading in addition to the 25% casual loading’.

[1328] The evening penalty rate in the *Restaurant Award* was considered by the Award Modernisation Full Bench in its decision of 25 September 2009:

‘We deal now with night work before midnight on Monday to Friday. There is no clear national benchmark emerging from the pre-reform awards and NAPSAs in the industry. A penalty in the order of 10% for work between 7.00pm and midnight is common to the Victorian Restaurant Award and most NAPSAs. There is a penalty of a similar quantum in both Queensland NAPSAs, but the penalty applies from time later than 7.00pm in each case. However, there is no penalty rate at all in the NSW Restaurant Award, which applies in the largest State. In this circumstance, bearing in mind the terms of clause 27A of the consolidated request and having regard to the fact that evenings constitute core trading times and the operational requirements of the industry in that regard, we have decided to adopt a penalty of 10% between the hours of 10pm and midnight.’

[1329] The AIRC rejected a subsequent attempt by the LHMU to have the penalty apply to work between 8 pm and midnight (instead of 10 pm and midnight) and decided not to depart from the penalty provisions in the exposure draft.

[1330] Clause 34.2 of the *Restaurant Award* currently provides:

‘34.2 Additional payment for work done between the hours of 10.00 pm to 7.00 am on Monday to Friday

(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours of 10.00 pm and midnight Monday to Friday inclusive, or between midnight and 7.00 am Monday to Friday inclusive, must be paid an additional amount per hour calculated according to the following:

- (i) Between 10.00 pm and midnight
 - For each hour or part of an hour worked during such times—10% of the standard hourly rate per hour extra.
- (ii) Between midnight and 7.00 am
 - For each hour or part of an hour worked during such times—15% of the standard hourly rate per hour extra.

(b) For the purposes of this clause midnight will include midnight Sunday.’

[1331] The evening penalty rate provisions in the *Fast Food* and *Restaurant Awards* differ in the time at which the 10 per cent evening penalty commences – 10 pm under the *Restaurant Award* and 9 pm under the *Fast Food Award*. Ai Group seeks a variation to the *Fast Food Award* so that the 10 per cent evening work loading applies from 10 pm, not 9 pm.

[1332] Having regard to the reasons given by the Award Modernisation Full Bench for varying the evening penalty provision in the *Fast Food Award* it appears that the existing threshold for the payment of the penalty – 9 pm – was simply an error. The Full Bench clearly intended to align the evening penalty rate provisions in the *Fast Food* and *Restaurant Awards*, but for whatever reason that intention was incompletely implemented.

[1333] We agree with the proposition that there is logic in adopting a similar approach to evening penalty rate payments in these two awards.

[1334] It is convenient to deal here with another aspect of clause 25.5, in particular clause 25.5(a)(ii) which states:

‘(ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% loading.’

[1335] Clause 25.5(a)(ii) provides for the payment of a 15 per cent loading for ordinary hours of work ‘after midnight’, but does not set the span of hours between which the loading is to be paid. The equivalent provision in the *Restaurant Award* (clause 34.2(a)(ii), above) provides that the 15 per cent loading is paid for ordinary hours worked between midnight and 7.00 am. We note that RCI proposes to vary the span of hours to which this penalty applies, but the pertinent point for present purposes is that the *Fast Food Award* does not presently prescribe the span of hours during which the loading is to be paid. For the reasons set out above it would be logical to align the evening penalty rate provisions in the *Fast Food* and *Restaurant Awards*. We now turn to the RCI’s claim.

[1336] RCI’s claim in relation to the late night penalty did not receive much attention in the proceedings, in either the evidence or in submissions. RCI led evidence from two lay witness fast food business proprietors: the operator of 3 hamburger restaurants employing 65 employees in South Australia (RCI Fast Food Witness 1) and the operator of nine shopping centre food outlets employing 120 employees in Queensland (RCI Fast Food Witness 2). The identity of these witnesses and the names of the businesses they operate was the subject of a

confidentiality order. No particular findings are sought to be drawn from the evidence of the RCI witnesses. Both witnesses address the late night penalty. Witness 1 says:

‘Although the company closes to the public week nights at 9PM we incur the 10% late night penalty during clean up and staff generally staying back until 10PM to complete the necessary closure of operations on each site. This equates to a total of \$4,391 across all three sites per annum and is considered a disincentive for the business’

[1337] During cross-examination Witness 1 did not suggest that the removal of the 10 per cent penalty between 9 pm and 10 pm would lead to a change in staffing arrangements or trading hours, but did note that the time between 9 pm and 10 pm ‘is still our core business trading hours and with that 10 per cent it is – it does disadvantage us slightly when it is still core business hours’.

[1338] Witness 2’s evidence was that:

‘The company would consider extending its evening trading hours across all outlets if the late night penalty was altered from 9PM to Midnight.’

[1339] Witness 2 operates nine fast food outlets in Queensland; six of which are open until 7.00 pm on weeknights. The other three outlets trade until 9.30 pm on Thursday night. During the course of cross-examination the witness explained that the trading hours reflected the level of demand:

‘In paragraph 4 you say that the operating times are typically 9 am to 7 pm weekdays. I had a look at your website. It tells me that three of your outlets trade to 9.30 pm on Thursday nights. Is that correct?---Yes, that’s correct.

I take it that that’s because, in the case of those three outlets, the level of trade justifies them opening to the later hour of 9.30?---Yes. And all the current outlets are in shopping centres, so that’s the late-night trade night.

I see. And in relation to the other six outlets, the level of trade doesn’t justify you opening past about 7 pm on weeknights?---Correct.’

[1340] The witness went on to concede that the existing late night penalty did not restrict his ability to extend the trading hours from 7 pm to 9 pm in the six outlets which presently traded until 7 pm, and then made the following concession:

‘So I would suggest to you that your claim in paragraph 7 that the company would consider extending its evening trading hours across all outlets if the late-night penalty was altered out to midnight, you would accept that that’s an overstatement because you already, in relation to all but three of your stores, only trade to 7 pm. Do you accept that’s so?---Yes, I would agree to that. Yes.’

[1341] As mentioned earlier, RCI is seeking to vary the late night penalty provisions in the *Restaurant Award* and the *Fast Food Award* in the same terms and advances a common submission in respect of both awards. In support of its position RCI relied on a report by the Fair Work Ombudsman in respect of compliance with the *Restaurant Award*. Compliance with the *Fast Food Award* was the subject of a subsequent report by the Fair Work

Ombudsman, dated March 2016 – ‘National Hospitality Industry Campaign 2012–15 Takeaway Foods (Wave 3)’ (the ‘FWO Wave 3 Report’).

[1342] The results of the FWO Wave 3 Report reveal a high level of non-compliance (67 per cent).

[1343] The FWO Wave 3 Report states:

‘Fair Work Inspectors found some businesses providing flat rates of pay for all hours worked, with many advising they had adopted this practice to simplify their payroll processes. In nearly one third of cases, the hourly rate paid was not enough to cover hours attracting penalty rates and loadings, resulting in additional errors.’

[1344] The essence of RCI’s submission is that varying clause 25.5(a) such that it only provides for a 5 per cent loading for work between midnight and 5.00 am would make the award simpler and improve compliance. It is not submitted (at least not expressly) that the variation proposed would lead to an increase in the operating hours of fast food businesses, or to an increase in employment. Nor is there much (if any) direct, probative, evidence to support such a contention.

[1345] The proposition that a variation in the terms sought would increase compliance is only given limited support by the FWO Wave 3 Report. That report identified the most common source of non-compliance as the underpayment of hourly rates, whereas errors in the application of penalty rates and loadings only accounted for 15 per cent of instances of incorrect payment.

[1346] We acknowledge that the variation proposed would make the award simpler and easier to understand, consistent with one of the s.134 considerations (s.134(1)(g)). But the same may be said about the abolition of the evening work penalty. Simplicity is a laudable objective, but it is only one of the matters we are required to take into account – the central question is whether the award term provides ‘a fair and relevant minimum safety net’.

(ii) *The Sunday penalty rate*

[1347] We now turn to the claims to reduce the penalty rate for Sunday work, from 150 per cent to 125 per cent for full-time and part-time employees and from 175 per cent to 150 per cent for casual employees. As mentioned earlier, no party contended that the penalty rate for Saturday work – presently 125 per cent – should be varied.

[1348] The claims made are consistent with the recommendations in the PC Final Report, that for full-time and part-time employees the Sunday penalty rates be set at the higher rate of 125 per cent and the existing Saturday penalty rate.

[1349] In addition to the general findings made on the basis of the common evidence (see Chapter 6), there a number of important contextual matters relevant to our consideration of weekend penalty rates in the *Fast Food Award*.

[1350] The Fast Food industry comprises of about 24,600 establishments operating in a number of industry sub-sectors. There is a high level of competition in the industry with businesses offering a wide range of different fast food options.¹¹⁸² In terms of employment,

the industry is dominated by the QSR major chains, which employ about 86 per cent of Fast Food industry employees. McDonald's and Hungry Jack's employ just over half,¹¹⁸³ and McDonald's alone employs 46 per cent of the employees in the Fast Food industry.

[1351] The standard operating hours of most fast food businesses include Saturdays and Sundays, reflecting customer demand for the purchase and consumption of fast food. In McDonald's stores the peak period of sales is usually Friday to Sunday,¹¹⁸⁴ with 17 per cent of the weekly revenue earned on a Saturday¹¹⁸⁵ and 14 per cent of weekly revenue generated on a Sunday.¹¹⁸⁶ In some McDonald's stores, Sunday sales were 25 to 30 per cent greater than on the average weekday.¹¹⁸⁷

[1352] As we have mentioned a 'typical' Fast Food employee is likely to be:

- a student (full-time or part-time);
- aged between 14 and 24 years;
- employed on a part-time basis (in the sense that they are not a full-time employee and may be engaged on either a casual or part-time basis); and
- working between 1 and 24 hours per week.

[1353] Further, the profile of Fast Food employees differs from the profile of employees in 'All industries' in four important respects:

- (i) almost 80 per cent of Fast Food employees work part-time (i.e. less than 35 hours per week¹¹⁸⁸), compared with only 32.2 per cent of all employees;
- (ii) about half (49.6 per cent) of Fast Food employees work 1–15 hours per week and just over two-thirds (67.8 per cent) work 1–24 hours per week, compared with only 11.2 per cent respectively of all employees;
- (iii) over half (52 per cent) of Fast Food employees are aged between 15 and 19 years, and 71.1 per cent are aged between 15 and 24 years, compared with only 6.6 per cent and 17.8 per cent respectively of all employees; and
- (iv) over half (55.6 per cent) of Fast Food employees are students (51.1 per cent are full-time students and 4.5 per cent study part-time) compared to 13.6 per cent of all employees.

[1354] The incidence of weekend work is also a distinguishing characteristic of the Fast Food industry. The Ai Group employee survey, which is representative of the major QSR chains (and 86 per cent of employees in the industry) shows that some 64 per cent of respondents work on Saturdays and 58 per cent on Sundays (the total is greater than 100 per cent as they may work on both days).¹¹⁸⁹ ABS data shows that for all industries only around one quarter of employees work on weekends.¹¹⁹⁰

[1355] We now turn to the s.134 considerations.

[1356] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. 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). On the basis of the O’Brien Report and Chart 27 (see [738] above) we are satisfied that a substantial proportion of Fast Food industry employees are ‘low paid’; are more likely to reside in a lower income households and are more likely to experience financial difficulties.

[1357] A reduction in Sunday penalty rates will have an adverse impact on those Fast Food industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid and to have a negative effect on their relative living standards and on their capacity to meet their needs.

[1358] While s.134(1)(a) is a consideration against the reduction in Sunday penalty rates, 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, it is not designed to address the needs of the low paid. As we have mentioned, the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).

[1359] The adverse impact of a reduction in Sunday penalty rates is relevant to our consideration of the transitional arrangements associated with any reduction in penalty rates (see Chapter 13).

[1360] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award. We are not persuaded that a reduction in penalty rates would ‘*encourage* collective bargaining’ and on that basis this consideration does not favour a change to weekend penalty rates.

[1361] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. Obtaining employment is the focus of s.134(1)(c).

[1362] Other than the common evidence dealing with the employment effects of a reduction in penalty rates (see Chapter 6) there is a paucity of direct evidence from industry participants about the employment effects of reducing the Sunday penalty rate. None of the Ai Group lay Fast Food operator witnesses addressed the employment effects of such a change.

[1363] As mentioned, RCI led evidence from 2 lay witness fast food proprietors. Witness 1 gave evidence that:

‘A reduction to the Sunday penalty rate would benefit the Company and would boost casual employment by 3 new staff across the three sites. This is because we currently reduce headcount in each site on Sundays to mitigate the Sunday penalty rate.’¹¹⁹¹

[1364] In cross-examination the witness clarified that a reduction in the Sunday penalty rate would lead to the employment of three casual employees (one at each site) at key times on a Sunday, that is from noon until 3.00 pm and in the evening.¹¹⁹²

[1365] Witness 2 gave evidence that:

‘... any reduction to the Sunday and Public Holiday penalty rate would benefit the Company and would boost casual employment in each outlet.’¹¹⁹³

[1366] The company referred to operates nine Fast Food outlets. During cross-examination Witness 2 conceded that he had not worked out how many additional casuals would be employed if the Sunday penalty rate was reduced.¹¹⁹⁴ The witness also conceded that the suggestion that such a reduction would ‘boost casual employment in each outlet’ was ‘really just surmise or speculation’ on his part.¹¹⁹⁵

[1367] On the basis of the common evidence we conclude that a reduction in the Sunday penalty rate in the *Fast Food Award* (from 150 per cent to 125 per cent) is likely to lead to some increase in employment, albeit only a modest increase.

[1368] Section 134(1)(d) requires that we take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’.

[1369] Ai Group submits¹¹⁹⁶ that this consideration is *not* relevant to our consideration of its claim.

[1370] The NRA submits that a reduction in Sunday penalty rates will:

- promote flexible modern work practices by creating additional options for rostering of staff on Sundays; and
- will increase efficiency and productivity.

[1371] As we have mentioned, the NRA did not adduce any evidence in support of its claim.

[1372] RCI submits that ‘at a general level’ there is ‘sufficient evidence’ to find that the current Sunday penalty rate operates ‘negatively in relation to promoting flexible work practices and the efficient and productive performance of work’.¹¹⁹⁷ RCI does not identify the evidence which is said to support the finding advanced. As mentioned, RCI led evidence from two lay witness fast food proprietors.¹¹⁹⁸ That evidence says nothing about the impact of a reduction in the Sunday penalty rate on ‘flexible modern work practices and the efficient and productive performance of work’.

[1373] We regard s.134(1)(d) as neutral to our consideration of the claims before us.

[1374] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on weekends’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[1375] As to matter (ii) the relevant modern award does not already compensate employees for working on weekends, other than through the penalty rates prescribed in the award. As mentioned earlier, working on weekends, (matter (iii)), is a feature of the Fast Food industry.

[1376] As mentioned in Chapter 3, compensating employees for the disutility associated with working on weekends is a primary consideration in the setting of weekend penalty rates. Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health¹¹⁹⁹ and work-life balance, taking into account the preferences of the employees for working at those times. In the Fast Food industry, Sunday work is *not* associated with a higher rate of safety incidents (i.e. number of reported incidents divided by number of employees working).¹²⁰⁰

[1377] The Ai Group survey provides a useful source of information on employee disutility associated with Sunday work. The Ai Group employee survey results show a marked difference in the willingness to work some or more hours on a Sunday based on age (see Chart 45). Almost three in four respondents (73 per cent) aged under 21 years of age were willing to work some or more hours on a Sunday, compared to just over half (56 per cent) employees aged 21 years or older. The responses to a number of other, related, survey questions also show a strong correlation to the age of the respondent, namely:

- *Preferred day to work:* generally speaking, the preference for working only weekdays (i.e. Monday to Friday) – and by inference the preference to *not* work on weekends – increased with age. Twice as many respondents aged 21 years and over (54 per cent) preferred not to work on weekends compared to those aged 14 to 20 years (26 per cent).¹²⁰¹
- *Negative impact of Sunday work:* a significantly higher proportion of respondents aged 21 years and over (55.1 per cent) reported some or a lot of negative impact of working on Sundays on spending time with family and friends, compared to respondents aged 14 to 20 years (42.3 per cent). Almost three times as many employees aged 21 years and over (15.4 per cent) reported a lot of negative impact, compared to those aged 14 to 20 years (5.2 per cent). Similarly, just over half (51.2 per cent) of respondents aged 14 to 20 years reported 'no impact of working on Sundays on spending time with family and friends, compared to 39 per cent of respondents aged 21 years and over.¹²⁰²

[1378] It is also likely that the correlation between the reported experiences and preferences and age is influenced by the student status of the employee respondent. In this regard we note that 73.4 per cent of full-time students indicated that they would work some or more hours on a Sunday, if offered.¹²⁰³ Full-time students also indicated a much stronger preference for working a mix of weekdays and weekends (70.3 per cent) than non-students (41.7 per cent).

Further, almost 80 per cent of full-time students preferred to work either weekends or a mix of weekdays and weekends, compared to 44 per cent of non-students.¹²⁰⁴

[1379] As a consequence of our decision on these claims the employees covered by the *Fast Food Award* will continue to receive additional remuneration for working on Sundays.

[1380] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in Sunday penalty rates would apply equally to men and women workers. For the reasons given earlier we regard s.134(1)(e) as neutral to our consideration of the claims before us.

[1381] Section 134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[1382] Ai Group contends¹²⁰⁵ that if the Sunday penalty rate was reduced then employment costs would reduce. The NRA makes a similar point, and submits that the current level of Sunday penalty rates in the award ‘imposes an unreasonable employment cost’. This consideration supports a reduction in the Sunday penalty rate. It was not contended that a reduction in the Sunday penalty rate would impact on productivity or regulatory burden.

[1383] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’. We regard s.134(1)(g) as neutral to our consideration of the claims before us. No party contended to the contrary.

[1384] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[1385] Ai Group submits¹²⁰⁶ that the reduction in the level of penalty rates will *not* have economy wide effects. The NRA takes a different position and submits ‘the impact of reducing Sunday penalty rates in the Fast Food Award will have positive economy-wide effects in that it will encourage further employment and increase productivity in the fast food industry’.¹²⁰⁷

[1386] A detailed assessment of the impact of a reduction in Sunday penalty rates in the *Fast Food Award* on the national economy is not feasible on the basis of the limited material before us.

[1387] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us.

[1388] The central issue is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’. In relation to level 1 employees we have concluded that the existing Sunday penalty rate is neither fair nor relevant. The evidence as to the work preferences and experiences of level 1 employees leads us to conclude that the existing

penalty rate overcompensates those employees for the level of disutility associated with Sunday work. That evidence supports a reduction in the Sunday penalty rate, for level 1 employees, from 150 per cent to 125 per cent.

[1389] The position in respect of level 2 and 3 employees is quite different. There is a clear distinction between the reported preferences and experiences of level 1 employees (using those aged 14 to 20 years as a proxy), and those employees classified at levels 2 and 3. In terms of reported preferences, level 1 employees (compared to level 2 and 3 employees) are *more likely* to express a preference for weekend work (either weekends only or a mix of weekdays and weekends) and a willingness to work some or more hours on a Sunday.

[1390] In terms of their reported experiences, level 2 and 3 employees (compared to level 1 employees) are *more likely* to report some or a lot of negative impact from working on Sundays on spending time with family and friends and *less likely* to report no impact of working on Sundays on spending time with family and friends.

7.5.7 Conclusion

[1391] For the reasons given we will vary the late night penalty provision as proposed by Ai Group. The 10 per cent evening work loading will now apply to work between 10.00 pm (rather than 9.00 pm) and midnight.

[1392] We do not propose to vary the *Fast Food Award* late night penalty in the manner proposed by RCI. A sufficient merit case has not been advanced to support the extent of the changes proposed.

[1393] As mentioned earlier, RCI is also seeking to vary the late night penalty in the *Restaurant Award* in the same terms as its proposed variation to the *Fast Food Award*. We have dealt with that proposal in Chapter 7.4.5(i) of our decision and have decided that the current 15 per cent loading be payable between midnight and 6 am (not 7 am as it is in the current award term). We adopt the same view in respect of the *Fast Food Award*. We note that the *Fast Food Award* does not presently prescribe the span of hours during which the loading is paid. For the reasons set out above ([1331]–[1335]) we propose to align the span of hours in the *Fast Food Award* with that provided in the *Restaurant Award*.

[1394] For the reasons given, we have decided to reduce the Sunday penalty rate, for level 1 employees. The Sunday penalty rate for full-time and part-time level 1 employees will be reduced from 150 per cent to 125 per cent and the penalty rate for level 1 casuals will be reduced from 175 per cent to 150 per cent. We do not propose to change the Sunday penalty rate for Level 2 and 3 employees.

[1395] Level 2 and 3 employees experience a higher level of disutility associated with Sunday work than that experienced by level 1 employees. The evidence supports the retention of the current Sunday penalty rate for level 2 and 3 employees. In this context we note that level 2 and 3 employees are, generally speaking, regarded as ‘career’ employees with the QSR major chains whereas casual and part-time crew member (level 1 employees) are usually regarded as ‘non-career’ employees.

[1396] The change to the Sunday penalty rate for Level 1 employees will apply to the vast majority of Fast Food industry employees. We note that about 92 per cent of McDonald's and Hungry Jack's employees are Level 1 employees and that the employment composition of McDonald's and Hungry Jack's is, broadly speaking, representative of the major chains, which in turn employ just over 86 per cent of all employees in the Fast Food industry.

[1397] In the settlement of the order giving effect to this part of our decision, the parties are to give consideration to whether it is necessary to include a term similar to that contained in clause 34.1A of the *Restaurants Award*.

[1398] As set out earlier, neither Ai Group, the NRA nor RCI propose any change to Saturday penalty rates.

[1399] As mentioned earlier, in the Review the Commission is not constrained by the terms of a particular application, it may vary a modern award in whatever terms it considers appropriate, subject to procedural fairness considerations. Accordingly, if we were satisfied of the merit of doing so, it would be open to us to reduce the Saturday penalty rate. But as we are not satisfied of the merit of doing so, we have decided not to adopt that course.

[1400] As set out in Chapter 6, there is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday.

[1401] We are satisfied that the existing Saturday penalty rates in the *Fast Food Award* achieve the modern awards objective – they provide a fair and relevant minimum safety.

[1402] There are two final matters we wish to address.

[1403] As mentioned earlier, we have a preference for what the Productivity Commission calls the 'default' method to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is *added* to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals. This issue is addressed in clause 25.5 of the *Fast Food Award* which provides, relevantly:

(c) Saturday work

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.

(d) Sunday work

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

[1404] It appears that there may be a different method for calculating the payment to casual employees for weekend work, depending on whether it is Saturday work or Sunday work. For

Sunday work, the Productivity Commission's 'default' method is applied. But for Saturday clause 25.5(a) may be interpreted such that the Saturday work loading (25 per cent) is applied to the casual rate of pay for ordinary hours (that is, the relevant minimum hourly rate of pay + the 25 per cent casual loading). Hence in respect of Saturday work there is a degree of compounding by applying a penalty upon a penalty.

[1405] In the context of the *Fast Food Award* there appears to be no logical reason why there should be a different method for calculating the entitlements of casuals, depending on whether they work on a Saturday or Sunday.

[1406] Our *provisional* view is that clause 25.5(a) be amended, as follows:

(a) Saturday work

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

[1407] The other matter concerns the NRA's proposed amendment to clause 26, Overtime. It will be recalled that the proposed variation sought the deletion of the words: 'Casual employees shall be paid 275% on a Public Holiday'. On its face the NRA proposal appears to have merit, given that the penalty rate for casuals who work on public holidays is set out in clause 30.3, which seemingly renders the last sentence in clause 26 unnecessary. It is also relevant to observe that the sentence sought to be deleted does not appear to deal with 'overtime' in any event. We note however that the proposed change was not the subject of any submissions or evidence.

[1408] In the circumstances we propose to adopt the *provisional* view that the last sentence of clause 26 be deleted. We deal with the process for interested parties to comment on our provisional view in Chapter 12, Next Steps.

[1409] We deal with the transitional arrangements associated with the reduction in penalty rates we have determined in Chapter 13 of our decision.

8. The Retail Sector

8.1 Overview

[1410] This section present data on the Retail group of modern awards, that is:

- *General Retail Industry Award 2010*; and
- *Pharmacy Industry Award 2010*

[1411] The data in this section are based on the Commission’s report *Industry profile—Retail trade*. We also make reference to two expert reports. Dr Watson’s report is titled ‘Employee Earnings in the National Retail Industry’¹²⁰⁸ (the Watson Report). Professor Peetz and Dr Watson co-author a report titled ‘*Characteristics of the Workforce in the National Retail Industry*’¹²⁰⁹ (the Peetz and Watson Report). These two experts were not required for cross-examination in relation to their reports and, broadly speaking, we accept their evidence, save where the data upon which they rely had been supplanted by more recent data.

[1412] The data presented are collected from five sources: the ABS, the Fair Work Commission’s AWRS and ARS, the HILDA Survey and the Department of Employment’s WAD. The ABS contains a number of surveys on the performance, structure and characteristics of industries. The AWRS, ARS and HILDA are large-scale quantitative surveys that collectively provide information on enterprises, employees and households. HILDA has the added advantage of presenting information over time. The WAD is a database that contains information of all Australian enterprise agreements. Further information on the Commission’s data sources is located on its website.¹²¹⁰

[1413] A paper¹²¹¹ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. There are 4 levels within the ANZSIC structure: division, subdivision, group and class. The most readily available data are at the division level (or 1 digit level) and data are presented at this level. In this instance, the relevant division of ANZSIC is Division G: the Retail sector (for convenience we refer to this as the Retail sector). The following presents the subdivisions, groups and classes within the Retail sector:

- 39 Motor vehicle and motor vehicle parts retailing
 - 391 Motor vehicle retailing
 - 3911 Car retailing
 - 3912 Motor cycle retailing
 - 3913 Trailer and other motor vehicle retailing
 - 392 Motor vehicle parts and tyre retailing
 - 3921 Motor vehicle parts retailing
 - 3922 Tyre retailing
- 40 Fuel retailing
 - 400 Fuel retailing
 - 4000 Fuel retailing
- 41 Food retailing
 - 411 Supermarket and grocery stores
 - 4110 Supermarket and grocery stores

- 412 Specialised food retailing
 - 4121 Fresh meat, fish and poultry retailing
 - 4122 Fruit and vegetable retailing
 - 4123 Liquor retailing
 - 4129 Other specialised food retailing
- 42 Other store-based retailing
 - 421 Furniture, floor coverings, houseware and textile goods retailing
 - 4211 Furniture retailing
 - 4212 Floor covering retailing
 - 4213 Houseware retailing
 - 4214 Manchester and other textile goods retailing
 - 425 Electrical and electronic goods retailing
 - 4221 Electrical, electronic and gas appliance retailing
 - 4222 Computer and computer peripheral retailing
 - 4229 Other electrical and electronic goods retailing
 - 423 Hardware, building and garden supplies retailing
 - 4231 Hardware and building supplies retailing
 - 4232 Garden supplies retailing
 - 424 Recreational goods retailing
 - 4241 Sport and camping equipment retailing
 - 4242 Entertainment media retailing
 - 4243 Toy and game retailing
 - 4244 Newspaper and book retailing
 - 4245 Marine equipment retailing
 - 425 Clothing, footwear and personal accessory retailing
 - 4251 Clothing retailing
 - 4252 Footwear retailing
 - 4253 Watch and jewellery retailing
 - 4259 Other personal accessory retailing
 - 426 Department stores
 - 427 Pharmaceuticals and other store-based retailing
 - 4271 Pharmaceutical, cosmetic and toiletry goods retailing
 - 4272 Stationery goods retailing
 - 4273 Antique and used goods retailing
 - 4274 Flower retailing
 - 4279 Other store-based retailing n.e.c.
- 43 Non-store retailing and retail commission-based buying and/or selling
 - 431 Non-store retailing
 - 432 Retail commission-based buying and/or selling.

[1414] Table 48 shows how the modern awards in the Retail sector ‘map’ with the relevant industry class.

Table 48¹²¹²
Modern awards ‘mapped’ to ANZSIC class

Retail group modern award	ANZSIC class included in profile
General Retail Industry	4110 – Supermarket and grocery stores 4122 – Fruit and vegetable retailing 4129 – Other specialised food retailing 4211 – Furniture retailing 4213 – Houseware retailing 4214 – Manchester and other textile goods retailing 4221 – Electrical, electronic and gas appliance retailing 4222 – Computer and computer peripheral retailing 4229 – Other electrical and electronic goods retailing 4231 – Hardware and building supplies retailing 4231 – Garden supplies retailing 4241 – Sport and camping equipment goods retailing 4242 – Entertainment media retailing 4243 – Toy and game retailing 4244 – Newspaper and book retailing 4245 – Marine equipment retailing 4251 – Clothing retailing 4252 – Footwear retailing 4253 – Watch and jewellery retailing 4259 – Other personal accessory retailing 4260 – Department stores 4272 – Stationary good retailing 4273 – Antique and used goods retailing 4274 – Flower retailing 4279 – Other store-based retailing n.e.c.
Pharmacy Industry	4271 – Pharmaceutical, cosmetic and toiletry goods retailing

[1415] We propose to first set out the data relating to the Retail sector and the employers who operate within it, before turning to the characteristics of employees in the sector. It should be noted that the data in some of the tables presented in this chapter may not add up to 100, due to rounding.

8.1.1 Features of the Retail Sector

(i) *General economic indicators*

[1416] Key indicators for Retail sector are presented in Table 49. The data show that the industry accounted for:

- over \$380 billion of sales and almost 5 per cent of value added to the economy;
- over 10 per cent of employment, 9 per cent of actual hours worked per week in all jobs and over 8 per cent of wages;
- over 6 per cent of all businesses and over 16 per cent of all award-reliant non-managerial employees;
- around 2 per cent of investment;
- almost 20 per cent of total underemployment; and
- almost \$18 billion in company gross operating profit.

Table 49 ¹²¹³
Economic indicators of the Retail sector

	Retail sector	Percentage of all industries
Industry value added (\$m) (June 2016) ^a	74 284	4.8
Sales (\$m) (June 2016) ^{a,c}	381 950	14.9
Employment ('000s) (August 2016) ^b	1256	10.5
Actual hours worked per week in all jobs ('000s) (August 2016) ^b	35 762	9.0
Company gross operating profit (\$m) (June 2016) ^{a,c}	17 723	7.1
Wages (\$m) (June 2016) ^{a,d}	41 774	8.2
Gross fixed capital formation (\$m) (June 2015) ^a	8656	2.1
Businesses (June 2015) ^c	132 382	6.2
Award-reliant non-managerial employees ('000s) (May 2016) ^d	368	16.2
Underemployment ('000s) (August 2016) ^b	208	19.5

Note: (a) sum of four quarters; (b) average over the four quarters; (c) All industries excluding Agriculture, forestry and fishing, Education and training, Health care and social assistance and some subdivisions of Finance and insurance services; (d) all industries excluding Agriculture, forestry and fishing; (e) All industries excluding the public sector.

Industry value added and sales are seasonally adjusted and expressed in real terms from chain volume estimates. Employment is expressed in seasonally adjusted terms. Actual hours worked per week in all jobs and underemployment are expressed in original terms. Company gross operating profits and wages are seasonally adjusted from current price estimates. Gross fixed capital formation is expressed in original and real terms, from chain volume estimates.

(ii) Business size

[1417] As shown in Table 50, businesses in the Retail sector were predominantly small businesses and more likely to be employing businesses compared with businesses across all industries.

Table 50 ¹²¹⁴
Percentage of businesses by business size, June 2015

	Retail sector (%)	All industries (%)
All businesses		
Non-employing	41.8	60.6
Small	53.8	36.9
Medium	4.2	2.4
Large	0.2	0.2
	100.0	100.0
Employing businesses		
Small	92.5	93.5
Medium	7.2	6.1
Large	0.3	0.4
	100.0	100.0

Note: Small businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. The publication only includes actively trading businesses in the market sector and hence excludes entities that are in the public sector.

[1418] In June 2015, small businesses accounted for over half of businesses in the Retail sector. Both small and medium businesses comprised a higher proportion of businesses in the Retail sector than across all industries.

(iii) *Industry concentration and competition*

[1419] As mentioned earlier, industry concentration refers to the degree with which a small number of firms provide a major proportion of total production within an industry and provides a measure of competition within an industry.

[1420] As shown in Table 51, large businesses accounted for almost half of wages and salaries, sales and service income and industry value added in the Retail sector. Small and non-employing businesses accounted for higher proportions of wages and salaries in the Retail sector than in total selected industries (i.e. all industries except for Financial and insurance services), while medium businesses accounted for lower proportions across each of these measures in the Retail sector than in total selected industries.

Table 51 ¹²¹⁵

Wages and salaries, sales and service income, and industry value added by business size, 2014–15

	Percentage of industry total		
	Wages and salaries (%)	Sales and service income (%)	Industry value added (%)
Retail sector			
Small and non-employing	30.6	33.8	31.5
Medium	23.0	19.9	20.7
Large	46.4	46.3	47.8
	100.0	100.0	100.0
Total selected industries			
Small and non-employing	28.2	35.3	35.6
Medium	26.8	22.3	21.5
Large	44.9	42.4	43.0
	100.0	100.0	100.0

Note: Small and non-employing businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey. Small and non-employing businesses cannot be disaggregated.

[1421] Table 52 provides information on market and competition for enterprises in the Retail sector and across all industries in 2014. Subjective measures of market and competition include the number of direct competitors faced and the degree of competition observed for their major products and/or services during the last financial year.

Table 52 ¹²¹⁶
Market and competition, 2014

	Retail sector (%)	All industries (%)
<i>Nature of market</i>		
Domestic only	88.2	83.6
Domestic with some export	10.5	14.6
Export with some domestic	np	1.4
Export only	–	0.5
	100.0	100.0
<i>Market focus</i>		
Immediate local area only	58.3	44.0
Intrastate	19.4	19.5
Interstate	2.5	9.1
Australia wide	19.8	27.4
Other	–	np
	100.0	100.0
<i>Number of direct competitors</i>		
1–4	21.2	21.7
5–9	27.3	23.6
10–19	22.2	18.9
20–49	14.0	12.8
50 or more	13.5	16.4
None/captive market/no effective competition	np	6.6
	100.0	100.0
<i>Degree of competition</i>		
Intense competition	31.5	29.6
Strong competition	45.8	42.3
Moderate competition	20.3	21.6
Limited competition	2.5	6.5
	100.0	100.0

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

[1422] Most enterprises in the Retail sector and across all industries operated within the domestic market only. A higher proportion of enterprises in the Retail sector focused on the immediate local area only compared with enterprises across all industries, which were more likely to focus Australia wide. We note however that enterprises in the Retail sector are facing increased competition from overseas based on-line retailers.

[1423] While most enterprises reported five to nine direct competitors, enterprises in the Retail sector were less likely to report 50 or more direct competitors compared with all industries. Most enterprises reported strong or intense competition, with enterprises in the Retail sector less likely to report limited competition compared with all industries. We note that the Productivity Commission has identified that the most sweeping change impacting upon the retail sector “does not involve physical provision of goods and services” but rather

“online provisions playing a much more important role” in relation to some products and services.¹²¹⁷ This in turn has increased competition and reduced the need for brick and mortar establishments.

(iv) *Award reliance*

[1424] A higher proportion of non-managerial employees in the Retail sector were reliant on award rates of pay relative to all industries, offset by a lower proportion of employees on individual arrangements (Table 53). However, collective agreements were the most common method of setting pay.

Table 53¹²¹⁸
Methods of setting pay, May 2016

	Retail sector (%)	All industries (%)
Award only	34.5	24.5
Collective agreement	37.6	38.9
Individual arrangement	27.9	36.6
All methods of setting pay	100.0	100.0

[1425] The Commission’s Award Reliance Survey collected data on the number of organisations that use each modern award. The most common modern award used by award-reliant organisations within the Retail sector in 2013 was the *General Retail Industry Award 2010* (Table 54). This was used by more than six in 10 award-reliant organisations in the Retail sector. It was also the second most common modern award used by award-reliant organisations across all industries.

Table 54¹²¹⁹
**Top 10 modern awards used in the Retail sector,
percentage of award-reliant organisations, 2013**

	Retail sector (%)	All industries (%)
<i>General Retail Industry Award 2010</i>	61.5	15.1
<i>Vehicle Manufacturing, Repair, Services and Retail Award 2010</i>	11.6	6.6
<i>Pharmacy Industry Award 2010</i>	10.9	2.1
<i>Clerks—Private Sector Award 2010</i>	8.9	16.0
<i>Meat Industry Award 2010</i>	4.0	0.9
<i>Manufacturing and Associated Industries and Occupations Award 2010</i>	2.5	4.7
<i>Road Transport and Distribution Award 2010</i>	2.0	2.3
<i>Hospitality Industry (General) Award 2010</i>	1.0	13.3
<i>Fast Food Industry Award 2010</i>	0.9	1.8
<i>Nursery Award 2010</i>	0.8	0.4

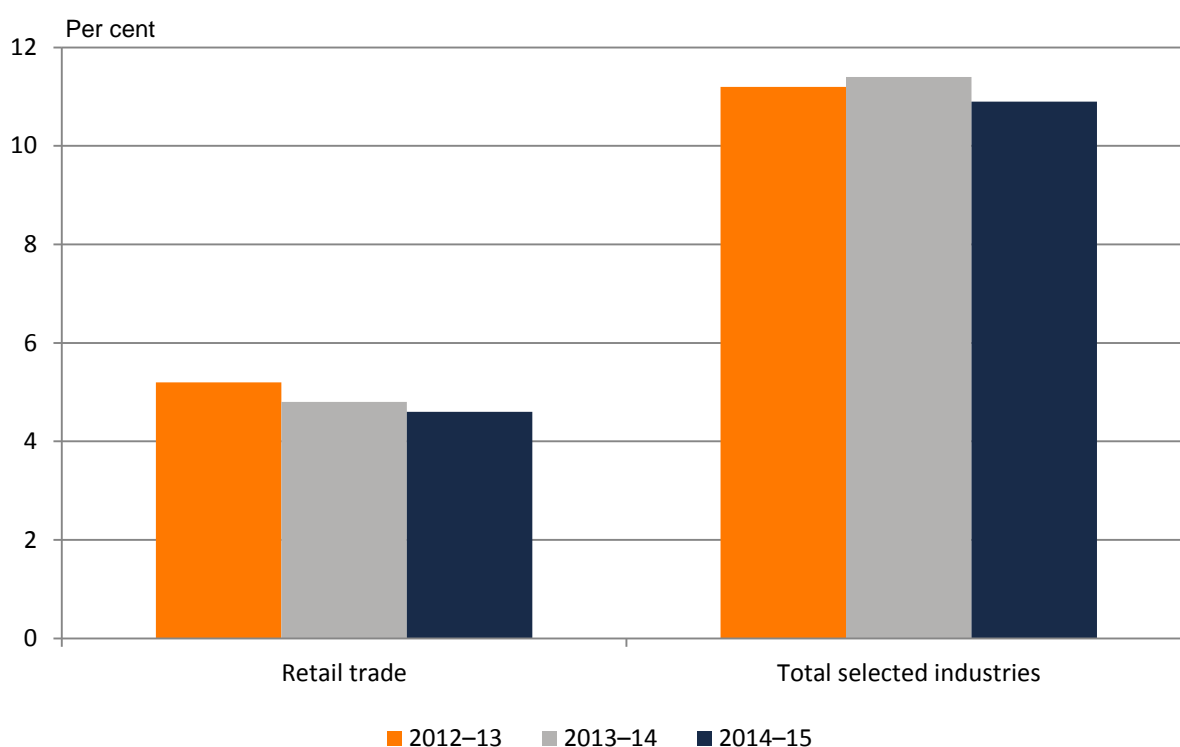
Note: An award-reliant organisation has at least one employee that receives the exact award rate of pay.

(v) *Profitability*

[1426] Profit margins are operating profits before tax as a percentage of income received, and can be used to compare profitability between industries. They provide an indication of the level of competition within an industry as well as its level of capital intensity.

[1427] Profit margins for the Retail sector compared with total selected industries are presented for the period 2012–13 to 2014–15 in Chart 47. Profit margins in the Retail sector were lower relative to total selected industries and also decreased over the period.

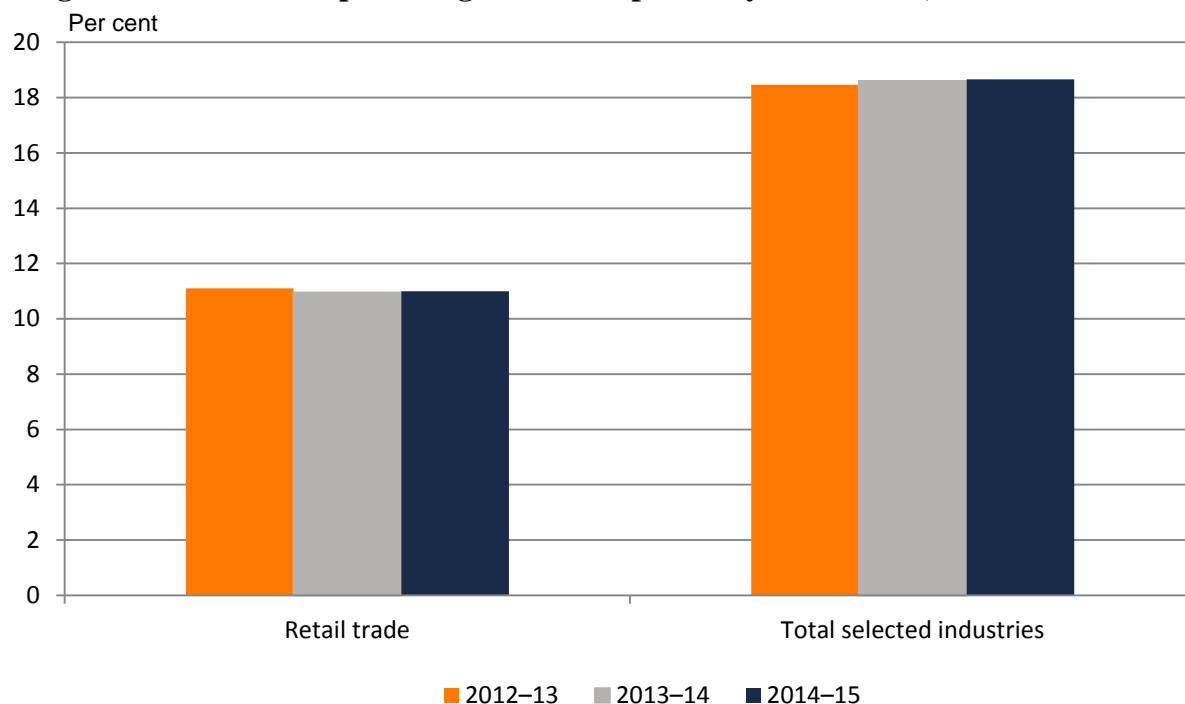
Chart 47 ¹²²⁰
Profit margins, 2012-13 to 2014-15



Note: Profit margins are calculated as the percentage of sales and service income available as operating profit before tax. Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey.

(vi) *Wages and Salaries*

[1428] Wages and salaries comprised a lower proportion of total expenses in the Retail sector compared with total selected industries at around 11 per cent (Chart 48).

Chart 48 ¹²²¹**Wages and salaries as a percentage of total expenses by subdivision, 2012-13 to 2014-15**

Note: Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey.

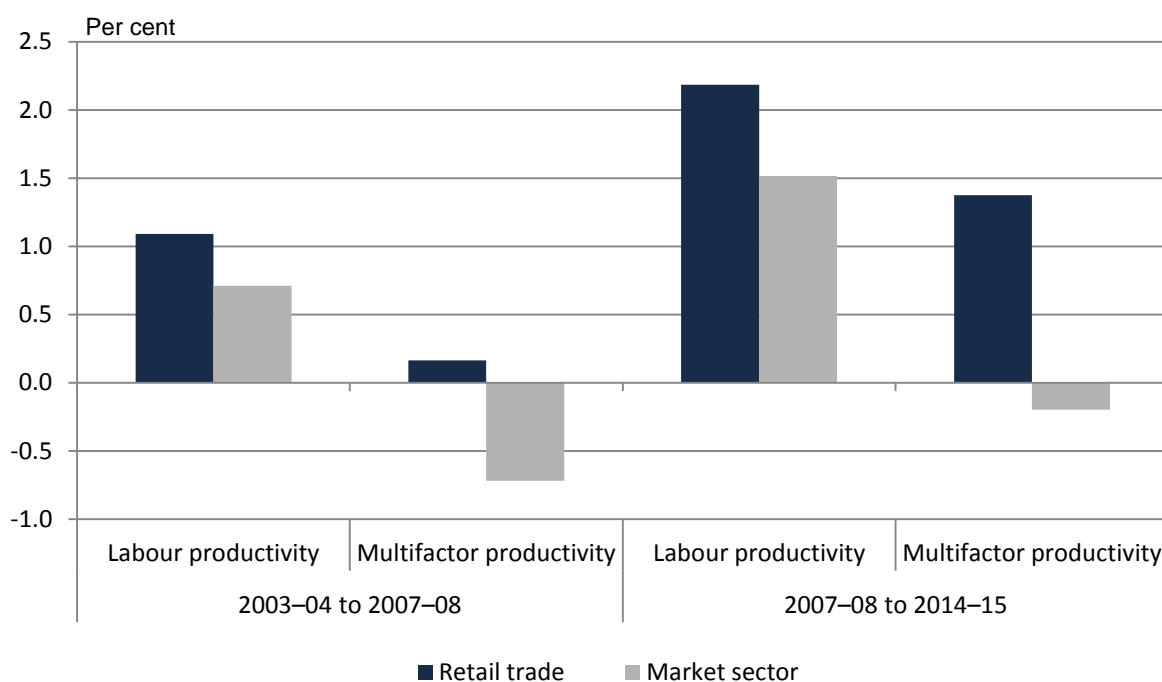
(vii) Productivity

[1429] Average annual growth in productivity is presented for both labour and multifactor productivity over the two most recent productivity cycles, 2003-04 to 2007-08 and 2007-08 to 2014-15. The common approach to measuring productivity is to compare average annual rates of growth in the market sector between peaks in the productivity cycle (as identified by the ABS) rather than focusing on short-run (quarterly and annual) trends.

[1430] Chart 49 shows that average annual growth of both labour and multifactor productivity were higher in the Retail sector compared with the market sector in both productivity cycles. While there was a decline in multifactor productivity for the market sector across both cycles, it increased in the Retail sector. Average annual growth in both labour and multifactor productivity in the Retail sector was higher from 2007-08 to 2014-15 than the previous cycle.

Chart 49¹²²²

Average annual growth rates of labour and multifactor productivity, 2003-04 to 2014-15

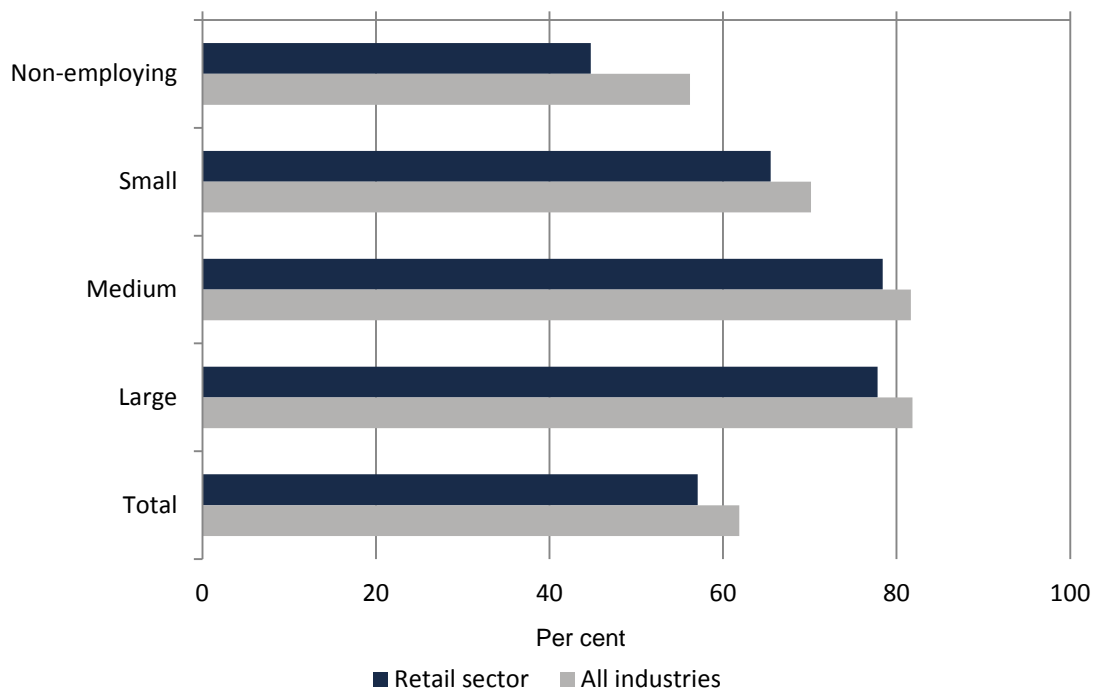


Note: The 2007-08 to 2014-15 growth cycle is incomplete. Labour productivity measures the amount of output per unit of labour which is measured in terms of gross value added per hour worked on a quality adjusted hours basis. Multifactor productivity measures the ratio of growth in output to growth in two or more factor inputs and represents that part of the change in output that cannot be explained by changes in the inputs. Multifactor productivity, in this case, is based on the gross value added of capital and labour in production and is measured on a quality adjusted hours basis. The total market sector comprises all industries except for Public administration and safety, Education and training and Health care and social assistance.

(viii) Business viability

[1431] Chart 50 shows the survival rates in June 2015 of businesses that were operating in June 2011 by business size. It shows that while business survival rates increased with business size in the Retail sector and for all industries, the survival rates among businesses of all sizes in the Retail sector were consistently lower than for all industries.

Chart 50 ¹²²³
Business survival rates, by employment size, June 2011 to June 2015



Note: Survival rates in June 2015 of businesses that were operating in June 2011. The publication only includes actively trading businesses in the market sector and hence excludes entities that are in the public sector.

(ix) Enterprise characteristics

[1432] The highest proportion of enterprises in the Retail sector operated 7 days per week, followed by weekdays and Saturday (Table 55). Collectively, these two groups accounted for over three-quarters of enterprises in the Retail sector. In contrast, across all industries, almost half operated at these times while around half operated weekdays only.

Table 55 ¹²²⁴
Structure and operations, 2014

	Retail sector (%)	All industries (%)
<i>Operating days</i>		
Weekdays only	18.9	48.8
Weekdays and Saturday	37.1	17.5
Some weekdays and weekend	2.8	2.3
Operating 7 days	40.6	31.1
Other	np	0.4
	100.0	100.0
Average number of operating days per week	6.2	5.8
Average years of operation under current ownership	18.9	18.5

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

(x) Labour market trends

[1433] Table 56 shows how employment in the Retail sector changed between August 2011 and August 2016. Over the period, growth in full-time, part-time and total employment in the Retail sector was lower than growth across all industries. Indeed, full-time employment contracted in the Retail sector compared with a small increase for all industries while total employment was unchanged.

Table 56¹²²⁵
Average annual growth rate of employed persons, by full/part-time status and industry group of main job, August 2011 to August 2016

Industry group	Full-time	Part-time	Total
	(%)	(%)	(%)
Retail sector	-1.1	1.3	0.0
All industries	0.7	2.7	1.3

8.1.2 Retail sector employees*(i) Composition of employment*

[1434] Table 57 shows that the total workforce in the Retail sector comprised around 10 per cent of total employment in August 2016. More than half of the workforce in the Retail sector was female. While the proportion of full-time and part-time employment within the Retail sector was relatively even, the proportion that is employed part-time (50.1 per cent) is greater than for all industries (31.9 per cent).

Table 57¹²²⁶
Composition of employed persons, August 2016

	Total employment (‘000s)	Percentage of total employment							
		Male		Female		Total		Total	
		Full-time	Part-time	Full-time	Part-time	Male	Female	Full-time	Part-time
	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	
Retail sector	1194.7	28.9	15.5	20.9	34.6	44.5	55.5	49.9	50.1
All industries	11 869.1	43.5	10.1	24.6	21.8	53.6	46.4	68.1	31.9

Note: Data may not sum to 100 due to rounding. All data are expressed in original terms.

[1435] As shown in Table 58, young people aged between 15 and 24 years were more likely to be employed in the Retail sector, comprising almost one in three employed persons aged 24 years or under compared with less than one in six employed persons across all industries.

Fewer employed persons aged 25 years and over were employed in the Retail sector than across all industries.

Table 58¹²²⁷
Employed persons by age, August 2016

Age (Years)	Retail sector		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
15–19	174.7	14.6	5.3
20–24	211.1	17.7	9.7
25–34	255.8	21.4	23.5
35–44	190.7	16.0	21.8
45–54	192.7	16.1	21.2
55–59	76.5	6.4	8.7
60–64	53.1	4.4	5.9
65 and over	40.1	3.4	3.8
Total	1194.7	100.0	100.0

Note: All data are expressed in original terms.

[1436] The Peetz and Watson Report finds a higher proportion of young people in the Retail sector in 2013 than shown in the table—between 38 and 39 per cent aged 24 years or under and between 19 and 21 per cent aged 19 years or under.¹²²⁸

[1437] Professor Peetz and Dr Watson also observe that the weekend retail workforce is ageing: between 2004 and 2013 the point estimate of the average age of the weekend employee retail workforce *increased* from 27.3 years to 29.0 years¹²²⁹.

[1438] Professor Peetz and Dr Watson also provide data on the proportion of retail employees who are ‘dependent students’. A dependent student is defined as a person aged 15 to 24, studying full-time, not working full-time and living in a household with their parent(s).¹²³⁰ In 2013 18.4 per cent of retail employees were dependent students and there was no statistically significant change in the proportion of ‘dependent students’ in the weekend employee retail workforce between 2004 and 2013.¹²³¹ The Peetz and Watson Report concludes:

‘In summary, while a majority of tertiary students who are employed work in either retailing or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need. ... The majority of retail employees are not students, nor even young people (if we consider those under 25 years of age as young), even though a significant minority are students.’¹²³²

(ii) *Average hours worked*

[1439] Table 59 shows that the average hours actually worked per week in all jobs in August 2016 were lower for the Retail sector than across all industries, as well as for both full-time and part-time workers.

Table 59 ¹²³³
**Average hours actually worked in all jobs, by industry group of main job
and full/part-time status, August 2016**

Industry group	Average hours actually worked in all jobs		
	Full-time	Part-time	Total
Retail sector	40.1	16.1	28.1
All industries	40.6	17.4	33.2

Note: Actual hours of work refers to the hours actually worked during normal periods of work (including overtime) over a specified reference week. It excludes meal breaks, paid/unpaid time 'on call', commuting time and time off during work hours to attend educational activities not connected to the job. The actual hours of work over a specified period may be affected if the person took personal/annual leave, went on strike, changed job, or similar reasons.

(iii) Forms and conditions of employment

[1440] The majority of workers in the Retail sector were employees with paid leave entitlements, although the proportion of employees without paid leave entitlements was higher relative to employment across all industries (Table 60). The proportion of employees without paid leave entitlements was similar to that found by Dr Watson for 2013.¹²³⁴

Table 60 ¹²³⁵
Employed persons by employment type in main job, August 2016

	Retail sector		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
Employee	1068.5	89.5	82.7
<i>With paid leave entitlements</i>	682.4	57.1	62.0
<i>Without paid leave entitlements</i>	386.2	32.3	20.8
Owner manager of enterprise with employees	65.9	5.5	6.2
Owner manager of enterprise without employees	59.8	5.0	10.9
Contributing family worker	0.3	0.0	0.2
Total	1194.5	100.0	100.0

Note: All data are expressed in original terms.

[1441] Full-time employees in the Retail sector were more likely to be employed with paid leave entitlements while part-time employees were more likely to be employed without paid leave entitlements (Table 61).

Table 61 ¹²³⁶
Employees with and without paid leave, August 2016

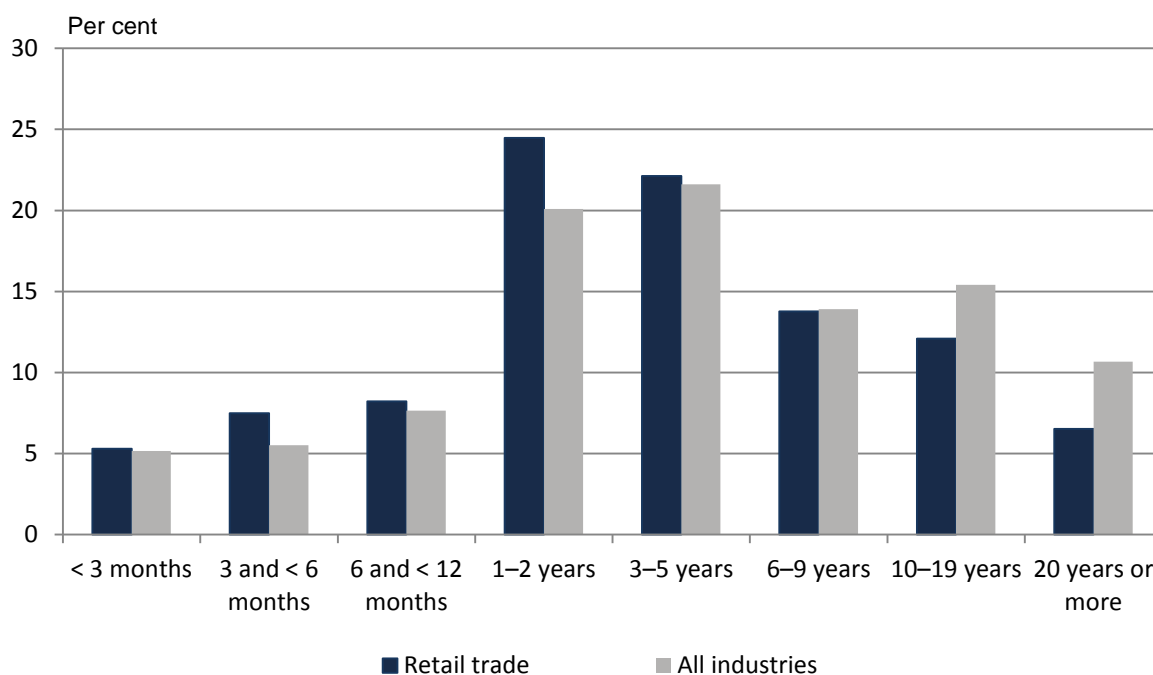
	Full-time		Part-time		All employees	
	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)
Retail sector	89.3	10.7	40.8	59.2	63.9	36.1
All industries	88.3	11.7	46.1	53.9	74.9	25.1

[1442] An absence of paid leave entitlements is an indication of casual employment. It follows that there are a higher proportion of casual employees in the Retail sector than across all industries.

(iv) *Employment tenure*

[1443] Workers in the Retail sector were more likely to experience a shorter duration of employment with an employer/business than workers employed across all industries. Chart 51 shows that almost one-quarter of workers in the Retail sector had been with their current employer/business for '1–2 years', while around one in five workers had been with their current employer/business for less than 12 months.

Chart 51¹²³⁷
Duration of employment with current employer/business in the Retail sector,
February 2015



(v) *Work schedule*

[1444] Table 62 shows the prevalence and types of shiftwork arrangements used in enterprises in the Retail sector and across all industries in 2014. A lower proportion of enterprises in the Retail sector used shiftwork arrangements compared with all industries. However, the most common shiftwork arrangements used in both enterprises in the Retail sector and across all industries were set rosters and eight-hour shifts.

Table 62 ¹²³⁸
Prevalence and types of shiftwork arrangements, 2014

	Retail sector	All industries
	(%)	(%)
Uses shiftwork arrangements	17.9	23.8
<i>Types of shiftwork arrangements</i>		
Rotating rosters	56.2	57.1
Set rosters	86.2	77.6
Early morning shifts	45.8	62.2
Afternoon shifts	72.7	71.9
Evening and night shifts	61.7	70.8
Standard business hours	78.2	69.7
Split/broken shifts	15.5	36.1
Standby/on call	35.8	39.8
8-hour shifts	86.2	80.3
12-hour shifts	20.7	27.8
Short shifts of 4 hours or less	59.5	53.7
Other	–	3.6

[1445] Using the HILDA survey, Table 63 shows the current work schedule for employees in their main job in 2015. The most common schedule for employees in the Retail sector was a regular daytime schedule, although this proportion was less than for employees across all industries. Employees in the Retail sector were more likely to work a regular evening shift than employees across all industries.

Table 63 ¹²³⁹
Current work schedule in main job, employees, 2015

	Retail sector	All industries
	(%)	(%)
A regular daytime schedule	69.8	75.5
A regular evening shift	6.3	3.7
A regular night shift	3.4	1.7
A rotating shift (changes from days to evenings to nights)	10.1	9.4
Split shift (two distinct periods each day)	1.2	1.4
On call	0.4	1.1
Irregular schedule	8.8	6.9
Other	0.1	0.2
Total	100.0	100.0

[1446] Using HILDA and ABS data the Peetz and Watson Report concluded that the proportion of the total retail workforce that usually worked on weekends (either on one of both of the weekend days) was between ‘a little below 60 per cent’ and 62 per cent, and that 31–35 per cent of the total retail workforce usually worked on a Sunday.¹²⁴⁰

(vi) Earnings

[1447] As shown in Table 64, most employees in the Retail sector received the adult rate of pay; however, the proportion was lower than for all industries. The proportion of employees that received a junior rate of pay was over three times the proportion across all industries.

Table 64¹²⁴¹
Employees by rate of pay, May 2016

	Retail sector	All industries
	(%)	(%)
Adult rate of pay	85.4	94.0
Junior rate of pay	13.7	4.1
Apprentice or trainee	0.9*	1.9
Disability rate	0.04*	0.1
All rates of pay	100.0	100.0

Note: * Estimate has a relative standard error between 25 and 50 per cent and should be used with caution.

[1448] Average weekly earnings in the Retail sector were lower than for all industries across each measure in Table 65. Average weekly earnings for full-time employees in the Retail sector were around three quarters of average weekly earnings for full-time employees in all industries.

[1449] Using similar measures of average weekly earnings to that presented in Table 65, Dr Watson examines the changes from May 2010 to November 2014. His report finds that the ratio of average weekly earnings in the Retail sector relative to all industries declined from 73 per cent to 69 per cent over that period.¹²⁴²

Table 65¹²⁴³
Average weekly earnings, May 2016

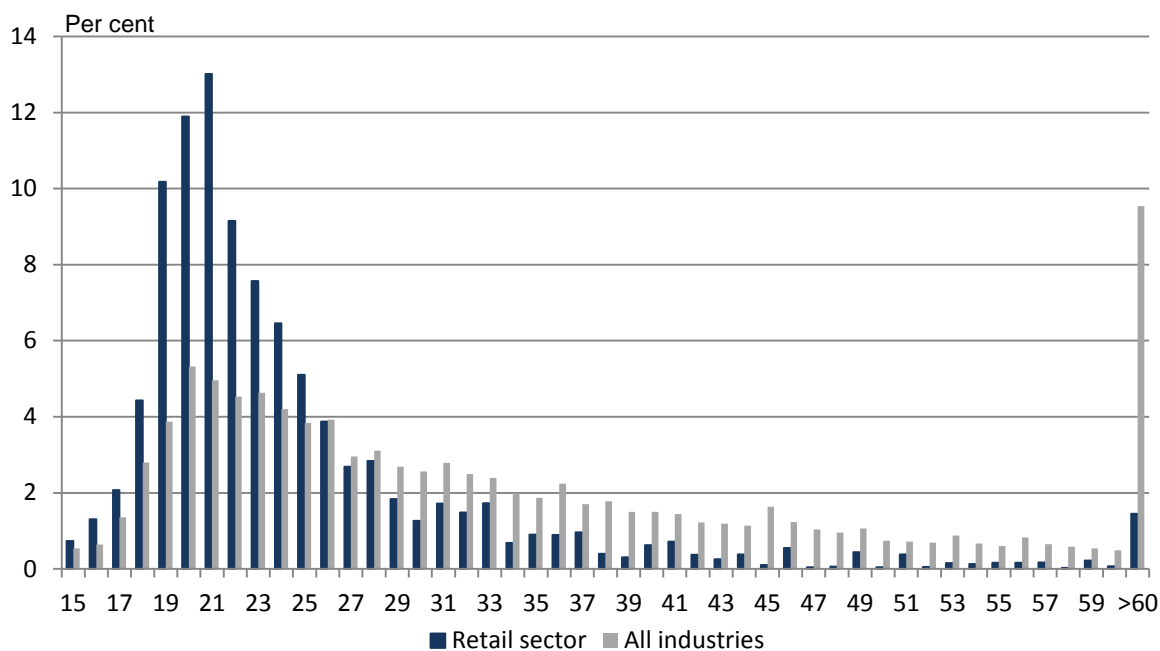
	Retail sector	All industries	Ratio of the Retail sector relative to all industries
	(\$)	(\$)	(%)
Average weekly earnings, all employees	692.60	1160.90	59.7
Average weekly earnings, full-time adult employees	1133.50	1573.30	72.0
Average weekly ordinary time earnings, full-time adult employees	1114.90	1516.00	73.5
Average weekly ordinary time earnings, full-time adult male employees	1163.40	1613.50	72.1
Average weekly ordinary time earnings, full-time adult female employees	1048.60	1352.10	77.6

Note: All data are expressed in original terms.

[1450] The distribution of hourly total cash earnings for adult employees in the Retail sector is relatively more concentrated toward the lower end of the wage distribution than the earnings of adult employees across all industries (Chart 52). Relative to all industries, the

Retail sector had a higher concentration of employees earning up to \$25 per hour. Using data from the EEH survey, the Watson Report compares the distribution of full-time non-managerial employee total hourly cash earnings in the Retail sector relative to all industries. Dr Watson finds that two-thirds of employees in the Retail sector fall below the average weekly total cash earnings of employees in the Retail sector.¹²⁴⁴

Chart 52¹²⁴⁵
Distribution of hourly total cash earnings, adult employees, May 2014

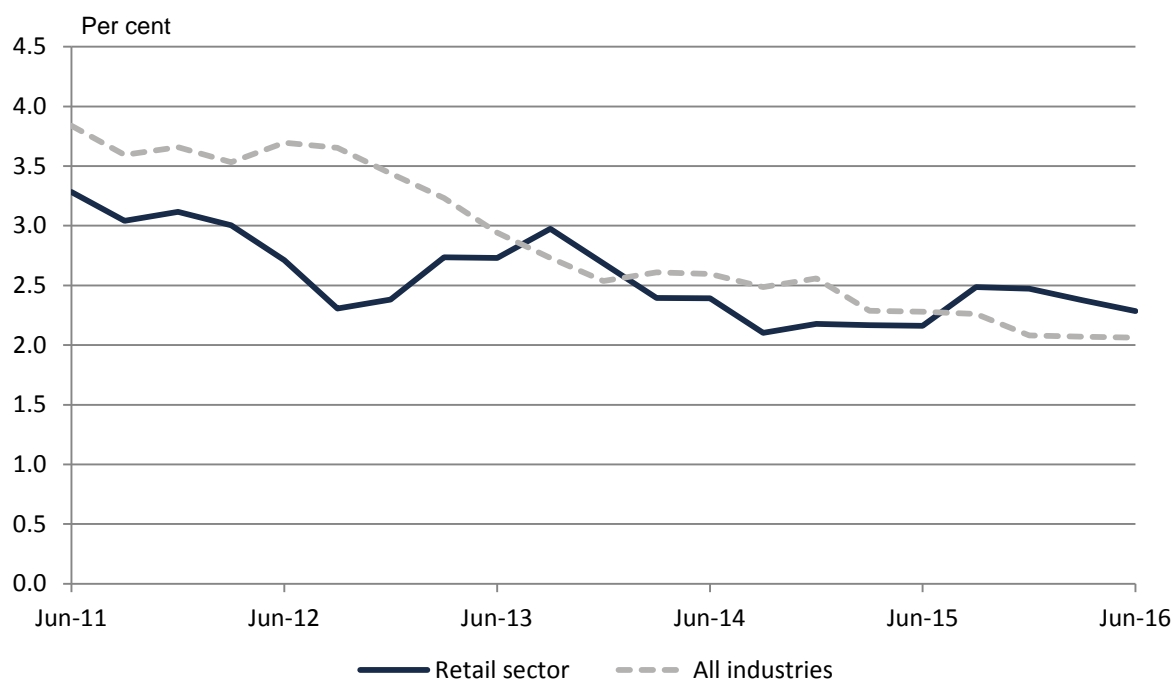


Note: Earnings are calculated at \$1 intervals up to and including the amount presented (e.g. \$17 includes amounts over \$16 per hour and up to and including \$17 per hour) for adult employees in the federal jurisdiction. Earnings of employees who receive a casual loading are discounted by 25 per cent.

[1451] Wages growth in the Retail sector was lower than wages growth across all industries for most of the period between the June quarter 2011 and the June quarter 2015. However, the trend was reversed between the September quarter 2015 and the June quarter 2016, as wage growth in the Retail sector was higher than wage growth across all industries (Chart 53).

[1452] These trends are consistent with the expert reports: the Watson Report shows that wages growth in the Retail sector was lower than across all industries between 2001 and 2014.¹²⁴⁶

Chart 53 ¹²⁴⁷
Annual growth in Wage Price Index, June quarter 2011 to June quarter 2016



Note: All data are expressed in original terms.

(vii) *Penalty payments*

[1453] The Commission's AWRS collected detailed data on employees' wages and identified employees that received penalty rates. Around one in 10 employees received penalty rates, both in the Retail sector and across all industries (Table 66). Award-reliant employees were more likely to receive penalty rates compared with employees on other methods of setting pay, both within the Retail sector and across all industries.

Table 66 ¹²⁴⁸
Percentage of employees who receive penalty rates, by method of setting pay, 2014

	Retail sector (%)	All industries (%)
Award	19.0	22.0
Other methods	5.5	6.2
All employees	10.6	10.6

Note: 'Other methods' of setting pay include enterprise agreements and individual arrangements. The sample analysed was restricted to employees that reported working for businesses that either operated 6 or 7 days in a week, operated on weekends or used shiftwork arrangements. 'Penalty rates' are collected in the AWRS by asking participants for the gross (before-tax) amount received for penalty payments (for work performed outside standard hours).

(viii) *'Low paid' employees in the Retail sector*

[1454] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a) (see [165]–[168]).

[1455] The Watson Report comments on the earnings and financial circumstances of retail workers compared to other workers:

'Using both household-based and employer-based surveys, the overall pattern in earnings are conclusive. Compared to workers in other industries, the retail workforce is amongst the lowest paid, coming close behind accommodation and food services. While the percentages vary slightly, the earnings for retail workers are about 70% of the earnings of the all-industry average.

Along with hospitality and food services, retail has the largest proportion of low paid workers in Australia. The extent to which the retail workforce is low paid varies, depending on the definition of low pay and the population under examination. The most optimistic figure is a proportion of 10% and the most pessimistic figure is 50%. A more robust estimate for the pessimistic figure is probably about 20% using the definition of low paid as below two thirds median earnings, and somewhere in the mid 30% range using the definition of low paid as earnings below the bottom quintile...

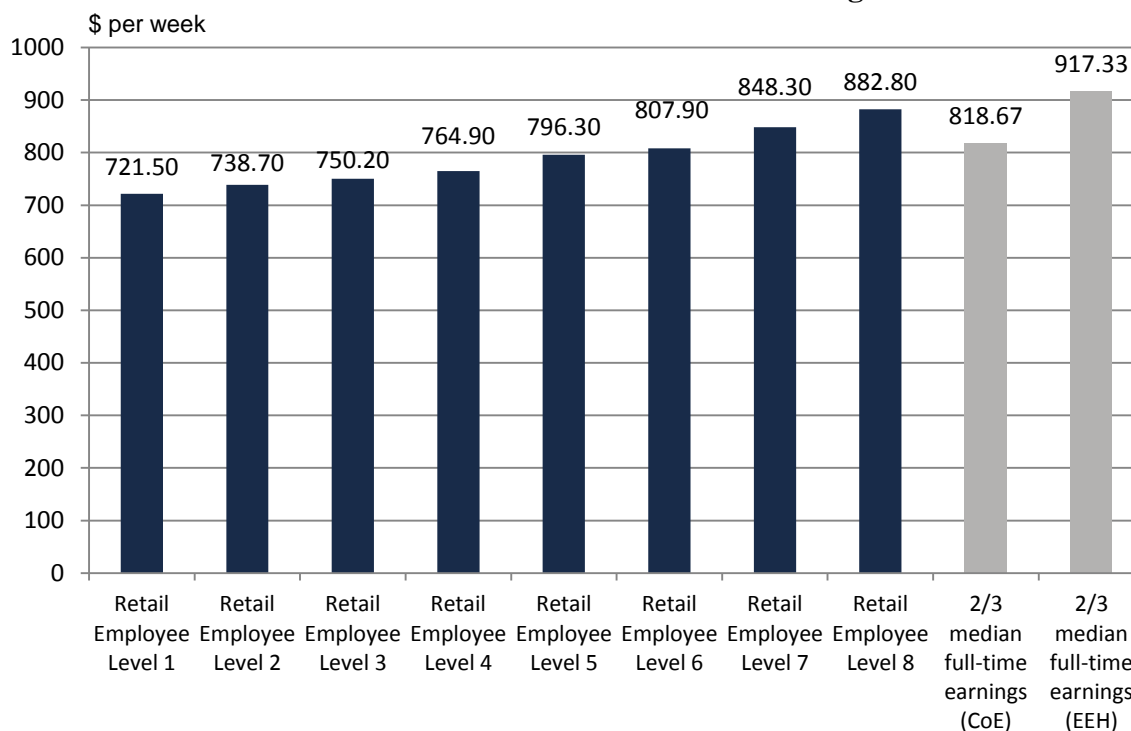
When it comes to financial hardship, the data suggested that retail households faced greater difficulties in raising emergency funds. This suggests that their financial resources are more limited than those of other - industry households'.¹²⁴⁹

[1456] The most recent data for median earnings is for May 2016 from the ABS EEH. Data on median earnings are also available from the CoE survey in August 2015. As such, the minimum weekly wages presented from these awards are those determined from the *Annual Wage Review 2014–15* on 2 June 2015.

[1457] The following charts present the minimum weekly wages of each classification in the *General Retail Industry Award 2010* and *Pharmacy Industry Award 2010*, comparing them with two-thirds of full-time median earnings.

[1458] Chart 54 shows that the full-time weekly wage for each classification in the *General Retail Industry Award 2010* was below the EEH measure of two-thirds of median full-time earnings. Most classifications were below the CoE measure of two-thirds of median full-time earnings except for Retail Employee Levels 7 and 8.

Chart 54 ¹²⁵⁰
Comparison of minimum weekly wages in the *General Retail Industry Award 2010* and two-thirds of median full-time earnings

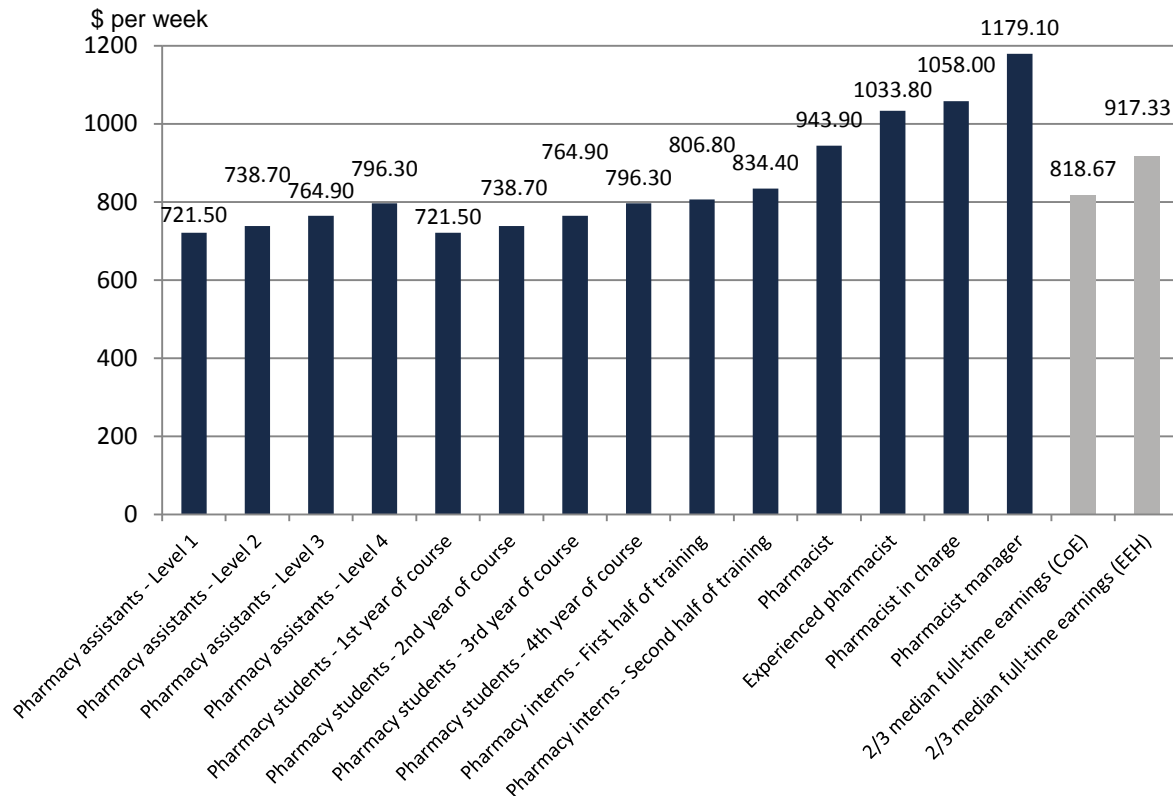


Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time adult non-managerial employees.

[1459] Chart 55 shows that the full-time weekly wages for most classifications in the *Pharmacy Industry Award 2010* were below both measures of two-thirds of median full-time earnings. The Pharmacist, Experienced Pharmacist, Pharmacist in charge and Pharmacist manager classifications were above both measures of two-thirds of median full-time earnings, while the 'Pharmacy Interns – Second half of training' classification was only above the CoE measure.

Chart 55 ¹²⁵¹

Comparison of minimum weekly wages in the *Pharmacy Industry Award 2010* and two-thirds of median full-time earnings



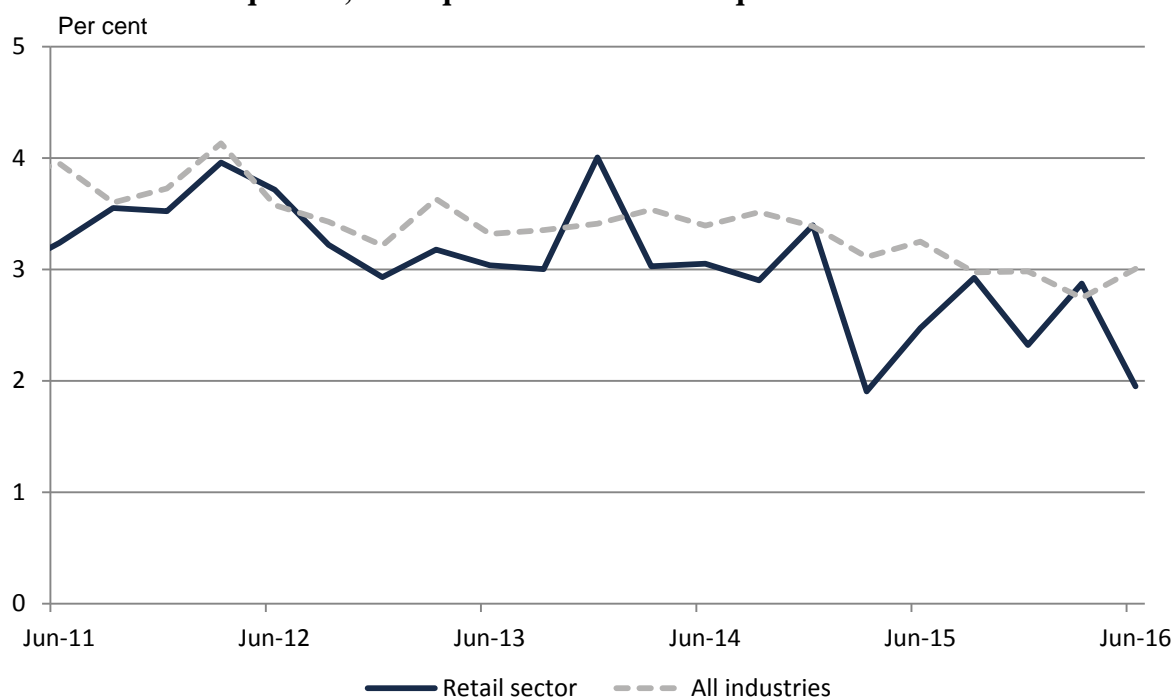
Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time adult non-managerial employees.

(ix) Bargaining

[1460] The Department of Employment’s WAD contains information on the AAWIs negotiated under enterprise agreements in each quarter.

[1461] AAWIs negotiated under enterprise agreements and approved in each quarter for the Retail sector between the June quarter 2011 and the June quarter 2016 were generally lower than across all industries (Chart 56).

Chart 56
Average annualised wage increases for federal enterprise agreements approved in the quarter, June quarter 2011 to June quarter 2016¹²⁵²



8.1.2 Summary

[1462] The Retail sector's contribution to overall sales, profits, wages, employment and hours worked was relatively large. Employees within the sector were also more likely to be underemployed and award reliant.

[1463] Key findings within this sector were that employers were relatively more likely to be characterised by:

- small and medium businesses;
- lower profit margins;
- lower wages and salaries as a proportion of total expenses;
- lower survival rates;
- strong or intense competition; and
- operate more than 6 days per week.

[1464] Key findings within this sector were that employees were relatively more likely to be characterised by:

- female;
- part-time and casual workers;
- award-reliant; and
- lower paid.

[1465] Further, retail households face greater difficulties in raising emergency funds. This suggests that their financial resources are more limited than those of other industry households.

8.2 The *General Retail Industry Award 2010*

8.2.1 The Claims

[1466] The Australian Retailers Association, the National Retail Association and the Master Grocers Association (collectively the Retail Employers) and ABI seek to vary the *General Retail Industry Award 2010* (the *Retail Award*) to reduce the loading payable on Sundays from 100 per cent to 50 per cent. ABI has also made a claim concerning public holiday penalty rates, which will be discussed later in this decision.

[1467] The changes sought to Sunday penalty rates are set out below, in a marked up version of clause 29.4.

29 Overtime and penalties

...

29.4 Penalty payments

(a) **Evening work Monday to Friday**

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) **Saturday work**

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

(c) **Sunday work**

A penalty payment of an additional ~~100%~~ 50% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2.

[1468] The Retail Employers also seek to amend the *Retail Award* to reduce the rates payable for shiftwork performed on Sundays. If granted, the variation would reduce the shiftwork rate payable on Sunday from 200 per cent to 175 per cent for full-time and part-time employees, and from 225 per cent to 200 per cent for casual employees. The changes sought are set out below, in a marked up version of clause 30.3:

30. Shiftwork

...

30.3 Rate of pay for shiftwork

- (a) Any shiftwork performed between midnight Sunday and midnight Friday will be paid at the rate of 130% (155% for casuals) of the ordinary time rate of pay.
- (b) Any shiftwork performed on a Saturday will be paid at the rate of 150% (175% for casuals) of the ordinary time rate of pay.
- (c) Any shiftwork performed on a Sunday will be paid at the rate of ~~200%~~ 175% (~~225%~~ 200% for casuals) of the ordinary time rate of pay.
- (d) Where an employee elects to work on a public holiday shift then the provisions set out in clause 29.4(d) will apply for all hours of the shift.
- (e) For the purposes of this clause, where a shift falls partly on a public holiday, the shift which commences on the public holiday will be regarded as the public holiday shift. Provided that if the employee elects not to work on a public holiday shift such employee will be entitled to be absent without loss of pay.
- (f) Provided that in any shop where it is mutually agreed between an employer and the majority of employees engaged under the provisions of this clause another shift may be substituted for the shift which commences on the holiday as the holiday shift and in such instance the provisions of clause 29.4(d) relating to such holiday will apply only to the day so substituted.

[1469] The claims of the Retail Employers and ABI are opposed by the SDA.

8.2.2 Background to the *Retail Award*

[1470] The Award Modernisation Full Bench designated the ‘Retail industry’ as a priority industry in the award modernisation process and initially proposed making one award to cover general retail, pharmacy, hair and beauty and fast food, :

‘...at least at this stage, we do not intend to exclude community pharmacies, fast food outlets or hairdressing services...Obviously the precise scope of a modern retail award cannot be determined at this stage but we intend to include a broad range of awards in our consideration to maximize the potential for rationalisation of award coverage’¹²⁵³

[1471] The SDA subsequently filed a draft general retail industry award, the scope of which included the fast food, hair and beauty, and community pharmacy industries.¹²⁵⁴ The SDA’s draft award provided for loadings of 25 per cent and 100 per cent for work performed on Saturdays and Sundays, respectively.¹²⁵⁵ Public holidays attracted loadings of 150 per cent for full-time and part-time employees and 175 per cent for casuals.¹²⁵⁶

[1472] The ARA, by contrast, submitted that no penalty rates should apply to weekend work¹²⁵⁷ unless it exceeded the maximum allowable number of ordinary hours. This submission was advanced on the basis that “if an employee chooses to accept a retail job that

involves working on evenings or weekends, but within the span of ordinary hours... additional compensation is (not) warranted.”¹²⁵⁸ Similarly, the ARA submitted that public holiday penalty rates should only be payable if the time worked fell during a period that would otherwise attract overtime payments (in which case the rate would be 250% in lieu of any other penalties).¹²⁵⁹

[1473] The MGA submitted that as Sunday work was no longer as intrusive to the personal time of employees than it had historically been a penalty rate of 150 per cent of the ordinary rate (‘rather than the 200 per cent that existed in most States’¹²⁶⁰) was the appropriate rate. It submitted that the penalty rate for public holidays remain at 250 per cent.¹²⁶¹ The NRA and ANRA submitted that a rate of 150 per cent for Sunday work was appropriate.¹²⁶²

[1474] An exposure draft of a modern award for the general retail industry was published on 12 September 2008. The coverage extended to the fast food, hair and beauty, and community pharmacy industries and provided for penalty rates which reflected those proposed by the SDA.¹²⁶³ In the accompanying Statement, the Full Bench did not specifically address the issue of the penalty rates contained in the exposure draft.¹²⁶⁴ After the publication of the exposure draft submissions were filed by interested parties.

[1475] A number of parties continued to agitate for the creation of multiple awards across the retail sector. In the decision issued on 19 December 2008 the scope of the modern *Retail Award* was restricted to what was defined as the ‘general retail sector’. Separate awards were made to cover employers and employees in the pharmacy, hair and beauty and fast food industries:

‘The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a “swings and roundabouts” approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.

We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies...

In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.¹²⁶⁵

[1476] In a Statement issued on 26 June 2009, the Commission provided parties an opportunity to apply to vary modern awards created in earlier stages but which had not yet

commenced operation.¹²⁶⁶ A number of applications were made including a claim by the NRA, Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the ARA which sought to reduce the Sunday penalty rates for full-time employees from 200 per cent to 150 per cent and for casual employees from 225 per cent to 150 per cent. The rates sought reflected the NAPSAs applying in New South Wales and to Queensland exempt shops, but were not generally reflected in other pre-reform awards and NAPSAs.¹²⁶⁷ The Award Modernisation Full Bench considered these applications and concluded that:

‘The modern award rate of 100% for full time employees is in line with the existing rate in Victoria, the Australian Capital Territory, Queensland non-exempt shops, Western Australia and Tasmania. In our view the critical mass supports the retention of this provision.

For casual employees there is a case for reducing the penalty payment. The level of 100% applies in Victoria, Queensland non-exempt shops and the Australian Capital Territory. Other states are higher or lower, but we believe that 100% represents a fair outcome overall. We will provide that the casual rate for working on Sundays will be the same as for full time employees.’¹²⁶⁸

[1477] On 26 August 2009 the Award Modernisation Request was amended by the Minister for Employment and Workplace Relations to include a new paragraph:

‘53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

offering additional hours of work to part-time employees; and

employing part-time employees rather than casual employees.’¹²⁶⁹

[1478] In a Statement issued on 10 September 2009, the Award Modernisation Full Bench invited submissions addressing the effect of the variation to the Ministerial request:

‘In its decision of 19 December 2008 the Commission made the *General Retail Industry Award 2010* and the *Pharmacy Industry Award 2010*. Any interested party which is of the view that either of those awards, or any other award, should be varied to give effect to the 26 August variation should make an appropriate application. We will endeavour to deal with any such application before the end of 2009.’¹²⁷⁰

[1479] No such applications were made.

[1480] In making the *Retail Award*, the ‘main federal industry award’ was deemed to be the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*¹²⁷¹ (the *Victorian Shops Interim Award*).

[1481] The *Victorian Shops Interim Award* was the subject of proceedings in 2003 which sought to extend the coverage of the award by ‘roping in’ some 17 000 employers.¹²⁷²

[1482] In *SDA v \$2 and Under and Others (No. 1)*¹²⁷³ a Full Bench of the AIRC decided that the ‘roping in’ would take place in a staged process so that all of the increases in labour costs were not introduced at the same time.¹²⁷⁴ The Full Bench made an award, known as the *Shop*,

Distributive and Allied Employees' Association Victorian Shops Interim (Roping-in No. 1) Award 2003 ('the *Roping-In Award*') which roped in some 17 000 employees. Importantly for present purposes, the Full Bench decided to adopt 'as an interim measure' pending a further hearing, a penalty rate of 150 per cent for all work performed in ordinary hours on a Sunday¹²⁷⁵.

[1483] In the proceedings which followed, the Full Bench heard evidence and submissions regarding the appropriate penalty rate for Sunday work. In essence, the SDA sought a Sunday penalty rate of 200 per cent and the Retail Employers contended that a penalty rate of 150 per cent was fair and equitable for both employers and employees.

[1484] In *SDA v \$2 and Under and Others (No. 2)*¹²⁷⁶, the Full Bench decided, by majority, to apply the 200 per cent Sunday work penalty which extended the *Victorian Shops Interim Award* to those employees who were the subject of the *Roping-In Award*. It is apparent from the majority decision that particular regard was paid to the terms in the *Victorian Shops Interim Award* and the general principles applicable to roping in awards. So much is clear from the following parts of the majority decision:

'[98] The rationale of fixing a Sunday penalty rate for ordinary time work on the basis of providing compensation for the disabilities upon employees, applied in an abstract way, would involve the task of seeking to place a value upon the level of compensation required. It seems to us that such an exercise would necessitate a thorough assessment and fixation of a range of related penalties, such as Saturday penalties, having regard to associated disabilities, rather than the fixation of a single penalty rate in isolation. However, an abstract exercise of that type is not appropriate in the context of the present matter. We are required to consider the fixation of a final Sunday penalty rate in the context of the history of the provision, established approaches in relation to the making of a roping-in award and the statutory context. Further, we are now required to determine the single outstanding issue of the appropriate final rate for ordinary time work on a Sunday. We do so, without repeating it, in the context of the background, the statutory scheme, principles in respect of roping-in awards and factual context set out in the January 2003 decision...

[116] Having considered all of the material, it is our view that the primary focus of our considerations should be on the interim award provisions in respect of the working of ordinary time on Sundays, found in the provisions operating in respect of Exempt Shops for a considerable time...

[119] As indicated above, we think the primary focus in assessing a fair minimum standard for the penalty for work in ordinary hours on a Sunday, in the context of living standards generally prevailing in the Australian community, is found in the interim award provisions and beyond that, to a lesser degree, in award provisions operating more generally in the Victorian retail sector. In our view, the provisions in other State and Territory awards and in federal awards, considered broadly, provide little assistance. Both the interim award, in respect of Exempt Shop provisions, and the predominance of other retail awards operating in Victoria support the double time standard. Such a provision in the roping-in award will also provide a single consistent standard as between the interim and roping-in award.¹²⁷⁷ (Footnotes omitted)

[1485] The majority also considered the evidence of 2 expert witnesses (Dr Michael Bittman and Dr Graeme Russell), in relation to the nature of Sunday work and the associated social disabilities,¹²⁷⁸ and concluded that the evidence 'demonstrates a significant social disability associated with work on a Sunday'.¹²⁷⁹

[1486] The minority decision of Giudice J. concluded that:

‘Taking all of these considerations into account, but particularly the penalty rates under the parent award for work in ordinary hours on other days of the week, a penalty rate of 100% for work performed in ordinary hours on Sundays in the retail industry in Victoria is excessive. In the circumstances it is not necessary that I express a final view on the appropriate penalty rate’.¹²⁸⁰

[1487] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue, but the particular context may be a cogent reason for not following a previous Full Bench decision. In considering the weight to be given to the majority decision in *SDA v \$2 and Under and Others (No. 2)* the following points are relevant:

- (i) The legislative scheme, the scope of the parties involved, and the roping-in nature of the proceedings in which that case was decided is materially different from the FW Act and the present Review;
- (ii) The evidentiary case advanced in previous proceedings was much more limited than the material before us in the present proceedings; and
- (iii) While the majority decision had regard to the expert evidence it is apparent from the decision that the majority paid particular regard to the existing terms of the *Victorian Shops Interim Award* and the general principles applicable to roping in awards.

[1488] Having regard to the above contextual considerations we do not feel constrained to follow the decision of the majority in *SDA v \$2 and Under and Others (No. 2)*.

[1489] In submissions filed in the current matter, the Retail Employers emphasise the fact that during the award modernisation:

- no witnesses were called to give evidence;
- no expert evidence was presented; and
- the Award Modernisation Full Bench did not undertake any analysis of the proceeding disabilities associated with working on weekends, or the relative disabilities as between Saturday and Sunday work, rather the focus of the AIRC was on ‘bringing together disparate State and Territory award conditions’.¹²⁸¹

[1490] The SDA, by contrast, submits that “the Sunday rate issue was very much a live issue in the context of the Award Modernisation process” and that “it was contested in different ways with numerous issues presented”.¹²⁸²

[1491] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis the *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench’s consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. It is

apparent from an examination of the relevant decisions that the Award Modernisation Full Bench did not undertake a detailed or considered review of the penalty rates in the *Retail Award*. Rather, understandably enough in view of the time constraints on the award modernisation process, the Full Bench gave effect to the existing penalty rates in the ‘critical mass’ of pre-reform instruments.

8.2.3 The Retail Industry

[1492] A paper¹²⁸³ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Using this framework the *General Retail Industry Award 2010* is ‘mapped’ to the following industry classes:

- 4110—Supermarket and grocery stores
- 4121—Fresh meat, fish and poultry retailing
- 4122—Fruit and vegetable retailing
- 4129—Other specialised food retailing
- 4211—Furniture retailing
- 4213—Houseware retailing
- 4214—Manchester and other textile goods retailing
- 4221—Electrical, electronic and gas appliance retailing
- 4222—Computer and computer peripheral retailing
- 4229—Other electrical and electronic goods retailing
- 4231—Hardware, building and garden supplies retailing
- 4241—Sport and camping equipment goods retailing
- 4242—Entertainment media retailing
- 4243—Toy and game retailing
- 4244—Newspaper and book retailing
- 4245—Marine equipment retailing
- 4251—Clothing retailing
- 4252—Footwear retailing
- 4253—Watch and jewellery retailing
- 4259—Other personal accessory retailing
- 4260—Department stores
- 4272—Stationary good retailing
- 4273—Antique and used goods retailing
- 4274—Flower retailing
- 4279—Other store-based retailing n.e.c.¹²⁸⁴
- 6632—Video and other electronic media rental and hiring
- 6639—Other goods and equipment rental and hiring n.e.c.
- 7220—Travel agency and tour arrangement services
- 9421—Domestic appliance repair and maintenance
- 9499—Other repair and maintenance n.e.c.
- 9532—Photographic film processing

[1493] It is convenient to refer to the aggregation of these industry classes as the General retail industry.

[1494] The Census is the only data source that contains all of the employment characteristics in Table 67 for the General retail industry. The most recent Census data is from August 2011.

[1495] The August 2011 Census data shows that there were around 718 000 employees in the General retail industry. Table 67 compares certain characteristics of employees in the General retail industry with employees in ‘all industries’.

Table 67¹²⁸⁵
Labour force characteristics of General retail industry,
ABS Census 9 August 2011

	General retail industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	272 937	38.0	4 207 586	50.8
Female	445 476	62.0	4 082 662	49.2
Total	718 413	100.0	8 290 248	100.0
Full-time/part-time status				
Full-time	297 444	43.8	5 279 853	67.8
Part-time	381 411	56.2	2 507 786	32.2
Total	678 855	100.0	7 787 639	100.0
Highest year of school completed				
Year 12 or equivalent	401 644	56.9	5 098 228	62.6
Year 11 or equivalent	96 094	13.6	885 404	10.9
Year 10 or equivalent	161 414	22.8	1 687 055	20.7
Year 9 or equivalent	36 107	5.1	317 447	3.9
Year 8 or below	10 133	1.4	141 973	1.7
Did not go to school	1 043	0.1	20 158	0.2
Total	706 435	100.0	8 150 265	100.0
Student status				
Full-time student	162 730	22.9	612 990	7.5
Part-time student	30 998	4.4	506 120	6.2
Not attending	517 593	72.8	7 084 360	86.4
Total	711 321	100.0	8 203 470	100.0
Age (5 year groups)				
15–19 years	142 891	19.9	547 666	6.6
20–24 years	130 352	18.1	927 865	11.2
25–29 years	82 568	11.5	1 020 678	12.3
30–34 years	63 026	8.8	933 827	11.3
35–39 years	61 146	8.5	934 448	11.3
40–44 years	59 347	8.3	938 386	11.3
45–49 years	56 752	7.9	911 739	11.0
50–54 years	49 716	6.9	848 223	10.2
55–59 years	37 244	5.2	652 190	7.9
60–64 years	24 893	3.5	404 470	4.9
65 years and over	10 478	1.5	170 718	2.1
Total	718 413	100.0	8 290 210	100.0
Average age	33.3		38.8	

	General retail industry		All industries	
	(No.)	(%)	(No.)	(%)
Hours worked				
1–15 hours	182 056	26.8	875 554	11.2
16–24 hours	105 062	15.5	792 539	10.2
25–34 hours	94 294	13.9	839 694	10.8
35–39 hours	123 140	18.1	1 676 920	21.5
40 hours	78 338	11.5	1 555 620	20.0
41–48 hours	48 641	7.2	895 619	11.5
49 hours and over	47 324	7.0	1 151 693	14.8
Total	678 855	100.0	7 787 639	100.0

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[1496] The profile of General retail industry employees differs from the profile of employees in ‘All industries’ in 5 important respects:

- (i) General retail industry employees are predominately female, (60 per cent, compared to 49.2 per cent of all employees);
- (ii) over half (56.2 per cent) of General retail industry employees are employed on a part-time or casual basis (i.e. less than 35 hours per week¹²⁸⁶), compared with only 32.2 per cent of all employees;
- (iii) over one quarter (26.8 per cent) of General retail industry employees work 1–15 hours per week compared with only 11.2 per cent of all employees;
- (iv) almost four in ten (38.0 per cent) General retail industry employees are aged between 15 and 24 years compared with only 17.8 per cent of all employees; and
- (v) over one quarter (27.3 per cent) of General retail industry employees are students (22.9 per cent are full-time students and 4.4 per cent study part-time) compared with 13.7 per cent of all employees.

8.2.4 The Evidence

(i) The Retail Employers

[1497] ABI called 3 witnesses to give evidence during the proceedings. Expert evidence was given by Professors Lewis¹²⁸⁷ and Rose,¹²⁸⁸ and evidence of a survey of retail sector employees was given by Ms Emily Baxter.¹²⁸⁹

[1498] The Retail Employers called 6 lay witnesses in support of their proposed variations:

- Barry Barron, Chief Operating Officer of the Sussan Group Pty Ltd;¹²⁹⁰

- Heath Goddard, Managing Director, founder and owner of Pillow Talk Pty Ltd;¹²⁹¹
- Graeme Gough, Director and part owner of Quaymarket Pty Ltd (SPAR Ballina);¹²⁹²
- Jorge-Daniel Leroy d'Oreli, General Manager of Jeanswest;¹²⁹³
- Peter Antonieff, Director of Prapla Pty Ltd (FoodWorks Oxley);¹²⁹⁴ and
- Belinda Daggart, Director of Bindoura Pty Ltd (Bakers Delight Lavington).¹²⁹⁵

[1499] The Retail Employers also rely upon expert evidence provided by Dr Sean Sands, Research Director of the Australian Centre for Retail Studies (ACRS) within the Department of Marketing at Monash University.¹²⁹⁶

[1500] It is convenient to deal first with the Retail Employers' lay witness evidence.

Barry Barron¹²⁹⁷

[1501] Mr Barron is the Group Chief Operating Officer of the Sussan Group, a privately owned speciality fashion group, comprising Sportsgirl, Sussan and Suzanne Grae businesses. The Sussan Group operates 493 stores across all States and Territories (180 under the Sussan brand; 119 under the Sportsgirl brand and 194 under the Suzanne Grae brand) and employs about 4,399 employees in retail positions. Mr Barron's evidence primarily relates to the Sussan and Sportsgirl businesses.

[1502] The majority of both Sussan and Sportsgirl retail employees are covered by the *Retail Award*.

[1503] The use of labour by these businesses is limited to a percentage of retail sales in each store: 'Store managers are required to operate within this labour budget, and this forms part of the assessment of their performance'.¹²⁹⁸ As to the impact of Sunday penalties, Mr Barron says:

'In allocating the budgeted hours across trading days, the group has had to limit allocations to Sunday due to the high cost of labour as a result of Sunday penalties.

Approximately 81% of Sussan and 95% of Sportsgirl stores trade on Sundays. The stores that do not trade on Sundays are closed because opening would result in a Sunday trading loss. These losses would primarily be as a result of higher Sunday labour costs due to penalties. The hours that our stores trade on Sundays varies from location to location. Taking into account the higher Sunday labour costs, Sunday employees engage entirely in selling activities and operating hours are restricted to busy periods to ensure turnover can cover the additional labour costs. In some instances we are required to trade on Sunday by landlords for hours that impact negatively on profit contribution...

Sunday has over the past 10 years become an increasingly important trading day for the business. While the proportion of stores opening on Sundays has increased steadily over this period, the average hours per store has decreased. This is despite the fact that sales per hour significantly higher than other days, and with this ratio growing.¹²⁹⁹

[1504] We note that of the 5 Sportsgirl stores (out of 119) that do not trade on Sundays, 3 are in country locations (Shepparton, Lismore and Mildura).¹³⁰⁰

[1505] The Sussan and Sportsgirl businesses respond to the current Sunday penalty rate by, in effect, restricting Sunday to ‘customer service only’ days:

‘This means that the business limits the work performed on Sundays almost solely to selling. We do not carry out any stock replenishment (unless there is no stock of a particular item on display), minimal store cleaning is carried out and no administrative tasks are completed.’¹³⁰¹

[1506] During the course of cross-examination Mr Barron agreed with the proposition that the tasks identified – stock replenishment, store cleaning and administrative tasks, as not being done on a Sunday were done on another day of the week.¹³⁰²

[1507] At paragraph [18] of his statement Mr Barron says:

‘With the increase in labour costs on Sundays the business has needed to respond in order to maintain labour costs at the required percentage of turnover. This has meant that a number of stores have reduced the hours they trade on a Sunday, because as a business we prefer to maintain customer service levels when we are open.’

[1508] In the course of his evidence, Mr Barron points to the fact that the allocated labour hours to Sundays for Sussan and Sportsgirl in NSW and Victoria fell between 2010/11 and 2014/15 as shown below:¹³⁰³

Table 68
Allocated labour hours

	Sussan		Sportsgirl	
	hours	% ↓	hours	% ↓
NSW				
2010/11	32833	6.6%	28307	11.7%
2014/15	27303		26980	
Victoria				
2010/11	27167	14%	27963	29.1%
2014/15	23832		21629	

[1509] We note that the percentage fall in hours in these stores between 2010/11 and 2014/15 was higher in Victoria than NSW.¹³⁰⁴ During cross-examination Mr Barron accepted that when referring to increased labour costs since 2010 he was referring principally to the cost of Sunday labour in Sportsgirl and Sussan in NSW and the ACT.¹³⁰⁵

[1510] Mr Barron rejected the suggestion that the NSW experience in this regard was inconsistent with his evidence that labour costs had led to reduced hours (because Sunday penalty rates *increased* in NSW but the reduction in hours is less than in Victoria, where penalty rates remained unchanged).¹³⁰⁶ But no satisfactory explanation was provided for this evident anomaly.

[1511] Mr Barron's evidence is that over the past 10 years Sunday has become an increasingly important trading day for the business. Sunday trading accounts for about 10.5 per cent and 11.75 per cent of Sussan and Sportsgirl weekly trading (taking into account only those stores that trade on Sundays). The average Sunday turnover per labour hour is higher than the average weekly turnover excluding Sundays.¹³⁰⁷

Table 69
Turnover per labour hour

Turnover (\$)/hr labour	Sussan	Sportsgirl
Average Weekly (excluding Sundays)	167	184
Sundays	254	291

[1512] Referring to the disparity in turnover/labour on Sundays compared to average weekly turnover excluding Sundays, Mr Barrow says:

'... we would expect to operate extended trading hours on Sunday, if it were not for the disproportionately high labour costs'.¹³⁰⁸

[1513] At paragraphs 12, 13 and 28 of his statement, Mr Barron sets out the effect of a reduced Sunday penalty rate:

'If Sunday penalties were reduced to an additional 50% most of the stores we close could become viable. Attached to this statement and marked BB1 is an analysis of the viability of opening a number of these stores at different penalty rates.

Reduced Sunday penalty rates would allow us to open additional stores and provide more hours of work on Sundays, while engaging employees to work beyond purely selling activities, e.g. restocking, administration task, etc...

Given the earlier observations I made about customer service levels and the need to match our operations with our customer needs, I firmly believe we would redirect all, or at very least the substantial majority, of the labour cost savings brought about by a reduced Sunday penalty rate back into store labour budgets. The changes we would implement would include:

- (a) opening some stores that are currently closed on Sundays;
- (b) extending trading hours in stores that are open;
- (c) allowing stores to undertake administrative tasks in addition to sales service on Sundays; and
- (d) putting more money into store labour budgets for the hours that they already trade in order to provide better service.¹³⁰⁹

[1514] The essence of Attachment BB1 to Mr Barron's statement is that to break even at the current Sunday penalty rate a store has to do 15 per cent more sales than are required to break even at a 150 per cent penalty rate.¹³¹⁰

[1515] We note that there are some limitations on the capacity of the business to open some stores which are currently closed on Sundays. In particular the Greenwood Plaza shopping centre (one of the locations where Sportsgirl does not open on Sundays) is closed on Sundays.¹³¹¹

[1516] Mr Barron was cross-examined in respect of the changes which would be implemented if Sunday penalty rates were reduced. In particular, Mr Barron acknowledged that Suzanne Grae has more stores than Sussan, though they are smaller stores, and that a greater proportion of Suzanne Grae stores are closed on a Sunday (compared to the number of Sussan stores closed on Sundays).¹³¹² The significance of this is that the terms and conditions of Suzanne Grae employees are set by the *Suzanne Grae Agreement 2012* (the ‘SG Agreement’)¹³¹³, not the *Retail Award*. The SG Agreement provides for a reduction in some penalty rates in exchange for an increase in ordinary rates of pay (over and above that prescribed in the *Retail Award*). The SG Agreement provides for a Sunday penalty rate of 150 per cent and no penalty rate for Saturdays.

[1517] Mr Barron was cross-examined about these matters – the short point being that even with the benefit of a lower Sunday penalty rate a number of Suzanne Grae stores do not open on Sundays:

‘I take it that the 2012 agreement, the current agreement, and its predecessors were entered into because the company saw it as providing - those agreements as providing for a set of conditions more suitable to its business operations than those provided for by the award?---Correct.

So in the Suzanne Grae setting, even with the benefit of a lower Sunday penalty rate of time and a half, I take it that the level of business in those stores doesn’t generally justify them opening?---Correct.

Can I suggest to you that the same outcome would likely occur with the Sussan stores if penalty rates were reduced since Sunday is, relatively speaking, the quietest day?---Incorrect.¹³¹⁴

[1518] Earlier in his evidence Mr Barron rejected the proposition that Sunday is a quiet day for Sussan ‘generally, across the board’:

‘It’s your lowest earning day of the seven?---No, but it’s one of our highest earning days on an hour by hour takings basis in individual stores. I absolutely reject that. It’s a very busy day.

Can I suggest to you that in the face of earning the lowest daily sales for Sundays for Sussan, in the face of a reduction of Sunday penalty rates to time and a half, do you accept that that of itself may not lead to any increase in opening hours or openings at all in Sussan businesses - brands?---I do not accept that.¹³¹⁵

Heath Goddard¹³¹⁶

[1519] Mr Goddard is the Managing Director and owner of Pillow Talk Pty Ltd (Pillow Talk), a homewares retailer specialising in home linen. Pillow talk operates 56 stores throughout Queensland, NSW, the ACT and Victoria, and employs about 557 employees in its stores under the *Retail Award*.

[1520] Pillow Talk trades 7 days a week in the majority of its stores, only 1 store does not trade on Sundays ‘due to, in part, cost of wages not being commensurate with turnover on that particular day’.¹³¹⁷

[1521] The business has responded to the level of labour costs on Sundays by generally capping hours worked by any given employee on a Sunday at 5 hours, ‘to avoid having to provide staff with an unpaid meal break and necessitating rostering an additional team member to work on that day to cover rest periods’.¹³¹⁸ The business operates a roster system that results in Sunday now effectively being a ‘service only’ day:

‘This means that the number of employees working on a Sunday is kept to an absolute minimum restricting them to selling activities only, to the exclusion of merchandising, stock, cleaning and administrative tasks.’¹³¹⁹

[1522] Mr Goddard’s statement sets out an analysis of 21 stores that currently trade on Sundays and which were also trading in 2009, prior to the commencement of the *Retail Award*. This analysis suggests that since 2009 total labour hours have reduced by 4061 hours.¹³²⁰ Mr Goddard’s evidence is that this fall:

‘... has largely arisen given the significant increase in staffing and operational costs from 2009 to 2015. Given the extremely competitive and volatile environment in which all retail establishments currently operate Pillow Talk is unable to pass these increased costs onto consumers meaning that Pillow Talk has had to look at all areas of its cost base to reduce costs and improve productivity in order to maintain profitability and ensure the viability of the business. Naturally staff and wage cost are not immune from this consideration.’¹³²¹

[1523] The analysis also shows that 14 per cent of all hours worked are worked on Saturdays and 10 per cent on Sundays, yet the average sales per hour was \$41,058 on Saturdays and \$41,610 on Sunday. As Mr Goddard observes, ‘it is clear that Sunday wage rates are resulting in significantly lower levels of employment/engagements on that day’.¹³²²

[1524] In the event that Sunday penalty rates were reduced, as sought by the Retail Employers, Mr Goddard says that:

‘... Pillow Talk would almost certainly provide more hours of work to existing employees and/or engage new employees. In the 21 stores that were part of the Sample Data Set alone 2072.5 hours were worked on Sundays. For those stores, a reduction to a 50% Sunday penalty would mean that 936.25 additional ordinary hours of work could be put into those stores without any impact on labour cost percentages.

While I am unable to exactly predict the increase in employment and/or the volume of additional hours which would be provided to employees, Pillow Talk would not simply look to accept the labour cost savings and keep hours in stores at current levels. As a customer service focused business, and given the relative importance of Sunday as a trading day, the business would like to add greater staffing volume on Sundays and a reduction in Sunday labour costs would provide the business with the opportunity to do so. Further, the wage costs for Pillow Talk have already been budgeted for 12 months’ in advance. Therefore a reduction in penalty rates would result in a saving which could be spent on more hours of work for existing employees or hours of work for new employees.’¹³²³

[1525] During the course of cross-examination Mr Goddard was asked whether he intended to reallocate some of the hours worked on Saturdays to Sundays if the Sunday penalty rate was reduced:

‘Well there would be a commensurate saving and we would probably put a little into Saturday and more into the Sunday, because both days are more compressed in turnover as retailing changes. So both days we’d probably get a little bit more staffing put into it.’¹³²⁴

[1526] Mr Goddard also agreed with the proposition that whether the additional hours were in fact put back into the business would depend principally on the anticipated level of sales in particular stores.¹³²⁵

*Graeme Gough*¹³²⁶

[1527] Mr Gough is a director and part owner of Quaymarket Pty Ltd (SPAR Ballina).

[1528] SPAR Ballina is located in QuayWest Shopping Centre in Ballina NSW and is a 650m² shop with ‘a deli, fresh produce, cooked and prepared food such as bakery lines, sandwiches and pies as well as the usual grocery and tobacco lines’.¹³²⁷ The business employs 20 employees (3 full-time, 1 part-time and 16 casuals). SPAR Ballina trades every Sunday and trading across all days of the week is reasonably even. Currently the store is not profitable – it requires \$72,000 in sales per week to break even and is currently making about \$70,000 per week. Indeed the business has not been profitable for any of the financial years since 2011.¹³²⁸

[1529] Rostered hours on Sundays are limited to keep costs down. At paragraph 19 of his statement, Mr Gough sets out the measures used to limit labour costs on Sundays:

- (a) rostering more junior employees on Sundays, as their hourly rate is lower than the more senior employees. However, this can and does create productivity issues. The hours worked summary at GG1 shows the split between junior employees (20 and under) and senior employees for 13 July 2015 and 26 July 2015. In this period, 39.5 hours (or an average of 19.75 hours per week) were rostered to senior employees and 46 hours (or an average of 23 hours per week) were rostered to junior employees;
- (b) Sunday is effectively a “service only” day. This means that the business limits the work performed on Sundays almost solely to selling. We do not carry out any stock replenishment (unless there is no stock of a particular item on display), we do not do any store cleaning and no administrative tasks are completed;
- (c) Our Deli doesn’t function to its full extent on Sundays. There is no preparation of hot food (such as pies, pastries) other than chickens, no baking is done and there is no food prepared such as sandwiches and pizzas. These tasks are undertaken on every other day of the week;
- (d) myself and the Manager work a number of unpaid hours in the business. I work approximately 38 unpaid hours per week, with the majority of these hours being worked between Monday and Friday. However, I will usually be in the store every day of the week. I also undertake ad hoc tasks which often fall on Sundays, such as maintenance tasks and driving the forklift, as there are no senior employees rostered on Sundays who can undertake these duties. The Manager of SPAR Ballina is rostered for 38 hours per week but will work approximately 60 hours per week (the balance of the hours being unpaid). The majority of these extra hours will fall between Monday to Friday, and the Manager works every second Sunday.¹³²⁹

[1530] Mr Gough was also asked whether the work referred to (stock replenishment, cleaning and administrative tasks) in paragraph (b) above was simply done on another day:

‘What you do I take it is you allocate those hours of work to days other than Sunday?---Yes, to an extent. We don’t do, as I’ve said in the statement, the paragraph there, we don’t - we wouldn’t do a major stock replenishment or we wouldn’t undertake, you know, a clean of the deli area for example or a stripping out stock to clean in the chilling units. So we do - we keep it to a minimum sort of day for that activity.

Yes, and those duties and work just get done when you can on other days, other than Sunday?--Well they’re also rostered on other days as well. We have days for doing different tasks and those tasks don’t happen to fall on Sundays.’¹³³⁰

[1531] In the event that the Sunday penalty rate was reduced to 150 per cent, Mr Gough says (at paragraph [20] of his statement) that he would take the following steps:

‘(a) roster more senior staff over both Saturday and Sunday. This would allow for a more productive work force on both days leading to a corresponding increase in sales. This would in turn reduce the amount of unpaid hours being used to prop up the business;

(b) operate the bakery department of the stores. This would mean that extra hours would be rostered to carry out this function;

(c) my partner, the Store Manager, and myself who work less “unpaid” hours and these hours would be given to other employees.

I am not certain that I would reinvest all of the labour cost savings brought about by a reduction in the Sunday penalty back into the additional labour hours. I would first need to address the profitability issue set out earlier in my statement. A return to required profitability would, however, mean more job security for our staff and enhanced prospects for the business, and it follows that this has a strong likelihood of creating even more jobs or more casual hours.’¹³³¹

[1532] During cross-examination Mr Gough clarified paragraph (a) and said that some junior staff would be *replaced* by senior staff on Sundays.¹³³²

[1533] As to the evidence in paragraph [20] of his statement Mr Gough conceded in cross-examination that the business would probably try to address its cash flow issues first, in the event that Sunday penalty rates were reduced¹³³³ and went on to say:

‘(a), (b) and (c) of paragraph 20, there’s a lot of losses to recoup, that’s so?---It is but it’s a chicken and egg thing really, because for us to - if we just relied on the recouping of the penalty rate we’d be a long time before we actually made good those losses, I can tell you. So if we could determine that it is a better reinvestment of that saving into productivity issues, then we could accelerate the return of profitability. So I think that’d be more along the lines that we would follow.’

‘But they are a long way off from being able to be pursued even if penalty rates were reduced, do you accept that?---Well we’re undertaking a range of measures to improve the business and I think we provided some rostering information as part of the submission which showed we’d dramatically cut overall hours to try and improve the business. We’ve invested in capital equipment to try and improve a lot of the business. So these aren’t just thoughts, these are things that you know ongoing we’ve been doing. We’ve just changed a whole lot of marketing

within the business to try and improve the fortunes of the business. It's not as if we're just simply sitting back, waiting for something else to happen, you know, to improve it. We've actively pursued other things to improve the business as well.¹³³⁴

[1534] Mr Gough was also asked if he had calculated the impact of the proposed reduction in penalty rates:

'I take it you actually haven't sat down and calculated the impact of the proposed reductions in penalty rates on how that would improve your profitability?---Well anecdotally we've looked at what would happen if we operated our bakery, for example, and you know you've got to understand we're just a small business really. We don't have a lot of resources to forecast and to put all of these things together. We don't have a lot of time to do it, but when - we've done quite well in our bakery business and we think that it would do quite well on Sundays and Saturdays. So they're the sorts of discussions and thoughts that we've had.'¹³³⁵

Jorge-Daniel Leroy d'Oreli¹³³⁶

[1535] Mr d'Oreli is the General Manager of Jeanswest. Jeanswest operates 197 stores across all States and the ACT and employs about 1,300 employees of which about 1,154 are employed in retail store positions under the *Retail Award*.¹³³⁷ About 184 of Jeanswest's 197 stores trade on Sundays.¹³³⁸

[1536] Mr d'Oreli details some of the competitive challenges currently facing Jeanswest:

'... international retailers, especially in the apparel and footwear category, continue to see value in the Australian market with the increasing number of new entrants and stores. This has had a clear impact on our sales performance.

Jeanswest Chadstone has seen more and more international brands open with Zara opening in 2012 and Uniqlo opening in 2014. Jeanswest Chadstone which traditionally has been one of our most high profile stores has struggled in recent years.¹³³⁹

[1537] The use of labour by Jeanswest is limited to a percentage of retail sales in each store: 'Store Managers are required to operate within this labour budget, and the business manages Store Manager performance in part on this'.¹³⁴⁰ As to the impact of Sunday penalty rates, Mr d'Oreli says:

'With the increase in labour costs on Sundays, in particular in New South Wales, the Australian Capital Territory and South Australia, Jeanswest has needed to focus on maintaining labour costs at the required percentage of turnover. Given Sunday has continued to grow in importance as a trading day, in order to avoid negative impacts on customer service levels the business has actually *increased* the overall hours worked on Sundays, but at the same time we have sought to limit Sunday activities in terms of the work performed.

Sunday is effectively a "service only" day. This means that the business limits the work performed on Sundays almost solely to selling as there are no stock deliveries and limited administrative tasks to be completed.¹³⁴¹ (emphasis added)

[1538] At paragraph 18 of his statement, Mr d'Oreli sets out some of the measures used to control labour costs on Sundays:

(a) reducing trading hours - several stores trade 11 .30 am to 4.00 pm on Sundays to both reduce overall trading hours, and also in an effort to avoid the need for an unpaid meal break. Such trade hours removes the requirement to roster an additional person for 3 hours to cover the meal break;

(b) rostering employees in such a way to avoid the need for breaks, thereby reducing their individual earning capacity. For example a 6 hour trade day is covered by two employees working 3.25 hour shifts, with one employee working the first half of the day an another working the second half. By rostering in this way neither employee requires a break and therefore no cover is required.¹³⁴²

[1539] During cross-examination, Mr d'Oreli clarified that the reference in paragraph 18(a) of his statement to 'several stores' was a reference to about 10 stores.¹³⁴³

[1540] Mr d'Oreli's evidence is that if Sunday penalty rates were reduced to the rate sought by the Retail Employers, Sunday trading hours would increase:

'Of the 13 stores that are currently closed on Sundays, I expect to re-open 3 stores (1 in Western Australia, 1 in Queensland and 1 in Victoria) on Sundays if the Sunday penalty rates was reduced from its current additional 100% to an additional 50%. Naturally this would result in additional shifts for employees working at those stores, or new opportunities for employment within the business...

As General Manager Retail I believe that all, or at least the substantial majority, of the labour cost savings brought about by a reduction in the Sunday penalty rate would be reinvested into labour hours within stores. With our customers having broader access to online channels, and therefore greater choice. the key offering we have in bricks and mortar stores is the customer experience, a significant part of which is service. Putting more hours into our stores will improve service to our customers.

With a reduction in the Sunday penalty rate Jeanswest would extend the trading hours for 28 stores that currently trade on Sundays. Specifically, there are 8 stores in Western Australia, 3 in New South Wales, 2 in Victoria, 11 in Queensland, 2 in South Australia, and 2 in Tasmania whose trading hours would extend.¹³⁴⁴

[1541] Mr d'Oreli was cross-examined about this aspect of his evidence:

'Now, in paragraph 14 you refer to the 13 stores that are currently closed on Sundays, and you're able to say that you expect to re-open three stores if the penalty rate for Sunday was reduced to 50 per cent. So I take it you have undertaken some sort of analysis or calculation to derive the conclusion?---That's correct. Yes, we have.

All right. And what sort of calculation or analysis did you undertake?---A number of things, mostly that these stores currently cannot afford to trade on those days with the current - so if they were to be reduced, it would be more advantageous to us to trade those days.

Yes. But that outcome is specific to the three stores; the reduction in penalties doesn't change the - doesn't lead you to open the other 10 stores?---There are more factors impacting.

That's right. So what I'm getting at, I suppose, is the analysis that you've undertaken was directed to these 13 stores individually?---Mm-hm...---That's correct.

And is that analysis document?---No

So was it an analysis that you did in your mind?---No. This is done on a quarterly basis all the time. It was just based on the fact that these stores currently cannot afford to trade; and based on a reduction, would more than likely be able to trade...

You look at that most recently occurring information before you make this statement?---I looked specifically at the period that I've discussed in my statement here, which was the period between 2011 and 2014. I'm saying that through a recurring quarterly basis we review and decide whether or not those stores open. So if you're asking me about the latest quarter, whether or not we've made any decisions to change the trading of those stores, no, we haven't, based on the fact that those stores haven't shown any improvement in any other days of the week to warrant an increase.

I see. So in saying to the Commission that if the penalty rates were reduced, you expect to reopen three stores, did you reach that conclusion by analysing the data from 2011 to current time?---Yes.¹³⁴⁵

Peter Christian Antonieff¹³⁴⁶

[1542] Mr Antonieff is a director of Prapla Pty Ltd owner of FoodWorks Oxley, which is located on a shopping strip in Oxley, Queensland. Mr Antonieff bought the business in 2004.

[1543] FoodWorks Oxley employs 7 employees (including Mr Antonieff and his wife) all employed under the *Retail Award*. The business trades 7 days a week, from 6.00 am to 7.30 pm. Sundays account for about 15.7 per cent of weekly trading which is the second best trading day (after Saturday).

[1544] Mr Antonieff observes that the business is experiencing a number of competitive challenges:

‘In July 2013 a Woolworths supermarket opened next door to FoodWorks Oxley. Since this time, FoodWorks Oxley had experienced a significant decline in sales, as some customers have been shopping at Woolworths.’¹³⁴⁷

[1545] Mr Antonieff notes that with the commencement of the *Retail Award* Sunday penalty rates progressively increased (from 150 per cent to 200 per cent). Since 2008, the business has reduced both its overall rostered hours and the rostered hours on Sundays:

‘A comparison of the Sunday hours and total hours rostered in 2008 with the Sunday hours and total hours rostered in 2013, as shown in paragraph 15 of this statement, shows that the hours rostered on Sundays and total hours rostered had decreased in 2013. On average the hours rostered on a Sunday had decreased by 14.25 hours per week, and the hours rostered overall had decreased by an average of 52 hours per week. These changes were made primarily due to the increasing cost of labour on Sundays.

As discussed earlier in my statement, a Woolworths supermarket opened next door to FoodWorks Oxley in July 2013. There has been a significant decline in hours rostered on Sundays and hours rostered overall from 2013 onwards. This is partly attributed to the opening of the Woolworths and therefore the decline in sales, but has also been due to the rate of pay on Sundays.’¹³⁴⁸

[1546] At paragraph 18 of his statement, Mr Antonieff sets out some of the measures used to control labour costs on Sundays:

- ‘(a) the store is prepared for the weekend on Friday (for example ensuring all products are fully stocked) so that no extra hours across the weekend need to be used for this task;
- (b) we roster more junior employees on Sundays, as their hourly rate is lower than the more senior employees;
- (c) we have ensured that no deliveries arrive on Sundays, which means that no hours on Sundays are used for unloading deliveries and employees can concentrate on sales; and
- (d) Sunday is effectively a “service only” day. This means that the business limits the work performed on Sundays almost solely to selling. We do not carry out any stock replenishment (unless there is no stock of a particular item on display), we do not do any store cleaning and no administrative tasks are completed.’¹³⁴⁹

[1547] In addition to these measures, since 2014 both Mr Antonieff and his wife commenced working significant rostered hours in the business (including on Sundays). Mr Antonieff’s evidence is that if Sunday penalty rates were reduced (from 200 per cent to 150 per cent) then he and his wife would work less hours ‘which would mean there would be more hours of work available to other employees’.¹³⁵⁰

[1548] Mr Antonieff was cross-examined about this aspect of his evidence:

‘In paragraph 19 you say that if penalties were reduced for Sundays you and your wife would work less hours. You mean in particular you would work less hours on a Sunday, is that right?--Correct. I have a young family, I have three kids. You know, our work commitments which is what we signed up for, I don’t have a problem with that, but I’m sure that the Commission would appreciate the fact that it would be better for a wage earner to earn the wage on a Sunday, so I give those hours back, and in return I also get a quality of life back and spend time with my kids as well.

So what do you want to spend your time with on Sundays instead of working Sundays?---With my family.

When you say you would work less Sunday hours I take it that if that happened that time that you currently spend working on Sundays you would then work all or most of that time during weekdays in the business. Would that be likely to be so?---On the business.

On the business?---On the business.’¹³⁵¹

Belinda Daggart¹³⁵²

[1549] Ms Daggart purchased the Bakers Delight franchise in Lavington, NSW, in July 2002. Prior to purchasing the business, Ms Daggart was the manager of Bakers Delight Lavington for 3 years (under different ownership).

[1550] Bakers Delight Lavington employs 18 employees (7 full-time, 1 part-time and 10 casual) most of whom are covered by the *Retail Award*. The business trades 7 days a week: 7.00 am – 7.00 pm Monday to Wednesday and on Friday; 7.00 am – 8.00 pm on Thursday and 7.00 am – 6.00 pm on Saturday and Sunday. Over the past 10 years, Sunday has become

an increasingly important trading day for the business and currently accounts for about 12 per cent of weekly trading.

[1551] The commencement of the *Retail Award* progressively increased Sunday penalty rates for NSW retail businesses (from 150 per cent to 200 per cent). The business responded to the increase in Sunday labour costs by reducing the number of hours rostered on Sundays (by 31 per cent) and across the whole week (by 11.6 per cent).¹³⁵³

[1552] At paragraph 19 of her statement, Ms Daggart refers to the other methods used by the business to reduce the cost of trading on Sundays:

‘a) making Sunday a “service only day”. This means that the business limits the work performed on Sundays almost solely to selling. The bakers and sales assistants only perform a small number of cleaning duties in comparison to the cleaning duties they undertake on weekdays and no administrative duties are undertaken;

b) approximately five years ago we decided to close the store at 6.00pm on Sundays, being an hour earlier than we had previously closed. This decision was made because of the rising cost of Sunday labour.

c) the bakers bake until 11 am on Sundays, in comparison to Monday to Friday when they bake until 4.00pm and on Saturdays when they bake until 2.00pm. We made this decision to cut back the baking hours on Sundays as a result of the cost of labour.

d) we no longer provide tastings on Sundays. From Monday to Saturday we have one sales assistant take tastings of various products around the shopping centre for anywhere between one to two hours in order to entice customers to the store. We ceased doing this on Sundays gradually over the last 12 months because we cannot afford to have a sales assistant performing this duty at the Sunday rate of pay;

e) we roster more junior employees to work on Sundays. We always have one senior employee working on Sundays in an attempt to ensure we maintain customer service, however we have noticed a negative impact in this as generally the more junior employees tend to be less experienced and have less developed communication skills;

f) my father, also a Director of Bakers Delight Lavington, and I both work every Sunday, my father in a baking capacity and myself either as a baker or in a sales capacity, in order to reduce the cost of labour on Sundays.¹³⁵⁴

[1553] Ms Daggart’s evidence is that if Sunday penalty rates were reduced (from 200 per cent to 150 per cent) then her ‘preferred operating structure’ would include:

‘a) I would not work on the weekends, which would mean I would roster another employee to work;

b) I would roster the more senior casual employees on Sundays, as they would provide better customer service; and

c) I would roster bakers until 2.00pm on Sundays (as opposed to 11am which is currently the case).¹³⁵⁵

[1554] Ms Daggart was questioned about the proposition at a) above:

‘One of those things understandably is that you say that you would not work on the weekends which would mean that you’d roster another employee to work. I presume that’s just to regain some of your work/life balance, is it?---Yes, because I have young children.

Would I be right in assuming that you’d be wanting to spend time with your children on a Sunday instead of work?---Yes, because they go to school during the week, so I don’t see them during the week.’¹³⁵⁶

[1555] Ms Daggart also notes that a reduction in the Sunday penalty rate would provide an additional 103.75 hours (at ordinary rates) that could be rostered in the business without having any negative impact on the labour cost target (i.e. labour costs are limited to 35 per cent of retail sales). As Ms Daggart also says:

‘I would put all of these hours back into the business, as I believe that this would drive stronger sales’.¹³⁵⁷

[1556] Ms Daggart was cross-examined about the above statement:

‘You say that you believe that putting these hours back into the business would drive stronger sales, have you done the analysis to suggest that that’s in fact the case, that that in fact would be the case? More rostered hours would drive stronger sales?---Well at the moment I’m currently trialling with having three staff members on a closing shift in the afternoons and our sales are growing a little bit each week at the moment. So we’re getting an extra few customers per shift a week, so that’ll just be a thing that you have to sort of play with and see whether it’s going to work or not. But I know that having had more senior staff on at different times of the day has helped grow our business because from this time last year, we’re up 150 customers approximately a week and we’ve got more senior staff in the business now than what we had 18 months ago.’¹³⁵⁸

[1557] The SDA submits that the Retail Employers lay witnesses ‘made important concessions on a number of key issues which had the effect of undermining the cogency of the particular contentions sought to be made by the employer parties’.¹³⁵⁹ Appendix 1 to the SDA’s submissions is a table which particularises the employer contentions and provides an analysis of the evidence upon which the employers rely in support of those contentions. We have reviewed all of this material.

[1558] As put by the SDA, we accept that demand or sales is a key driver of labour allocation. But it is also clear that it is common for retail businesses to fix labour budgets to a proportion of retail sales, hence labour costs, such as Sunday penalty rates, (or sales) may impact on the amount of labour rostered.

[1559] We also accept that the lay evidence provides little support for the contention that increased Sunday penalty rates in NSW negatively impacted employment and labour hours in the retail industry (see particularly [1508]–[1510] above).

[1560] We acknowledge that there are some limitations in the Retail Employers lay evidence and that the evidence as to future intentions is somewhat guarded, necessarily so. Despite this we found that the evidence was presented in a clear and forthright manner by persons with significant experience in the Retail sector. Further, collectively, the Retail Employers lay evidence covers 749 retail stores operating in various market segments, across all Australian

States and Territories, and the businesses concerned employ some 6155 employees covered by the *Retail Award*.

[1561] Subject to the limitations noted above, we consider that the Retail Employer's lay evidence is cogent, relevant and persuasive.

[1562] As mentioned earlier, ABI and the Retail Employers also relied on expert evidence and survey evidence in support of their claims. We have dealt with the evidence of Professors Lewis and Rose in Chapter 6, though we will return to part of Professor Rose's evidence shortly. ABI also rely on evidence of a survey of retail sector employees and the Retail Employers relied on expert evidence for Dr Sands.

[1563] ABI called Ms Emily Baxter, a lawyer for the Australian Business Lawyers Advisors (ABLA) who presented an analysis of a survey undertaken by ABLA of employers.¹³⁶⁰

[1564] ABLA developed a survey in July 2015 using the Survey Monkey program for the purpose of collecting evidence from employers in the retail industry on their trading and rostering practices (the 'Retail survey').¹³⁶¹ Ms Baxter was not involved in developing the survey.¹³⁶²

[1565] The survey was sent to a number of employer organisations who then sent it to their members. Baxter's evidence was that 8700 members were sent the survey and 690 responses were received. The survey analysis was based on the responses of the 485 businesses who confirmed that the *Retail Award* applied to their business and that they were not covered by an enterprise agreement.¹³⁶³

[1566] The survey results may be shortly summarised:

- 88.3 per cent of respondents indicated that Sunday trading hours are lower than weekdays;¹³⁶⁴
- the majority of respondents indicated that public holiday trading hours were lower than weekday trading hours (ranging from 83.4 per cent on Melbourne Cup/Show Day, to 98.1 per cent on Christmas Day);¹³⁶⁵
- 88.9 per cent rostered fewer employees on a Sunday than a weekday;¹³⁶⁶ and
- 90.5 per cent rostered fewer employees on a public holiday than a weekday.¹³⁶⁷

[1567] Answers could be provided to survey questions by either multiple choice or 'free text' where businesses could provide more than one answer. The free text responses were grouped into seven categories, including 'wages/costs'. The responses are summarised below:

- (i) For those whose trading hours were lower on a Sunday, the main reason was wages/costs (53.18 per cent).¹³⁶⁸
- (ii) For those whose trading hours were lower on a public holiday, the main reason was also wages/costs (62.55 per cent).¹³⁶⁹

- (iii) For those who responded that rostering of employees differed on a Sunday to weekdays or Saturdays, 80.77 per cent responded wages/costs as the reason.¹³⁷⁰
- (iv) For those who responded that rostering of employees differed on public holidays to weekends or weekdays, 75.68 per cent responded wages/costs as the reason.¹³⁷¹

[1568] ABI submits that the survey is broadly representative of employment across Australia based on responses from employers in each State and Territory¹³⁷² and is a ‘reliable source of information’ for employers in the industry.¹³⁷³

[1569] The Retail Employers submit that the survey provides evidence that:

- the current Sunday penalty rate (200 per cent) limits and reduces trading hours on Sundays;¹³⁷⁴
- the current Sunday penalty rate offers fewer hours of work to employees than other days;¹³⁷⁵ and
- overall labour hours in retail stores will increase after a reduction in the penalty rate.¹³⁷⁶

[1570] The SDA contends that no weight should be given to the survey results,¹³⁷⁷ for the following reasons:

- Ms Baxter had no direct knowledge of the terms upon which the employer organisation distributed the survey or the proportion of the total membership who were sent the survey;¹³⁷⁸
- a response rate of 7.9 per cent was “extremely low”;¹³⁷⁹
- the conduct of surveys as discussed in the *Annual Wage Review 2012–13* decision on representativeness of surveys, particularly of membership bases;¹³⁸⁰
- there is no way of ascertaining whether the sample is representative of employer organisations’ membership or employers more broadly;¹³⁸¹
- many respondents did not answer all of the questions, and only four questions were completed by all respondents;¹³⁸²
- based on the grouping of answers to why trading hours differed on Sundays, such as wages/costs, “very little” can be concluded on the role of wages, including penalty rates;¹³⁸³ and
- the survey results reflect perceived rather than actual effects.¹³⁸⁴

[1571] As we have explained earlier, and as described in the *Annual Wage Review 2012–13* decision, if survey material such as this is to be regarded as definitive we need to be confident

that it is a reliable representation of the target population, in this case, retail businesses. In particular:

‘If a membership list is used as the basis for a survey, then it is essential that those that respond are properly representative of the entire membership base (e.g. by firm size, form of ownership, industry sector, geographic location). Where this is not the case, then the responses become more like case studies or anecdotes—accounts of the situation of those who did respond, but not to be taken as representative of the survey population (e.g. the membership) as a whole.’¹³⁸⁵

[1572] We are not satisfied that the Retail survey can properly be said to be representative of all retail businesses. While providing the survey to all members of employer groups would maximise the total number of responses, the number of businesses that responded to the survey is relatively low. This could lead to biased results as the sample may not represent the retail business population.

[1573] Further, although a breakdown of businesses by State and Territory is provided, we have no information about the breakdown by business size which would be beneficial in determining the representativeness of the survey.

[1574] For the reasons given we reject the proposition that the results of the Retail survey can be extrapolated to all businesses covered by the *Retail Award*. However, we also reject the SDA’s submissions that we give no weight to the survey. As mentioned earlier, the assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. The central issue is the extent to which a survey’s limitations impact on the reliability of the results and the weight to be attributed to those results. Given the limitations of the Retail survey we propose to treat the survey results as suggestive or anecdotal, rather than definitive.

[1575] The SDA also relies upon expert evidence provided by:

Kevin Kirchner, Principal, Fulcrum Economics Australia;¹³⁸⁶

Helen Bartley, Bartley Consulting;¹³⁸⁷

Prof Morris Altman, Dean & Head, Newcastle Business School and Professor of Behavioural & Institutional Economics, University of Newcastle;¹³⁸⁸

Dr Ian Watson, freelance researcher and Visiting Senior Research Fellow, Macquarie University and SPRC, UNSW;¹³⁸⁹

Prof David Peetz, Professor of Employment Relations at the Centre for Work, Organisation & Wellbeing, Griffith University;¹³⁹⁰

Serena Yu, labour market researcher at the Workplace Research Centre, University of Sydney;¹³⁹¹

Prof Sara Charlesworth, Australian Research Council Future Fellow and Professor at the Centre for Sustainable Organisations and Work, within the School of Management at RMIT University;¹³⁹² and

Dr Fiona Macdonald, Vice Chancellor's Senior Research Fellow at the Centre for Sustainable Organisations and Work, within the School of Management at RMIT University.¹³⁹³

[1576] We have already dealt with the evidence of Ms Bartley, Professor Altman, Dr Yu, Professor Charlesworth and Dr McDonald, in Chapter 6. We have also dealt with the evidence of Dr Watson and Professor Peetz in Chapter 8.1, the overview of the Retail sector.

[1577] Mr Kirchner's evidence responds to Dr Sands' expert report. It is convenient to deal with Dr Sand's evidence now.

[1578] Dr Sands is Research Director at the Australian Centre for Retail Studies, Monash University, and he provided a report *Retail Award Research* (the Sands Report).¹³⁹⁴

[1579] The Sands Report contained three sections:

- (i) an analysis of trends in the retail industry;
- (ii) the 'shopfloor employee perspective'; and
- (iii) the retailer perspective.

(i) Trends in retail trade

[1580] This part of the Sands Report discussed trends in the performance of the Retail trade industry using data from the ABS, NAB and the Shopping Centre Council of Australia.

[1581] ABI submits that the Sands Report shows that the retail industry:

- generates revenue of \$380 billion per year;¹³⁹⁵
- accounted for around 2 per cent of investment at June 2015;¹³⁹⁶
- accounted for around \$20 billion in company gross operating profits at September 2015; and

[1582] ABI also submits that the Sands Report shows that retail employment:

- increased by more than all other industries over the past 20 years;¹³⁹⁷ and
- accounted for around 9 per cent of actual hours worked per week in all jobs and 8 per cent of wages at September 2015.¹³⁹⁸

[1583] The SDA called Kevin Kirchner, Principal of Fulcrum Economic Australia, to provide a response to this part of the Sands Report.¹³⁹⁹ The SDA submits that the following findings can be made on Mr Kirchner's uncontested evidence:¹⁴⁰⁰

- retail sales have grown in real terms over the period 2010 to 2014–15;¹⁴⁰¹

- total profits across Retail trade have remained at a strong level¹⁴⁰² and have exceeded the record level reached around 2008;¹⁴⁰³
- profit margins from 2010 to 2015 were at strong levels and around historical highs despite a decline in the past 12 months;¹⁴⁰⁴
- wages have not grown at a faster rate than wages growth across the whole economy;¹⁴⁰⁵
- the number of persons employed and aggregate hours worked have increased in recent years;¹⁴⁰⁶ and
- the number of persons employed aged 15–19 years has declined over recent years while the number of persons employed in other ages has increased.¹⁴⁰⁷

[1584] We have had regard to this part of the Sands Report and to Mr Kirchner’s evidence. The evidence, together with the data in Chapters 8.1 and 8.2.3, provides part of the context within which the claims before us are to be determined.

[1585] In regards to consumer trends, the Retail Employers submit:

- consumers demand access to retail businesses on Sundays, foot traffic across a portfolio of stabilised shopping centres showing an increase of 5.8 per cent on Sundays;¹⁴⁰⁸
- shopping centre leases mandate that tenants open on Sundays;¹⁴⁰⁹ and
- retail businesses would lose customers to competitors if they closed on Sundays.¹⁴¹⁰

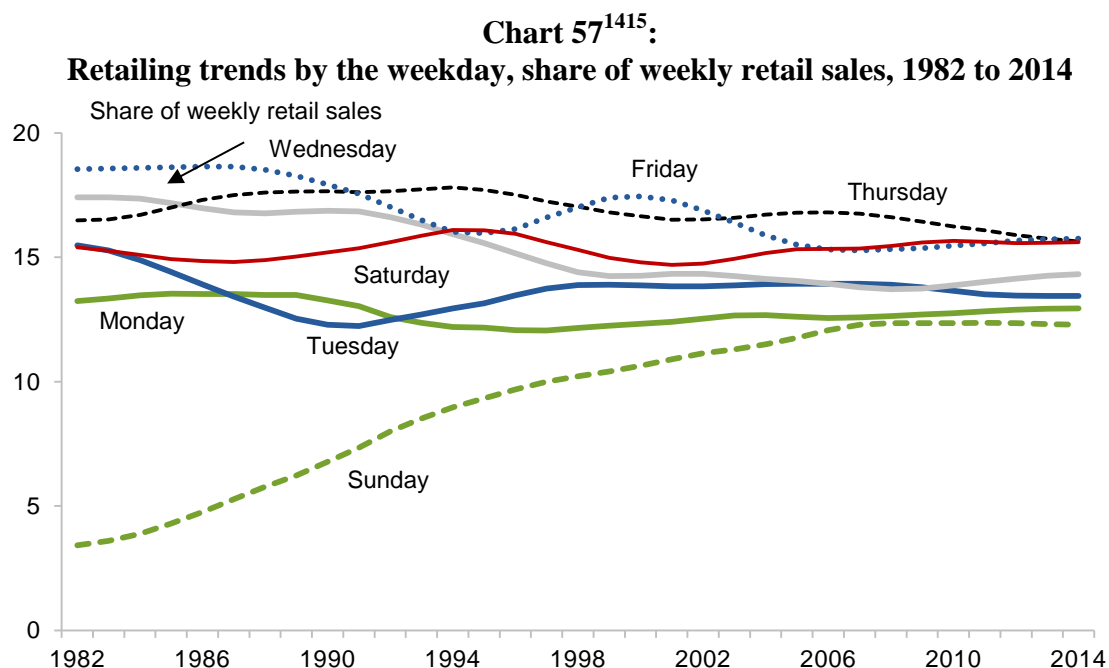
[1586] ABI submits that the Sands Report shows that a range of factors drive the demand for Sunday trading, including the need to balance competing work-life pressures and to connect with family members by spending time shopping together.¹⁴¹¹ As a result, Sunday has become the shopping day of choice for many consumers, accounting for 10–25 per cent of some retailers’ weekly trade.¹⁴¹²

[1587] The SDA also submit that Dr Sands accepted in cross-examination that he had potentially jeopardised the representativeness of the sample used for the retailer interviews by including in the invitation to potential survey participants a statement that the research will be used to seek a reduction in the Sunday penalty rate under the Retail Award. The inclusion of such a statement may have made it more likely that those with strong feelings in favour of a reduction in Sunday penalty rates would participate in the interviews.¹⁴¹³

[1588] We note that the PC Final Report also considered trends in retail trading across days of the week and it is convenient to refer to that material now.

[1589] The PC Final Report concludes that the share of weekly sales on Sundays have gone from a relatively small proportion to resemble that of other days of the week. This point is illustrated in data from the ABS that compared the share of weekly retail sales by each day of

the week (Chart 57). While still the lowest proportion across the days of the week, the proportion of retail sales on Sundays increased from less than 5 per cent in 1982 to be relatively more comparable with the remaining days of the week in 2014, particularly Monday and Tuesday.¹⁴¹⁴ This suggests that although consumer demand for shopping on Sundays has increased significantly since the early 1980s, the preference to shop still remains higher on Saturdays than Sundays.

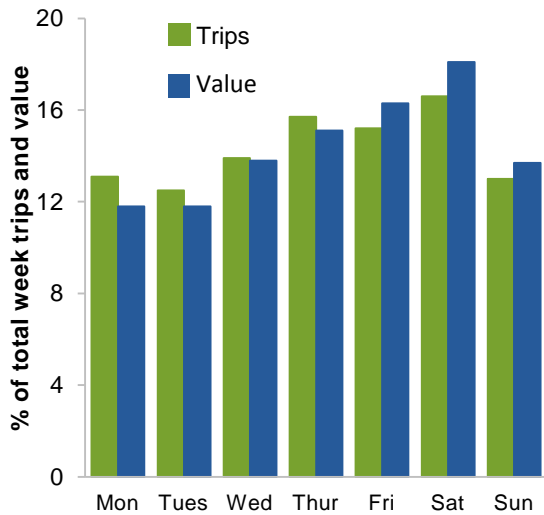


Note: Based on estimating trading days effects on ABS monthly retail data.

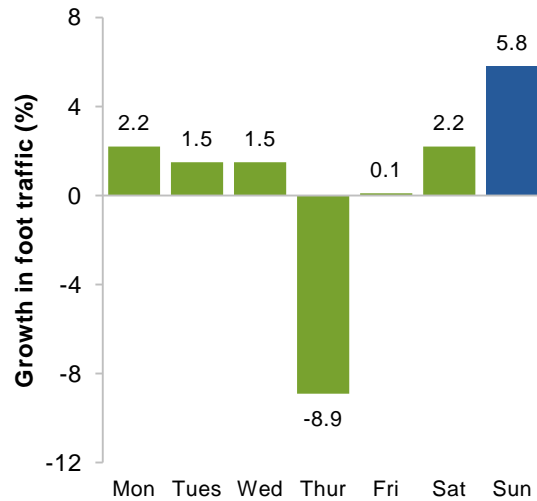
[1590] The PC Final Report also commented that there is some evidence that consumers are taking advantage of longer trading hours by making more frequent trips to supermarkets. This was provided in data showing that the number of supermarket trips and the value of transactions on Sundays are higher than Mondays and Tuesdays, although still below Saturdays (Chart 58). Additional data is used to show that the growth in average daily foot traffic in shopping centres between 2009 and 2014 was greater for Sunday than the remaining days of the week.¹⁴¹⁶

Chart 58¹⁴¹⁷:
Growth and significance of shopping by weekdays

Supermarket trips and transaction values by day, year ending August 2013



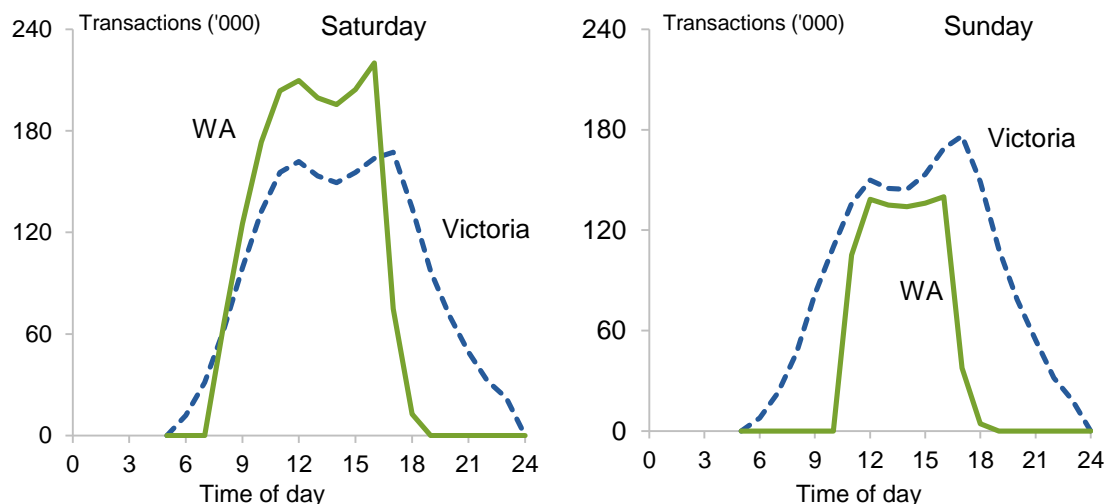
Growth in average daily foot traffic in shopping centres, 2009–2014^a



Note: a The Shopping Centre Council of Australia obtained six years of data (between 2009 and 2014) pertaining to centre foot traffic for ‘stabilised’ centres, that is those that are unaffected by development from the beginning to the end of the analysis period, across most states. Further, data were used from centres that were already subject to seven day trade and therefore could be considered ‘super stable’ centres. Using 2009 as the ‘baseline’ for the analysis, the change in foot traffic was then calculated over the following five years. The data relates to shopping centres owned by one major shopping centre provider. The results exclude Western Australia, where Sunday trading has only been permitted since 2012, and also exclude the ACT, Tasmania and the Northern Territory either because they did not have stabilised centres, or the dataset was not sufficiently reliable.

[1591] The PC Final Report argued that lowering penalty rates would have effects that mimic the relaxation of trading hours, where consumers have benefited through greater convenience and variety.¹⁴¹⁸ This is said to be demonstrated by comparing the number and timing of transactions between jurisdictions with and without restrictions on trading hours. To do this, the PC Final Report presented data that compared the average daily transactions for Coles’ supermarkets between Victoria and Western Australia. Chart 59 reproduces the charts from the PC Final Report which compared the average daily transactions for Saturday and Sunday.

Chart 59¹⁴¹⁹:
Longer weekend opening hours, Victoria and Western Australia, 2012–2013



Note: Average daily Coles' supermarket transactions. A transaction represents the purchase of any basket of goods that generates a receipt.

[1592] The Productivity Commission contends that Chart 59 shows that weekend trading hour restrictions not only reduce the aggregate number of transactions but also confine transactions to a short period.¹⁴²⁰

[1593] Chart 59 indicates a response by consumers to longer trading hours through a greater number of transactions, especially on Sundays. The increase in demand for retail services highlights that consumers derive a benefit from longer trading hours and also respond to such changes.

(ii) Retail employee focus group and survey material

[1594] The second part of the Sands Report involved an analysis of focus groups and an online survey of shopfloor employees' perspective on motivation and satisfaction, working weekdays versus weekends, Sunday work and observations of customer shopping preferences. The information from the focus groups informed the development of the online survey. Much of the analysis compared employees that were reliant on the *General Retail Industry Award 2010* with employees on enterprise agreements.

[1595] The focus groups contained 48 shopfloor employees across Sydney, Melbourne, Brisbane, Adelaide, Hobart and Perth, aged between 20 and 55 years, with between 1 and 35 years of shopfloor experience and between 6 months and 25 years of employer tenure.

[1596] The online survey comprised 1009 shopfloor employees, of which 506 worked on Sundays, and was conducted in April 2015. Dr Sands described the survey as representative of the 'shopfloor' working population according to gender, age and location. The survey respondents were aged between 18 and 58 years.

[1597] The survey reported that 44 per cent of respondents were reliant on the *General Retail Industry Award 2010*, 31 per cent were covered by an enterprise agreement and 25 per cent were not sure of their industrial arrangement.

[1598] Some of the key findings from the focus groups included:

- shopfloor employees reported that permanent staff are mostly employed on weekdays and casual are mostly employed on weekends;¹⁴²¹
- working on weekends was more focused on trade and customer service delivery, and the pace of work was faster;¹⁴²² and
- shopfloor employees reported that there were differences in the way customers shop between weekdays, evening/nights and weekends. Customers on weekdays were more likely to be buying something specific or browsing for a potential purchase, customers on evenings/nights were more 'rushed', while customers on weekends were more likely to purchase 'big ticket' items.¹⁴²³

[1599] The key findings of the online survey showed that:

- For all employees:
 - 44 per cent of employees reported a high level of satisfaction with working in the industry (responding 8–10 out of 10);
 - around 72 per cent of respondents worked weekends and around 37 per cent worked evenings/nights;
 - those aged under 25 years were less likely to work weekdays and more likely to work on weekends;¹⁴²⁴
- For those who worked weekends:
 - they were more likely to work on Saturdays than Sundays;
 - around 46 per cent of employees that worked on Sundays work every Sunday, and a further 30 per cent worked on a Sunday once a fortnight;
 - almost half of employees reported no real change in the availability of Sunday hours over the past five years;
 - over half of respondents reported that their workload on Sundays was about the same as any other day, with almost one-third reporting "more work to do";
 - around two-thirds responded that the key benefit of working Sundays was increased pay, with the next most common response being "having a weekday off" reported by around one quarter of respondents;
 - the main difficulty with working on Sundays was the "impact on the ability to spend time with family/friends" reported by over half of respondents;

- over half of respondents, particularly those on the *Retail Award*, reported hardly ever having the ability to make up time for community, sporting or cultural events during the week;
 - over half of respondents on EBAs and around four in ten on the *Retail Award* reported hardly ever being able to make up time for family and friends during the week, with the main reason being friends/family were not available at other times;
 - shopfloor employees were asked to rate their willingness to work on Sundays (from 0 to 10) at various penalty rates and, while the willingness to work increased relatively rapidly from no penalty rate to a 50 per cent penalty rate, the willingness to work increased at an “incremental” rate from a 50 per cent to 100 per cent penalty rate.¹⁴²⁵
- For employees that did not work on Sundays:
 - those on EBAs were more likely to report this was due to contractual arrangements, while those on the *Retail Award* were more likely to report that the store is closed on Sundays; and
 - almost half reported that nothing would motivate them to work on Sundays.¹⁴²⁶

[1600] ABI submits that the Sands Report identified individuals who benefit from weekend work, including employees aged 24 years and under, finding a statistically significant difference between young and older employees in relation to the imposition of weekend work on time spent with family and friends.¹⁴²⁷

[1601] The Retail Employers submit that:

- many retail employees choose, or are happy, to work on Sundays because it suits their personal circumstances and allows flexibility around non-work commitments;¹⁴²⁸
- 46 per cent of surveyed retail employees work every Sunday;¹⁴²⁹
- employees will continue to work in retail if the penalty rate is reduced to 50 per cent;¹⁴³⁰
- retail employees willingness to work and satisfaction with working on Sundays increased “substantially” from no penalty rate to a penalty rate of 50 per cent, yet increased “incrementally” from 50 per cent to 100 per cent;¹⁴³¹
- 53 per cent of non-Sunday workers would work on Sunday if they could, with a “substantial” majority not requiring higher pay to do so,¹⁴³² and

- 81 per cent of Sunday employees did not believe it had an adverse impact on their health.¹⁴³³

[1602] ABI also suggested the Sands Report identified advantages from working on Sundays, including:

- flexibility around life commitments;
- faster pace and increased sales opportunities of weekend trade;
- easier parking; and
- having a weekday off.¹⁴³⁴

[1603] ABI submits that only a “minority” of respondents (17 per cent) saw no real benefit in working on a Sunday, with penalty rates not the sole motivator for people undertaking weekend work.¹⁴³⁵

[1604] The Retail Employers observed that retail employees find working on Sundays difficult due to the limited number of staff, inexperienced staff and lack of managerial support.¹⁴³⁶ The Retail Employers also made reference to the following findings in the Sands Report:

- only 5 per cent of retail employees who do not work on Sundays cite religious reunion or observance and no retail employees in the focus groups identified these reasons;¹⁴³⁷
- family events can be, and are, arranged around Sunday work;¹⁴³⁸ and
- social interactions can be, and are, arranged around Sunday work.¹⁴³⁹

[1605] The Sands Report found that 72 per cent of retail employees work weekends.¹⁴⁴⁰ However, Dr Sands agreed that this may be an overestimate as Dr Watson found that 62 per cent of the total retail workforce usually worked on weekends by using the HILDA survey.¹⁴⁴¹

[1606] In cross-examination, Dr Sands conceded that:

- while the most common reason for not working Sundays was contractual arrangements, the analysis assumed that employees would otherwise be willing to work Sundays;¹⁴⁴² and
- for employees that work Monday to Friday, nothing is going to motivate them to work Sundays.¹⁴⁴³

[1607] The SDA highlighted what it submits are weaknesses in the Sands Report:¹⁴⁴⁴

- the employee focus groups consist of qualitative research and are not representative of the broader industry;¹⁴⁴⁵ and

- the findings of the employee online survey contain overestimates when compared with data from the HILDA survey from Dr Watson.¹⁴⁴⁶

[1608] The SDA also submitted that the employee survey:

- failed to ask participants that worked on Sunday whether this was because it was a requirement imposed by their employer or roster;¹⁴⁴⁷ and
- neglected to take account of the possibility of loss aversion.¹⁴⁴⁸

[1609] If the Commission were to give weight to the results of the employee survey, as proposed by the Retail Employers, then the SDA submits that weight should also be given to the following findings that support the conclusion that the Sunday penalty rate be retained:¹⁴⁴⁹

- 80 per cent of Sunday employees observed no real change or an increase in the availability of Sunday hours over the last five years;¹⁴⁵⁰
- The “vast majority” of employees that do not work on Sundays state that nothing will motivate them to work on a Sunday;¹⁴⁵¹
- The main difficulty with Sunday work is the impact on the ability to spend time with family/friends;¹⁴⁵²
- 86 per cent of Sunday employees hardly ever or never are able to make up time to attend community, sporting or cultural events during the week;¹⁴⁵³ and
- 29 per cent of Sunday employees with children believe that Sunday work has an adverse impact on the health and development of their children.¹⁴⁵⁴

(ii) Interviews with retail managers

[1610] The final part of the report involved 14 in-depth interviews with 16 retail managers (some involved multiple managers), from 3 small (fewer than 20 employees); one medium (20–199 employees) and 12 large retailers (200+ employees). Only one of the retailers did not trade on Sundays and who “recently made this decision due to high labour costs and an inability to work 7 days a week”.¹⁴⁵⁵ Further, the retailers that did trade on Sundays did not open all of their stores. Dr Sands noted that it is common for stores not located in shopping centres and in more regional locations to be closed on Sundays with operators in shopping centres “forced to open” on Sundays due to leasing agreements or to avoid losing business.¹⁴⁵⁶

[1611] The types of strategies used to reduce labour costs on Sundays included limiting opening hours, rostering junior or casual employees; rostering shorter shifts (without breaks); reducing the number of employees during quiet periods; and owners working by themselves.¹⁴⁵⁷ Dr Sands commented that retailers have strategically dedicated weekends to sales while other operational activities such as administration, inventory management, re-stocking and cleaning are performed on weekdays.¹⁴⁵⁸

[1612] Sundays were described by retailers as a busy shopping and trading day. According to the retailers surveyed, the busiest retail areas on Sundays are clothing and apparel, furniture

and homewares, sporting goods and outdoor living.¹⁴⁵⁹ Retailers perceived the consequences of not trading on Sundays to include:

- loss of sales;
- breach of contractual agreement with shopping centres;
- loss of goodwill;
- loss of customers and sales to competitors; and
- loss of staff due to less available work hours.¹⁴⁶⁰

[1613] Other key information provided by retailers included:

- the proportion of weekly trade attributed to Sundays is dependent on store location, with higher proportions in metropolitan areas and in warmer seasons; and
- employees most commonly available to work on Sundays are those with full-time commitments on weekdays (e.g. another job or studying) and those with weekday caring responsibilities.¹⁴⁶¹

[1614] The Retail Employers submit that the Sands Report presents evidence that businesses respond to a double time penalty rate on Sundays by:

- closing stores on Sundays;¹⁴⁶²
- limiting and reducing trading hours on Sundays;¹⁴⁶³
- limiting operational activities such as administration tasks, inventory management, stock replenishment, cleaning, and limiting deliveries to days other than Sunday;¹⁴⁶⁴
- offer fewer hours to employees on Sunday than other days;¹⁴⁶⁵
- offer fewer hours to employees on days other than Sundays in response to an inability to reduce Sunday hours any further;¹⁴⁶⁶
- structuring rosters to eliminate breaks and shift crossover;¹⁴⁶⁷
- rostering younger and less experienced employees on Sundays¹⁴⁶⁸ which is negatively impacting service delivery;¹⁴⁶⁹ and
- owners and family members working on Sundays.¹⁴⁷⁰

[1615] Further, the Retail Employers submit that the Sands Report supports the proposition that if there is a reduction in penalty rates on Sundays then retail businesses are likely to:

- roster more hours on activities such as restocking;¹⁴⁷¹

- roster more hours on Sundays, including to managers and experienced staff members¹⁴⁷²; and
- expand operational activities;¹⁴⁷³

[1616] ABI highlight that the qualitative analysis provided evidence of the steps taken to address wage costs on Sundays, such as:

- rostering of casual, younger and “cheaper” employees;
- reducing Sunday labour budgets;
- performing only service delivery and not other activities such as stock resupply;
- shorter shifts; and
- fewer management staff.¹⁴⁷⁴

[1617] As to the various criticisms of aspects of the Sands Report we accept that the employee focus group data and the retailer interviews constitute qualitative research, hence, as Dr Sands acknowledged, the results are not ‘generalisable or representative ... in a qualitative sense’.¹⁴⁷⁵ We also note that not all of the comments in respect of particular issues are sourced from answers to questions concerning those issues. However, as Dr Sands observes, focus group research involves an iterative conversation and attempts to identify the themes emerging from that conversation.¹⁴⁷⁶ Despite the limitations of qualitative research it can provide more detail and context to assess in gaining a deeper understanding about a particular issue.

[1618] In relation to the employee survey aspect of the Sands Report, due to various limitations in the survey design, we are not satisfied that it can be said to be representative of the views of retail employees generally. Given these limitations we propose to treat the survey results as suggestive or anecdotal, rather than definitive.

(ii) *Conclusion on the ABI and Retail Employers evidence*

[1619] A number of general propositions can be drawn from the Retail Employers lay evidence, the Retail survey and the Sands Report:

- (i) Sunday is a significant trading day for retail businesses,¹⁴⁷⁷
- (ii) In order to maintain profitability it is common for retail businesses to fix labour budgets to a proportion of retail sales, hence changes in labour costs (or sales) may impact on the amount of labour rostered.¹⁴⁷⁸
- (iii) The current level of Sunday penalty rates has led employers to take measures to reduce the labour costs associated with trading on Sunday, including:
 - closing stores,¹⁴⁷⁹

- restricting trading hours on Sundays,¹⁴⁸⁰ 88.3 per cent of respondents to the Retail survey said that their Sunday trading hours are lower than weekday trading hours¹⁴⁸¹ and the main reason given was wages/costs (58.18 per cent),¹⁴⁸²
- limiting the activities performed, so that Sundays are effectively limited to customer service and selling,¹⁴⁸³
- operating with less experienced junior employees,¹⁴⁸⁴
- owners of the retail business work on Sundays instead of rostering employees.¹⁴⁸⁵

[1620] The evidence also supports the proposition that a lower Sunday penalty rate would increase service levels with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees). In particular, a reduction in Sunday penalty rates is likely to lead to:

- more stores being open on Sundays,¹⁴⁸⁶
- increased Sunday trading hours,¹⁴⁸⁷
- a reduction in hours by some owner operators,¹⁴⁸⁸
- an increase in overall hours worked in retail stores,¹⁴⁸⁹ 65.5 per cent of respondents to the Retail survey said that they would allocate more hours to employees on Sunday if the Sunday penalty rate was reduced (from 200 per cent to 150 per cent).

[1621] It is not suggested that the likely changes identified above will apply uniformly across all retail businesses. The actual impact of a reduction in Sunday penalty rates will depend on the circumstances applying to individual businesses or stores. An assessment of a range of considerations (including the level of Sunday penalty rates) may mean that particular businesses or stores do not change their existing Sunday trading hours. For example: the business may not be trading profitably and any reduction in costs will be applied to facilitate a return to profitability (see Gough at [1533] above); the shopping centre in which the store operates may not open on a Sunday (see Barron at [1515] above); or there may be insufficient consumer demand.

[1622] As to the last point, Mr d'Oreli's evidence was that 13 of Jeanswest's 197 stores do not trade on Sundays and if Sunday penalty rates were reduced he expected to reopen 3 of those 13 stores on Sundays. Mr d'Oreli was asked about the factors which led him to the view that he probably would *not* open the other 10 stores on Sundays and he replied:

'There's a lot of factors. Mostly the cost is the biggest thing. The other ten may not be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping. For instance, some country towns there's no point opening on Sundays because they just - the whole town doesn't open. If that were to change we would most certainly review that.'¹⁴⁹⁰

(iii) The SDA

[1623] The SDA called 7 witnesses. The names, addresses and workplaces of these witnesses are confidential per the Order of Catanzariti VP of 3 March 2016.¹⁴⁹¹ For convenience we refer to these witnesses as witness SDA Retail 1; witness SDA Retail 2; witness SDA Retail 3; etc.

[1624] The SDA also relies upon expert evidence provided by the following individuals:

- Kevin Kirchner, Principal, Fulcrum Economics Australia;¹⁴⁹²
- Helen Bartley, Bartley Consulting;¹⁴⁹³
- Prof Morris Altman, Dean & Head, Newcastle Business School and Professor of Behavioural & Institutional Economics, University of Newcastle;¹⁴⁹⁴
- Dr Ian Watson, freelance researcher and Visiting Senior Research Fellow, Macquarie University and SPRC, UNSW;¹⁴⁹⁵
- Prof David Peetz, Professor of Employment Relations at the Centre for Work, Organisation & Wellbeing, Griffith University;¹⁴⁹⁶
- Serena Yu, labour market researcher at the Workplace Research Centre, University of Sydney;¹⁴⁹⁷
- Prof Sara Charlesworth, Australian Research Council Future Fellow and Professor at the Centre for Sustainable Organisations and Work, within the School of Management at RMIT University;¹⁴⁹⁸ and
- Dr Fiona Macdonald, Vice Chancellor's Senior Research Fellow at the Centre for Sustainable Organisations and Work, within the School of Management at RMIT University.¹⁴⁹⁹

[1625] We have dealt with the SDA's expert evidence elsewhere and we now turn to deal with the SDA's lay witness evidence.

Witness SDA Retail 1¹⁵⁰⁰

[1626] Witness SDA Retail 1 has been employed as a retail assistant on a full-time basis for about 15 years and currently works at a store that trades as a newsagent, bookstore, gifts and confectionary outlet (as a Retail Employee Level 3 under the *Retail Award*). At the time the statement was made, the witness worked Sunday to Tuesday from 5.30 am to 1.30 pm and Wednesday from 1.00 pm to 9.30 pm and on Thursday from 1.30 pm to 9.30 pm.

[1627] As to the impact of weekend work, witness SDA Retail 1 says:

'Most of our big social occasions are on Sundays and I am regularly arriving late to birthdays and barbeques with family and friends. Sometimes I miss these events altogether... You miss out on a lot when you work on a Sunday, particularly spending quality time with people you care about...'¹⁵⁰¹

[1628] At paragraphs 13, 15 and 16 of his statement, witness SDA Retail 1 sets out the impact upon him of a reduction in Sunday and public holiday penalty rates as sought by the Retail Employers, in particular:

‘I do not like working on Sundays but I need the penalty rate. The Sunday penalty rate goes some way to making up for the disadvantages of working on that day and they are crucial to assisting me to meet my financial obligations. Without the additional penalty rates it would be difficult to provide for my family...

If the Sunday penalty rate were reduced to time and a half from double time, I would be \$74.06 worse off every week. This equates to a 7.88% reduction to my current weekly earnings. This is a lot of money to me and losing this from my weekly income would cause yet more financial stress to my family.

I also work the majority of public holidays that fall on a Monday, as I am currently rostered every Monday. The reason I volunteer to work on the public holidays is because of the penalty rate of double time and a half. I would much prefer to be spending this day with family and friends. It is a sacrifice to work on public holidays and if the penalty rate were reduced on these days, I would be far less likely to volunteer to work them.’¹⁵⁰²

[1629] During the course of his oral evidence, the witness said that if the Sunday penalty rate was reduced from 200 per cent to 150 per cent then he would not work on Sundays, but would work on Saturdays instead (at the current Saturday penalty rate of 125 per cent):

‘Because there’s – for the amount that you’re losing, it’s more – I find it more valuable to me to – and more quality of life if I’m going to lose that much, spending it with my family on the Sunday’¹⁵⁰³

Witness SDA Retail 2¹⁵⁰⁴

[1630] Witness SDA Retail 2 is employed on a full-time basis as a Level 1 Retail Employee under the *Retail Award*. At the time the statement was made the witness worked 76 hours a fortnight and was rostered on weekends once a fortnight (witness SDA Retail 2’s working arrangements are detailed at paragraphs 2 and 3 of her statement), including on Sunday between 10.00 am and 5.00 pm.

[1631] As to the impact of working on weekends and public holidays, particularly on her capacity to engage in social activities, the witness says:

‘If I had a choice, I would prefer not to work weekends I don’t think that is possible... If I refused to work weekends, or pushed back on my weekend roster in any way, I doubt I’d have a job...

When my children were young, I had trouble working on the weekends. My children often wanted to participate in school or other social activities, such as sport or friends’ birthday parties on Saturdays or Sundays and I couldn’t take them to these events because of my work.

Now, I find the difficulty with working on weekends arises in my own social life. If there is a special family celebration on a Sunday, for example, I will try to organise annual leave in advance or simply arrive late to the function. Taking time off on the weekends that I am rostered to work is not really an option. I simply have to work around my shifts and plan

activities with my family in advance, given that many of them work more regular weekday hours.¹⁵⁰⁵

[1632] The witness plans her activities in advance as best she can, so that they occur on a weekend when she is not working.¹⁵⁰⁶ As to the relative level of intrusion into her social activities of Sunday versus Saturday work, the witness said it was ‘about the same’.¹⁵⁰⁷

[1633] Witness SDA Retail 2 earns \$1,606.75 per fortnight, and if Sunday penalty rates in the *Retail Award* were reduced in the manner sought by Retail Employers, she would lose approximately \$60 per fortnight:

‘[T]he penalty rates I receive on Saturday, and particularly Sunday, are a significant component of my wage...

I rely on my weekend penalties to boost my take home pay. If Sunday penalty rates were reduced, it would be even harder for me to survive financially than at present.’¹⁵⁰⁸

Witness SDA Retail 3¹⁵⁰⁹

[1634] Witness SDA Retail 3 is employed on a part-time basis and has worked at an airport for about 15 years. The witness is employed under the *Retail Award* and works a 40 hour fortnightly roster on Monday and Tuesday from 5.00 am to 10.30 am and in ‘week 2’ on Friday to Wednesday from 5.00 am to 10.30 am. At the time the witness applied for her present position, she was aware that the business operated on weekends and that it was expected that he would work on weekends.¹⁵¹⁰

[1635] As to the impact of weekend and public holiday work, the witness says:

‘I regularly miss out on social activities because of my hours, particularly during my Week 2 Roster. For example, on a Sunday, if I have been up since 3:30am to get to work by 5:00am, I am often too tired to attend social activities like barbeques or other gatherings later in the day. My Saturday nights are also limited because I need to be up so early on Sunday mornings.’¹⁵¹¹

[1636] During cross-examination, the witness acknowledged that both Saturday and Sunday work intruded upon his social activities.¹⁵¹² In reply to a question as to the relative level of intrusion of Saturday and Sunday work, the witness said:

‘Well, most of the intrusions are usually on a Saturday night, because a lot of my friends and the people who I associate with who usually work on a Friday, so most occasions usually happen on a Saturday night and I can’t go to them because I have to be in bed quite early to start work on Sunday morning, early.’¹⁵¹³

[1637] At paragraphs 6, 12 and 13 of her statement, the witness sets out the impact upon him of a reduction in penalty rates as sought by the Retail Employers:

‘Although my hours can vary depending on the amount of overtime I work, last fortnight, as an example, I worked 46.25 hours. Only 18 of those hours were paid at my ordinary hourly wage. I am heavily reliant upon penalty rates...

If there were a reduction in Sunday penalty rates, I would lose \$53.15 per fortnight. This is a lot of money to me considering my financial and caring responsibilities and my disability, which means that I would struggle to work additional hours to make up for this loss.

I work on average seven out of the ten public holidays, depending upon when these public holidays fall. Sometimes, I work all the public holidays in a year. I am not in a position to refuse to work on public holidays as I need the extra money but I'd prefer not to work on these days from a social perspective.^{'1514}

Witness SDA Retail 4¹⁵¹⁵

[1638] Witness SDA Retail 4 has worked on a part-time basis with her current employer since 2009 (as a Level 1 Retail Employee under the *Retail Award*). The witness works shifts on Monday from 5.15 pm to 8.15 pm; Tuesday from 8.15 am to 6.15 pm; Wednesday from 10.15 am to 8.15 pm; Saturday from 3.00 pm to 8.15 pm and Sunday from 7.45 pm to 12.45 pm. When the witness accepted her current job she was aware that she would be required to work on weekends.¹⁵¹⁶

[1639] The witness's evidence as to the adverse impact of weekend and public holiday work is set out at paragraphs 11–13 of her statement. Working at these times impacts her ability to see her family:

'If my grandchildren come to visit from Sydney, it is hard to get time off to see them because of the work I do on the weekends. I tend to use annual leave or leave without pay so that I can spend time with them. I also find that my weekend work makes it difficult for me to visit my son in Orange and my son in Sydney as often as I would like and I struggle to catch up with friends for lunch or dinner.

I have worked Sundays since I started... I don't feel like I have much choice in working Sundays because this is the shift the company gives me. It is very difficult for me to take a weekend off because it is hard to find people to replace my shift. Other employees who are trained as supervisors often do not want to work weekends.

I used to feel heavily pressured to work on public holidays. In 2013, I refused to work New Years Eve, which was not my rostered shift. I had already worked Christmas Eve, which was also not my rostered shift, and I had missed time with my grandchildren because of it. After refusing to work New Years Eve, I was treated horribly by my supervisor and the 2IC who ignored and excluded me.^{'1517} (footnotes omitted)

[1640] The witness was also asked about the relative level of intrusion into her social activities of Saturday and Sunday work:

'That level of intrusion into your social and personal life, that's about the same between a Saturday and a Sunday?---Probably overall it is but if there's a family event that goes all weekend. Even if there is something on a Saturday then the family gets together on a Sunday so it sort of carries over the whole weekend.^{'1518}

[1641] At paragraphs 14–15 of her statement, the witness sets out the likely impact of a reduction in penalty rates as sought by the Retail Employers:

'I consider Sunday to be more of a day of leisure than Saturday. Whilst I'd prefer not to have to work on Sundays, I need the Sunday penalty rate to make my financial situation more

manageable. If the penalty rate were reduced from 200% to 150% on Sunday, I would lose \$47.48 per week. This would make it harder for me to justify working the Sunday shift and would be difficult for me financially. I feel that every bit I earn is needed to get me across the line financially from week to week. I would probably still have to work on Sunday, not just because I need the money, but because I would feel pressured to do so. In the past, after I refused to work a short shift at night, I lost a number of hours in my roster at other times.

I work on some public holidays. If I can see my grandchildren, either by them visiting me or by me visiting them, I prefer not to work on a public holiday. Otherwise, I work on a public holiday because I can't afford to turn down a 250% penalty rate merely for the benefit of a day off.¹⁵¹⁹

[1642] As to whether she would still work on Sundays if the penalty rate was reduced to 150 per cent, the witness said:

‘I would have to do whatever the shift is because I need to have a job... because I need to work’¹⁵²⁰

Witness SDA Retail 5¹⁵²¹

[1643] Witness SDA Retail 5 commenced work with her current employer in 2000 and is employed on a permanent, part-time basis, working an average of 28.75 hours per week (as a Level 1 Retail Employee under the *Retail Award*). The witness's working arrangements are detailed at paragraph 5 of her statement. In week 1, the witness works Wednesday from 9.00 am to 1.00 pm; Thursday from 1.00 pm to 9.00 pm and Friday from 9.00 am to 5.30 pm and in week 2 on Wednesday from 9.30 am to 5.30 pm; Thursday from 9.00 am to 6.00 pm; Friday from 9.00 am to 5.30 pm; Saturday from 9.00 am to 5.00 pm and Sunday from 10.00 am to 5.00 pm.

[1644] When the witness applied for her present job she was aware that it was a retail business that operated 7 days a week¹⁵²² and when she moved from casual to part-time employment the witness was aware that she was going to work Saturdays and Sundays.¹⁵²³

[1645] The witness deals with the impact of a reduction in penalty rates as proposed by the Retail Employers at paragraphs 7–13 of her statement, in particular:

‘My current fortnightly income of \$1,056.00 barely meets my costs of living...

My weekly expenses include mortgage repayments on my house, general grocery and other household bills as well as the costs of running my car. These costs need to be covered by my income of just over \$700.00 per week...

My roster requires me to work every second weekend. If I did not receive the 100% penalty rate on Sunday, I would find it increasingly difficult to meet my living expenses, including paying my mortgage and providing for my son. Penalty rates are a critical component of my income and make missing out on Sunday family time more tolerable.

The \$246.83 that I earn on Sunday is about 20% of my fortnightly gross wage of \$1265.00. This is despite the fact that the hours that I work on Sunday are only about 11% of those that I work every fortnightly roster. Any reduction in the Sunday penalty rate would place a great deal of financial pressure on me. In the past, when a public holiday has fallen on my rostered

days, I have elected to work that day in order to get the public holiday penalty rate that applies. This is despite not wanting to work on these holidays.¹⁵²⁴

[1646] The witness was asked about the relative level of intrusion into her social life of Saturday and Sunday work:

‘And can I assume from what you’ve said that the level of intrusion into your social life is about the same between Saturday and Sunday?---Well, no, because Sunday is more important. If my kids don’t come down till Sunday night from Sydney, we usually try and get - like, you know, Sunday is quite important to me, so I really missed out on a lot. You can’t compare Saturday to Sunday when, you know, my daughter might work Saturday, but she doesn’t the Sunday, and my son might work Saturday and not the Sunday; so, you know, Sunday is more important than Saturday, of course.

And the importance you associate, though, relates to spending time with family, such as your son, such as your daughter, such as your granddaughter; that’s what you’re saying is important. Yes?---Yes.

So if you were able to spend time with them - so it’s not that the quality of time differs, but you’re saying - sorry, I withdraw that. I apologise. So if you see your grandchild for two hours on a Saturday, that’s the same, isn’t it, as if you see them on a Sunday for two hours; the important thing to you is seeing these people that are close to you?---Yes, that’s the most important thing, is seeing them.¹⁵²⁵

Witness SDA Retail 6¹⁵²⁶

[1647] Witness SDA Retail 6 has worked for her current employer since 2000 and is employed on a permanent part-time basis (as a Level 1 Retail Employee under the *Retail Award*). The witness works a 51 hour per fortnight roster where in Week 1 she works Monday from 1.30 pm to 5.30 pm; Tuesday from 9.00 am to 1.30 pm; Wednesday from 1.30 pm to 5.30 pm and Thursday from 9.00 am to 4.00 pm. In week 2 she works Monday from 1.30 pm to 5.30 pm; Tuesday from 9.00 am to 1.30 pm; Wednesday from 1.30 pm to 5.30 pm; Thursday from 1.30 pm to 9.00 pm; Saturday from 10.00 am to 3.00 pm and Sunday from 1.00 pm to 5.00 pm.

[1648] The witness accepted her current job knowing that she would be working Saturdays and Sundays.¹⁵²⁷

[1649] As to the impact of working Sundays, the witness’s evidence is as follows:

‘Whilst my roster requires that I work on Saturdays and Sundays and whilst I’d prefer to have my weekends to myself, the reality is that I rely on the money that I receive in penalty rates on these days to support myself financially. This compensates me for the weekend events that I often miss, particularly on Sundays when my family and friends most often get together for social functions. My family is tight knit and my two brothers live close by, one is just up the street. I have often missed my nieces’ and nephews’ birthday parties because of my weekend work.¹⁵²⁸

[1650] As best she can, the witness plans her social activities and family interactions to occur on the weekends when she is not working.¹⁵²⁹

[1651] The witness earns \$931.25 a fortnight, and if the Sunday penalty rate was reduced to the rate sought by the Retail Employers, she would earn \$37.96 less a fortnight or 4 per cent of her fortnightly income before tax:

‘... This is a lot of money to me. Considering the difficulties I have meeting my living costs on my current income, a reduction in my Sunday penalty rate would place me under even more financial strain.

When I work on a public holiday, I do so because of the extra money I am able to earn and it is always a trade off with the time I would ordinarily spend with my family or friends.’¹⁵³⁰

Witness SDA Retail 7¹⁵³¹

[1652] Witness SDA Retail 7 is employed as a retail service assistant on a part-time basis and has worked for her current employer since October 2007 (as a Level 1 Retail Employee under the *Retail Award*). The witness works 30.5 hours per week and her weekly roster is Monday from 9.00 am to 3.00 pm; Tuesday from 7.00 am to 4.00 pm; Wednesday from 10.00 am to 3.00 pm; Thursday from 9.00 am to 3.30 pm and Sunday from 7.00 am to noon.

[1653] At the time the witness applied for her current job, she was aware that it was a retail business that operated 7 days a week and that she would be required to work on weekends.¹⁵³²

[1654] At paragraphs 10–13 of her statement, the witness sets out the impact upon her of a reduction in penalty rates as sought by the Retail Employers:

‘After [my living] expenses are paid, I have very little, if anything, left over for savings or discretionary spending. At present, I do not have any money in savings. If something unexpected occurred, I would struggle to meet those needs...

My manager offered my Sunday shift to me around eight months ago. The reason that I work on Sunday is that the higher rate of pay has a significant effect on my ability to cope financially - I used to struggle even more than I do now to pay my debts and living expenses. I decided to take up the offer of working on Sundays as I suspected that if I refused, the company would find someone else to take my place on that day and the opportunity for more income would be lost.

If the Sunday penalty rate were reduced, the difficulties I have surviving financially week to week to support my family would again be compounded. For example, a cut in the penalty rate from 200% to 150% would see me lose approximately \$47.43 per week. Working to receive the Sunday penalty rate has become a necessity for me, particularly in circumstances where my children are getting older and my child support payments will soon cease altogether.’¹⁵³³

8.2.5 Consideration

[1655] We propose to deal with the s.134 considerations first.

[1656] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. 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). As shown in Chart 54 (see [1458]) a substantial proportion of award-reliant employees covered by the *Retail Award* are ‘low paid’. Further, retail households face greater difficulties in

raising emergency funds. This suggests that their financial resources are more limited than those of other industry households.

[1657] As stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs.

[1658] The evidence of the SDA lay witnesses provides an individual perspective on the impact of the proposed changes. For example, witness SDA Retail 1 said that if Sunday penalty rates were reduced to 150 per cent he would be \$74.06 worse off each week – a reduction of 7.88 per cent in his current weekly earnings.¹⁵³⁴

[1659] The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.

[1660] 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 of pay (independent of penalty rates).

[1661] We are conscious of the adverse impact of a reduction in Sunday penalty rates on the earnings of retail workers who work on Sundays and this will be particularly relevant to our consideration of the transitional arrangements associated with any such reduction.

[1662] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[1663] Despite the absence of any direct evidence as to the likely impact of a reduction in Sunday penalty rates on collective bargaining, ABI submits that the changes proposed 'are only likely to increase the prospects of collective bargaining'.¹⁵³⁵

[1664] Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. Contrary to ABI's submissions we are not persuaded that a reduction in penalty rates would '*encourage* collective bargaining', it follows that this consideration does not provide any support for a change to Sunday penalty rates.

[1665] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. Obtaining employment is the focus of s.134(1)(c).

[1666] On the basis of the common evidence we conclude that a reduction in the Sunday penalty rate in the *Retail Award* is likely to lead to some additional employment. We are fortified in that conclusion by the evidence called by ABI and the Retail Employers (see [1671] below).

[1667] This consideration lends support to a reduction in Sunday penalty rates.

[1668] It is convenient to deal with the considerations s.134(1)(d) and (f) together.

[1669] It is self-evident that if the Sunday penalty rate was reduced then employment costs would reduce. It was not contended that a reduction in the Sunday penalty rate would impact on the regulatory burden. This consideration supports a reduction in the Sunday penalty rate. As we have mentioned, s.134(1)(f) is not confined to a consideration of the impact of the 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’.

[1670] The evidence called by the ABI and Retail Employers supports the proposition that the current level of Sunday penalty rates has led employers to take measures reduce the labour costs associated with Sunday trading including:

- closing stores,¹⁵³⁶
- restricting trading hours on Sundays,¹⁵³⁷ 88.3 per cent of respondents to the Retail survey said that their Sunday trading hours are lower than weekday trading hours¹⁵³⁸ and the main reason given was wages/costs (58.18 per cent),¹⁵³⁹
- limiting the activities performed, so that Sundays are effectively limited to customer service and selling,¹⁵⁴⁰
- operating with less experienced junior employees,¹⁵⁴¹
- owners of the retail business work on Sundays instead of rostering employees.¹⁵⁴²

[1671] The Retail survey results, the Sands Report and the evidence of the Retail Employers’ lay witnesses also supports the proposition that a lower Sunday penalty rate would *increase* the level and range of services offered on a Sunday. The type of changes suggested in the evidence are:

- more stores being open on Sundays,¹⁵⁴³
- increased Sunday trading hours,¹⁵⁴⁴
- a reduction in hours by some owner operator,¹⁵⁴⁵

- an increase in overall hours worked in retail stores,¹⁵⁴⁶ 65.5 per cent of respondents to the Retail survey said that they would allocate more hours to employees on Sunday if the Sunday penalty rate was reduced (from 200 per cent to 150 per cent).

[1672] On this basis, it may be said that a reduction in penalty rates will promote flexible modern work practices. This consideration lends support to a reduction in Sunday penalty rates.

[1673] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on weekends’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[1674] It is convenient to deal with matters (ii) and (iii) first.

[1675] As to matter (ii), the minimum wage rates in the *Retail Award* do not already compensate employees for working on weekends. However, in this context it is relevant to observe that there are terms of the *Retail Award* which operate to minimise the incidence of Sunday work. In particular, clause 28.13 provides:

‘28.13 Employees regularly working Sundays

- (a) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.
- (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.’

[1676] We also note that clause 28.11 provides that (absent an individual agreement to the contrary) ordinary hours are to be worked so as to provide an employee with 2 consecutive days off each week or 3 consecutive days off in a 2 week period. Clauses 28.13 and 28.11 only apply to full-time employees.

[1677] In relation to matter (iii), weekend work is a feature of the Retail sector. As mentioned earlier, enterprises in the Retail sector operate 7 days a week (compared to 31.1 per cent across all industries) operate on an average of 6.2 days per week and just over 40 per cent of enterprises operate 7 days a week. This feature of the Retail sector was consistent with the lay witnesses called by the Retail Employers and the SDA. Further, the Watson and Peetz Report concluded that the proportion of the total retail workforce that usually worked on weekends (either on one or both weekend days) was between ‘a little below 60 per cent’ and 62 per cent, and that 31-35 per cent of the total retail workforce usually worked on a Sunday.¹⁵⁴⁷

[1678] We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA spoke to the adverse impact of weekend work on the ability of retail sector employees to engage in social and family activities.

[1679] While for some of those witnesses Sunday work had a particularly adverse impact, others simply referred to the impact of weekend work and one said that the intrusion into their social activities of Saturday and Sunday work was ‘about the same’.¹⁵⁴⁸

[1680] We also note the following findings from the Sands Report online survey of retail employees:

- The ‘vast majority’ of employees that do not work on Sundays state that nothing will motivate them to work on a Sunday;¹⁵⁴⁹
- The main difficulty with Sunday work is the impact on the ability to spend time with family/friends;¹⁵⁵⁰
- 86 per cent of Sunday employees hardly ever or never are able to make up time to attend community, sporting or cultural events during the week;¹⁵⁵¹ and
- 29 per cent of Sunday employees with children believe that Sunday work has an adverse impact on the health and development of their children.¹⁵⁵²

[1681] We note that in the event Sunday penalty rates were reduced (but not removed entirely) employees working on Sundays would still receive ‘additional remuneration’.

[1682] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in Sunday penalty rates would apply equally to men and women workers. For the reasons given earlier we regard s.134(1)(e) as neutral to our consideration of the claims before us.

[1683] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’. We regard s.134(1)(g) as neutral to our consideration of the claims before us. No party contended to the contrary.

[1684] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[1685] The Retail Employers adopt Ai Group’s submissions (dealing with the *Fast Food Award*) in respect of this consideration. It will be recalled that Ai Group submit that the reduction in the level of penalty rates will not have economy wide effects. However, the Retail Employers go on to submit (at para 154):

‘Additionally, we note that the size of the retail industry means that any positive impacts of varying the Sunday penalty rate under the [*Retail Award*] will have a positive impact on the Australian economy’.

[1686] ABI advances a similar submission.¹⁵⁵³

[1687] A detailed assessment of the impact of a reduction in Sunday penalty rates in the *Retail Award* on the national economy is not feasible on the basis of the limited material before us.

[1688] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us.

[1689] The central issue in these proceedings is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’.

[1690] ABI and the Retail Employers advance three broad contentions in support of their claim to reduce the Sunday penalty rate in the *Retail Award*:

- (i) weekends are important time for retail trade (unlike when the penalty rate was first fixed);
- (ii) deterrence is no longer a valid consideration in determining the appropriate level of a penalty rate; and
- (iii) the current level of Sunday penalty rate is ‘dis-incentivising’ employers from trading at times at which it would otherwise be profitable and productive to trade.

[1691] In substance the submission put is that the current penalty rates are neither fair nor relevant. In short, the existing Sunday penalty rate is not ‘proportional to the disability’.

[1692] As set out earlier, ABI and the Retail Employers propose that the Sunday penalty rate be reduced from 200 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees).

[1693] ABI and the Retail Employers accept that there is disability associated with Sunday work and that there is a need to compensate for that disability. It is also accepted that for some

employees the disutility associated with Sunday work is higher than for Saturday work.¹⁵⁵⁴ As ABI put it in its additional submission filed on 2 May 2016:

‘... sometimes, working on Sundays may involve a *very slight* increased disability to some employees when compared to Saturday work.

This slightly increased disability for some employees is addressed by the draft clause for the Retail Award which provides for a higher Sunday penalty rate as compared to Saturday (25% greater loading on Sundays). The proposed clause may over-compensate the level of increased disability for those who experience it, and certainly provides compensation beyond those employees for whom there is additional disability.’¹⁵⁵⁵

[1694] We think ABI understates the relative disutility of Sunday as opposed to Saturday work, but it does acknowledge that there is a difference in the extent of disutility.

[1695] Further, as we have mentioned, ABI and the Retail Employers are *not* proposing that the Sunday penalty rate be reduced to the Saturday penalty rate.

[1696] Implicit in the claim advanced by ABI and the Retail Employers is an acceptance of the proposition that the disutility associated with Sunday work is *higher* than the disutility associated with Saturday work. If this was not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same.

[1697] We note that the PC Final Report recommended that for full-time and part-time employees the Sunday penalty rates be set at the higher rate of 125 per cent and the existing Saturday penalty rate.

[1698] In the *Retail Award* the existing Saturday penalty rate for full-time and part-time employees is 125 per cent. Hence, if adopted the Productivity Commission recommendation would result in the reduction of the Sunday penalty rate for full-time and part-time employees from 175 per cent to 125 per cent.

[1699] As mentioned earlier, in the Review the Commission is not constrained by the terms of a particular application, it may vary a modern award in whatever terms it considers appropriate, subject to procedural fairness considerations. Accordingly, if we were satisfied of the merit of doing so, it would be open to us to adopt the recommendation in the PC Final Report (and reduce the Saturday penalty rate to 125 per cent) or indeed to go further and reduce the Sunday penalty rate. But as we are not satisfied of the merit of doing so, we have decided not to adopt that course.

8.2.6 Conclusion

[1700] We are satisfied that the existing Saturday penalty rates for full-time and part-time employees in the *Retail Award* achieves the modern awards objective – they provide a fair and relevant minimum safety net. We refer to the Saturday penalty rate for casual employees shortly.

[1701] In relation to the Sunday penalty rate, for the reasons given, we have concluded that the existing Sunday penalty rate is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by

the modern award in question. The word ‘relevant’, in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.

[1702] Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, we have decided to reduce the Sunday penalty rate for full-time and part-time employees, from 200 per cent to 150 per cent.

[1703] We deal with the transitional arrangements associated with the reduction in the Sunday penalty rate in the *Retail Award* in Chapter 13 of our decision.

[1704] We now turn to the application of weekend penalty rates in the *Retail Award* to casual employees. The *Retail Award* provides that casual employees are paid a casual loading of 25 per cent.

[1705] Casuals are currently paid an additional 10 per cent for work performed on a Saturday between 7.00 am and 6.00 pm, that is in addition to the 25 per cent casual loading. It is not clear whether the 10 per cent premium is compounded upon the casual rate of 125 per cent of the applicable minimum hourly rate or whether it is simply added to the 125 per cent such that casuals are paid 135 per cent of the applicable hourly rate. But for present purposes, and for the sake of convenience, we will refer to the Saturday rate for casuals as 135 per cent, for work performed during 7.00 am and 6.00 pm.

[1706] It is also relevant to observe that clause 30.3(c) of the *Retail Award* provides that:

‘Any shiftwork performed on a Sunday will be paid at the rate of 200% (225% for casuals) of the ordinary time rate of pay.’

[1707] Yet, curiously, the Sunday rate for non-shift casuals is 200 per cent (inclusive of the 25 per cent casual loading), which is the same as the Sunday rate for full-time and part-time employees.

[1708] While these provisions no doubt have some history, they are plainly inconsistent and appear to lack logic and merit.

[1709] For instance, how is it that a casual employee working on a Saturday between 7.00 am and 6.00 pm is paid a premium of 135 per cent, but a casual working at, say, 6.00 am on a Saturday (or after 6.00 pm) is only paid the casual loading (i.e. 125 per cent)? Working early on a Saturday (at say 5.00 am or 6.00 am) or working late (say after 9.00 pm) may be said to attract a higher level of disutility than working between 7.00 am and 6.00 pm, yet casual employees receive *less* for working at these times.

[1710] The position in respect of Sunday work is even more curious. Casuals who work shiftwork on a Sunday are paid the Sunday loading (i.e. 225 per cent in total). In these proceedings the Retail Employers are seeking to reduce the premiums for shiftwork on Sunday, yet the proposal advanced retains the differential between full-time/part-time employees (at 150 per cent) and casual employees (at 175 per cent). If casual shiftworkers who work on Sunday are entitled to the Sunday loading *plus* their casual loading why is it that casual non-shiftworkers are treated differently?

[1711] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.

[1712] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits.

[1713] Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on Sundays.

[1714] As mentioned earlier we have a preference for what the Productivity Commission calls the 'default' approach to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is *added* to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals.

[1715] In our view, the casual loading should be *added* to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission's 'default' method. Accordingly, the new Sunday rate for casual employees in the *Retail Award* will be 25 *plus* 150, that is 175 per cent.

[1716] If the approach advocated by the Productivity Commission was applied to the Saturday rates for casuals then they would be entitled to a loading of 150 per cent (being the standard Saturday loading of 125 per cent *plus* the 25 per cent casual loading) for *all* hours worked on Saturday.

[1717] The Productivity Commission acknowledged that doing so could increase the casual rates in some awards such as the *Retail Award*, which, to some extent, could offset the impact of reducing Sunday penalty rates:

'The neutral treatment of casual penalty rates would diminish or, in some cases, eliminate the impact of income effects of the Productivity Commission's other penalty rate reforms affecting casual employees.'¹⁵⁵⁶

[1718] Recommendation 15.1 of the PC Final Report states:

'The Fair Work Commission should, as part of its current award review process:

...

- 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.'

[1719] While expressing the view that there may be grounds for some casual penalty rates to rise on Saturdays the Productivity Commission urged some caution in the adoption of the principle of neutrality:

‘... a major proviso is that the current regulated pay levels set for casual employees are ‘rough and ready’ and may not take into account the generally lower average skills and experience of those employees. Were this to be true, achieving parity in the employer costs of employing casuals compared with permanent employees might only have the appearance of ‘equal pay for equal’ work and would disadvantage the employment of casuals. That would be unfortunate given that casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young, and those needing flexible working arrangements. In that context, the wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.’¹⁵⁵⁷

[1720] Despite the apparent merit of adopting a consistent approach to the application of weekend penalty rates to casuals we are conscious of the fact that no party in the present proceedings has advocated an increase in the Saturday rates for casuals. In the event that such an application is made it can be determined in the award stage of the Review.

8.3 Pharmacy Industry Award 2010

8.3.1 The Claims

[1721] The Pharmacy Guild of Australia (the PGA) seeks to vary the *Pharmacy Industry Award 2010* (the *Pharmacy Award*) by removing clause 26.2(b) to (d) dealing with loadings for early morning and evening work, and loadings for weekend work and to insert a new clause, Additional remuneration, as set out in the marked up version of clause 26.2:

26.2 Overtime and penalty rates

...

~~(b) — Morning and Evening work Monday to Friday~~

~~A loading of 50% (casuals 75%) will apply for hours worked before 8.00 am and a loading of 25% (casuals 50%) for hours between 7.00 pm to 9.00 pm. A loading of 50% will apply to hours worked from 9.00 pm to midnight (casuals 75%).~~

~~(c) — Saturday work~~

~~A loading of 100% (casuals 125%) will apply for hours worked before 8.00 am, and a loading of 25% (casuals 50%) will apply for hours of work from 8.00 am to 6.00 pm on a Saturday. A loading of 50% (casuals 75%) will apply from 6.00 pm to 9.00 pm, and a loading of 75% (casuals 100%) for hours from 9.00 pm to midnight.~~

~~(d) — Sunday work~~

~~A 100% (casuals 125%) loading will apply for all hours of work on a Sunday.~~

26.2. Additional remuneration

26.2.1 The employer will pay to an employee the following rates for all ordinary hours worked during the specified periods:

Hours worked	Additional Remuneration Full-time and part-time employees	Additional Remuneration Casual employees (inclusive of casual loading)
% of minimum hourly rate		
Monday to Friday		
Before 7.00 am	150	175
Between 9.00 pm and midnight	125	150
Saturday		
Before 7.00 am	200	200
Between 7.00 am & 9.00 pm	125	125
Between 9.00 pm and midnight	150	150
Sunday		
Before 7.00 am	200	200
Between 7.00 am & 9.00 pm	150	150
Between 9.00 pm and midnight	175	175
Public holiday	200	125

[1722] The effect of the variations sought by the PGA is set out below.

(i) *Saturday work*

- Adjust the span of hours for the morning loading, so that it is paid for work performed ‘before 7.00am’ (rather than before 8.00am) *and* reduce the current loading paid to casuals, during this period from 225 per cent to 200 per cent (no change in the loading for full-time and part-time employees, it remains at 200 per cent).
- Remove the current loading for work performed between 8.00am and 6.00pm, and remove 6.00pm and 9.00pm and replace with a loading of 125 per cent for work performed between 7.00am and 9.00pm for all employees.
- Reduce the rate payable for work performed between 9.00 pm and midnight from 175 per cent (200 per cent for casuals) 150 per cent for all employees.

(ii) *Sunday work*

- Replace the current 200 per cent loading for all Sunday work (225 per cent for casuals) with rates payable at different times of the day, being:
 - Before 7.00 am—200 per cent for all employees;

- Between 7.00 am and 9.00 pm—150 per cent for all employees; and
- Between 9.00 pm and midnight—175 per cent for all employees.

[1723] The application for a variation to the public holiday rate is addressed in Chapter 9.

8.3.2 Background to the *Pharmacy Award*

[1724] The Award Modernisation Full Bench designated the ‘Retail industry’ as a priority industry in the award modernisation process and, at that stage, rejected an SDA proposal that community pharmacies be the subject of a separate modern award:

‘...we do not agree with all of the exclusions the SDA proposes. In particular, at least at this stage, we do not intend to exclude community pharmacies, fast food outlets or hairdressing services...Obviously the precise scope of a modern retail award cannot be determined at this stage but we intend to include a broad range of awards in our consideration to maximize the potential for rationalisation of award coverage’¹⁵⁵⁸

[1725] The SDA subsequently filed a draft general retail industry award, the scope of which included the community pharmacy industry.¹⁵⁵⁹ The draft provided for loadings of 25 per cent and 100 per cent for work performed on Saturdays and Sundays, respectively.¹⁵⁶⁰ Public holidays attracted loadings of 150 per cent and 175 per cent for permanent and casual employees, respectively.¹⁵⁶¹ The penalty rates were proposed to cover employees across all classifications of the award.

[1726] The PGA maintained that the community pharmacy industry should be confined to a discrete modern award, separate from the broader retail industry. The PGA’s submissions did not address penalty rates for weekend work, but focused primarily on issues of scope and coverage.¹⁵⁶² The draft award filed by the PGA at that time provided for penalty loadings of 50 per cent for work performed from 6.00 am to 8.00 am, and from 6.00 pm to midnight on Saturdays (the intervening period receiving no penalties), a loading of 50 per cent for work performed between 6.00 am and midnight on Sundays, and a loading of 100 per cent for work performed on public holidays.¹⁵⁶³

[1727] An exposure draft of a modern award for the general retail industry was published on 12 September 2008. The coverage extended to community pharmacies and provided for penalty rates which reflected those proposed by the SDA.¹⁵⁶⁴ In the accompanying Statement, the Full Bench did not specifically address the issue of the penalty rates contained in the exposure draft.¹⁵⁶⁵ Following the publication of the exposure draft submissions were filed by interested parties.

[1728] APESMA submitted that a separate award should be made to cover community pharmacies, and proposed that the rate for pharmacists working 6.00 pm to 9.00 pm on Saturdays should be set at 150 per cent, submitting that the proposed 25 per cent loading in the exposure draft was insufficient to compensate for the disutility of working on a Saturday evening.¹⁵⁶⁶

[1729] The PGA submitted that the penalty rates proposed in clause 29 of the exposure draft would substantially increase costs for community pharmacies, pointing to lower penalty rates in various pre-reform awards, and noting that:

‘the nature of the community pharmacy industry, and its regulated health service obligations, is that many pharmacies regularly open 7 days per week and operate long hours. The existing overtime and penalty rate regimes within the industry have evolved to accommodate this feature of the community pharmacy industry.’¹⁵⁶⁷

[1730] The PGA subsequently filed an analysis of potential cost increases by state, based on the differences in conditions between existing pre-reform awards the proposed conditions appearing in the exposure draft.¹⁵⁶⁸ That document concluded that the rates in the exposure draft would lead to increases (of varying degrees) for all but one of the 18 categories of establishment assessed.¹⁵⁶⁹ The report attributed the increases to the following factors:

- ‘a. New penalty rates which apply to the current base rate of pay of employees which in some cases are well above the current award rates of pay;
- b. Increase in casual loadings in most states (excluding NSW and Vic);
- c. Increase in garment laundry allowances in all states;
- d. Introduction of new allowances - first aid, language, bicycle. We have been conservative in our estimation of these (see later comments);
- e. Increase in penalty rates above existing penalty rates in some states.’¹⁵⁷⁰

[1731] In its decision of 19 December 2008 the Award Modernisation Full Bench responded to the concerns expressed about the scope of the proposed retail award and concluded that separate awards should be made for some sections of the retail sector:

‘The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a “swings and roundabouts” approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.

We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies...

In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular

the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.¹⁵⁷¹

[1732] The *Pharmacy Award* which was then published, provided for the same penalty rates that now appear in the modern award.¹⁵⁷²

[1733] The PGA continued to express its concern that the penalty rates provisions in the modern award (in the format proposed) did ‘not reflect the non-standard working time patterns of employees’ or ‘the seven day a week and late trading practices that prevail in the community pharmacy sector, as primary healthcare providers’.¹⁵⁷³ These submissions were accompanied by a number of ‘testimonials’ from people employed in the community pharmacy industry, many of which commented on the adverse effects penalty rates would have upon the businesses they owned or worked for.¹⁵⁷⁴

[1734] On 26 August 2009 the Award Modernisation Request was amended by the Minister for Employment and Workplace Relations to include a new paragraph:

‘53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

- offering additional hours of work to part-time employees; and
- employing part-time employees rather than casual employees.’¹⁵⁷⁵

[1735] In a Statement issued on 10 September 2009, the Award Modernisation Full Bench invited submissions addressing the effect of the variation to the Ministerial request:

‘In its decision of 19 December 2008 the Commission made the *General Retail Industry Award 2010*⁸ and the *Pharmacy Industry Award 2010*.⁹ Any interested party which is of the view that either of those awards, or any other award, should be varied to give effect to the 26 August variation should make an appropriate application. We will endeavour to deal with any such application before the end of 2009.’¹⁵⁷⁶

[1736] On 22 December 2009, the Award Modernisation Full Bench issued a decision in respect of a joint application by the PGA, the SDA and APESMA to vary the *Pharmacy Award*, noting that:

‘The variations are sought by agreement between the PGA, SDA and APESMA (the applicants) and no other parties have filed submissions in response to the application.’¹⁵⁷⁷

[1737] The agreed variations dealt with, among other things, penalty rates. In respect of this the Full Bench decision states:

‘Further the applicants seek the removal of the word “ordinary” appearing in cl.26.2(b) and (c):

(b) Morning and Evening work Monday to Friday

A loading of 50% (casuals 75%) will apply for ordinary hours worked before 8.00 am and a loading of 25% (casuals 50%) for hours between 7.00 pm to 9.00 pm. A loading of 50% will apply to ordinary hours worked from 9.00 pm to midnight (casuals 75%).

(c) Saturday work

A loading of 100% (casuals 125%) will apply for ordinary hours worked before 8.00 am, and a loading of 25% (casuals 50%) will apply for ordinary hours of work from 8.00 am to 6.00 pm on a Saturday. A loading of 50% (casuals 75%) will apply from 6.00 pm to 9.00 pm, and a loading of 75% (casuals 100%) for hours from 9.00 pm to midnight...

The variations developed by the parties are designed to reflect the circumstances of the industry and deal with the transition from a large number of pharmacy awards to a single national prescription for the industry. We approve the changes and will issue an order reflecting the agreed variations.¹⁵⁷⁸

[1738] On 2 February 2010, the Award Modernisation Full Bench issued a decision concerning separate applications by the SDA and the PGA to vary the *Pharmacy Award*. Relevantly for present purposes, one of the variations sought by the PGA concerned the penalty rates applicable to Sunday work. The Full Bench deals with this proposed variation at paragraphs [10]–[12] of its decision:

‘The third variation concerns Sunday work. The PGA submits that the Sunday penalty should be reduced from 100% to 50% from 8am to 6pm and other amounts for other parts of the day. It submits that the variation will assist pharmacies meet the expectations of customers and patients and is consistent with the pre-existing common industry award standard.

The SDA and APESMA submit that the matter was adequately addressed during the proceedings to establish the modern award and the outcome should not be altered.

The 100% penalty in the modern award is consistent with the previous rate for pharmacy assistants in New South Wales, Northern Territory, Victoria and South Australia and pharmacists in Victoria and South Australia. We are not disposed to vary the rate we have established in making this modern award.¹⁵⁷⁹

[1739] In the present proceedings, the SDA and the PGA made submissions about the extent to which penalty rates under the *Pharmacy Award* were considered during the award modernisation process.

[1740] The SDA submits that penalty rates were fully and carefully considered by the Full Bench of the AIRC during the award modernisation process:

‘It is submitted to be readily apparent from the above extracts that the Sunday rate issue was very much a live issue in the context of the Award Modernisation process as it concerned the pharmacy industry. It was contested in different ways with numerous issues presented and it will be seen from the [award modernisation material highlighted by the SDA] that the Guild brought forward the same arguments now again advanced in favour of reducing penalty rates.¹⁵⁸⁰

[1741] The PGA, by contrast, submits that the award modernisation process was more about the convenient rationalisation of existing rates in pre-reform instruments than it was about assessing the disutility associated with working on weekends and public holidays and setting rates accordingly. In particular, the PGA submits that:

- (a) The main issues confronting the Full Bench were whether the community pharmacy industry should be part of the general retail award and the rationalisation of the different penalty rate prescriptions contained in various Federal, State and Territory awards.
- (b) Neither party made detailed submissions or adduced specific evidence regarding the change in disabilities associated with working unsocial hours, weekends and public holidays.
- (c) [sic] The SDA submitted that the purpose of the award modernisation process was not to inquire into the basis upon penalty rates should be set. The Guild's submissions centred on the impact of the proposed conditions and not on measuring the level of disabilities associated with working unsocial hours, weekends and public holidays.
- (d) In the reasons for decision, the Full Bench did not expressly address the question of whether the penalty rates reflected the appropriate level of compensation for the disabilities associated for working unsocial hours, weekends and public holidays. Rather the Full Bench was concerned about rationalising the various penalty rates applicable under Federal and State/Territory awards and to produce a uniform set of conditions.¹⁵⁸¹

[1742] We agree with the submissions advanced by the PGA.

[1743] While the PGA submitted a range of material during the award modernisation process in support of its contention that the penalty rates in the *Pharmacy Award* were too high, it appears from a review of the relevant decisions that the Award Modernisation Full Bench did not give detailed consideration to this material. Indeed the material filed by the PGA in those proceedings is not mentioned in any of the relevant decisions. It is also clear – particularly from the decision of 2 February 2010 (see [1738] above) – that the penalty rates in the *Pharmacy Award* were primarily set on the basis of the penalty rates in the various pre-modernisation instruments.

[1744] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. It is apparent from an examination of the relevant decisions that the Award Modernisation Full Bench did not undertake a detailed or considered review of the penalty rates in the *Pharmacy Award*. Rather, understandably enough in view of the time constraints on the award modernisation process, the Full Bench gave effect to the existing penalty rates in the preponderance of pre-reform instruments.

8.3.3 The Pharmacy industry

[1745] The ABS data of direct relevance to the Pharmacy industry is quite limited.

[1746] A paper¹⁵⁸² by Commission staff provides a framework for 'mapping' modern award coverage to the ANZSIC. Using this framework the *Pharmacy Industry Award 2010* is 'mapped' to the Pharmaceutical, cosmetic and toiletry goods retailing industry class.

[1747] The Census is the only data source that contains all of the employment characteristics for Pharmaceutical, cosmetic and toiletry goods retailing. The most recent Census data is from August 2011.

[1748] The August 2011 Census data shows that there were around 63 000 employees in Pharmaceutical, cosmetic and toiletry goods retailing. Table 70 compares certain characteristics of employees in the Pharmaceutical, cosmetic and toiletry goods retailing industry class, with employees in 'all industries'.

Table 70¹⁵⁸³

Labour force characteristics of the Pharmaceutical, cosmetic and toiletry goods retailing industry class, ABS Census 9 August 2011

	Pharmaceutical, cosmetic and toiletry goods retailing		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	9 491	15.2	4 207 586	50.8
Female	53 062	84.8	4 082 662	49.2
Total	62 553	100.0	8 290 248	100.0
Full-time/part-time status				
Full-time	25 358	42.6	5 279 853	67.8
Part-time	34 198	57.4	2 507 786	32.2
Total	59 556	100.0	7 787 639	100.0
Highest year of school completed				
Year 12 or equivalent	39 221	63.6	5 098 228	62.6
Year 11 or equivalent	7 213	11.7	885 404	10.9
Year 10 or equivalent	12 486	20.2	1 687 055	20.7
Year 9 or equivalent	2 262	3.7	317 447	3.9
Year 8 or below	440	0.7	141 973	1.7
Did not go to school	42	0.1	20 158	0.2
Total	61 664	100.0	8 150 265	100.0
Student status				
Full-time student	13 510	21.8	612 990	7.5
Part-time student	2 896	4.7	506 120	6.2
Not attending	45 588	73.5	7 084 360	86.4
Total	61 994	100.0	8 203 470	100.0
Age (5 year groups)				
15–19 years	10 750	17.2	547 666	6.6
20–24 years	12 545	20.1	927 865	11.2
25–29 years	8 527	13.6	1 020 678	12.3
30–34 years	5 589	8.9	933 827	11.3
35–39 years	4 933	7.9	934 448	11.3
40–44 years	4 943	7.9	938 386	11.3
45–49 years	4 627	7.4	911 739	11.0
50–54 years	4 345	6.9	848 223	10.2
55–59 years	3 098	5.0	652 190	7.9
60–64 years	2 027	3.2	404 470	4.9
65 years and over	1 169	1.9	170 718	2.1
Total	62 553	100.0	8 290 210	100.0
Average age	33.3		38.8	

	Pharmaceutical, cosmetic and toiletry goods retailing		All industries	
	(No.)	(%)	(No.)	(%)
Hours worked				
1–15 hours	15 414	25.9	875 554	11.2
16–24 hours	9270	15.6	792 539	10.2
25–34 hours	9511	16.0	839 694	10.8
35–39 hours	12 927	21.7	1 676 920	21.5
40 hours	5580	9.4	1 555 620	20.0
41–48 hours	4399	7.4	895 619	11.5
49 hours and over	2455	4.1	1 151 693	14.8
Total	59 556	100.0	7 787 639	100.0

Note: Part-time work in the Census is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. This group includes both part-time and casual workers. Information on employment type is collected for persons aged 15 years and over.

Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[1749] The profile of Pharmaceutical, cosmetic and toiletry goods retailing employees differs from the profile of employees in ‘All industries’ in 5 important respects:

- (i) Pharmaceutical, cosmetic and toiletry goods retailing employees are overwhelmingly female (84.8 per cent, compared to 49.2 per cent for all industries);
- (ii) over half (57.4 per cent) of Pharmaceutical, cosmetic and toiletry goods retailing employees are employed on a part-time or casual basis (i.e. less than 35 hours per week), compared with only 32.2 per cent of all employees;
- (iii) about one quarter (25.9 per cent) of Pharmaceutical, cosmetic and toiletry goods retailing employees work 1–15 hours per week compared with only 11.2 per cent of all employees;
- (iv) over one third (37.3 per cent) of Pharmaceutical, cosmetic and toiletry goods retailing employees are aged between 15 and 24 years compared with only 17.8 per cent of all employees; and
- (v) just over one quarter (26.5 per cent) of Pharmaceutical, cosmetic and toiletry goods retailing employees are students (21.8 per cent are full-time students and 4.7 per cent study part-time) compared with 13.7 per cent of all employees.

[1750] The report by Ms Pezzullo on the effect of the *Pharmacy Award* on community pharmacies included information on the current state of community pharmacies in Australia.¹⁵⁸⁴ The report stated there were 5350 approved community pharmacies in Australia at 30 June 2013.¹⁵⁸⁵

[1751] Referring to an IBISWorld report,¹⁵⁸⁶ Ms Pezzullo explained that retail pharmacies (which include community pharmacies) could be categorised by the following:

- Banner group pharmacies or franchises (approximately one third of market share in 2014) are those where individual owners are provided with collective buying power, marketing, administration, branding and operating systems.
- Buying groups (less than 20 per cent of market share) have similar collective buying power but pharmacy owners have greater decision-making over branding and operating systems.
- Discount pharmacies (around 4.5 per cent of market share) are larger than traditional pharmacies and use a ‘checkout model’ rather than staff on the shop floor.
- Friendly Society Pharmacies Association (around 15 per cent of market share) are not-for-profit entities where the assets are owned by the members’ friendly society dispensaries.
- Independent pharmacies (around 2–10 per cent of market share) are pharmacies where the owner has complete control.¹⁵⁸⁷

[1752] We return to Ms Pezzullo’s report later.

[1753] We also note that another PGA witness, Mr Armstrong, gave evidence about the community pharmacy sector and the regulatory environment in which it operates. We deal with Mr Armstrong’s evidence later.

8.3.4 The Evidence

(i) *The PGA*

[1754] In support of its application, the PGA called 24 pharmacists to give lay evidence:

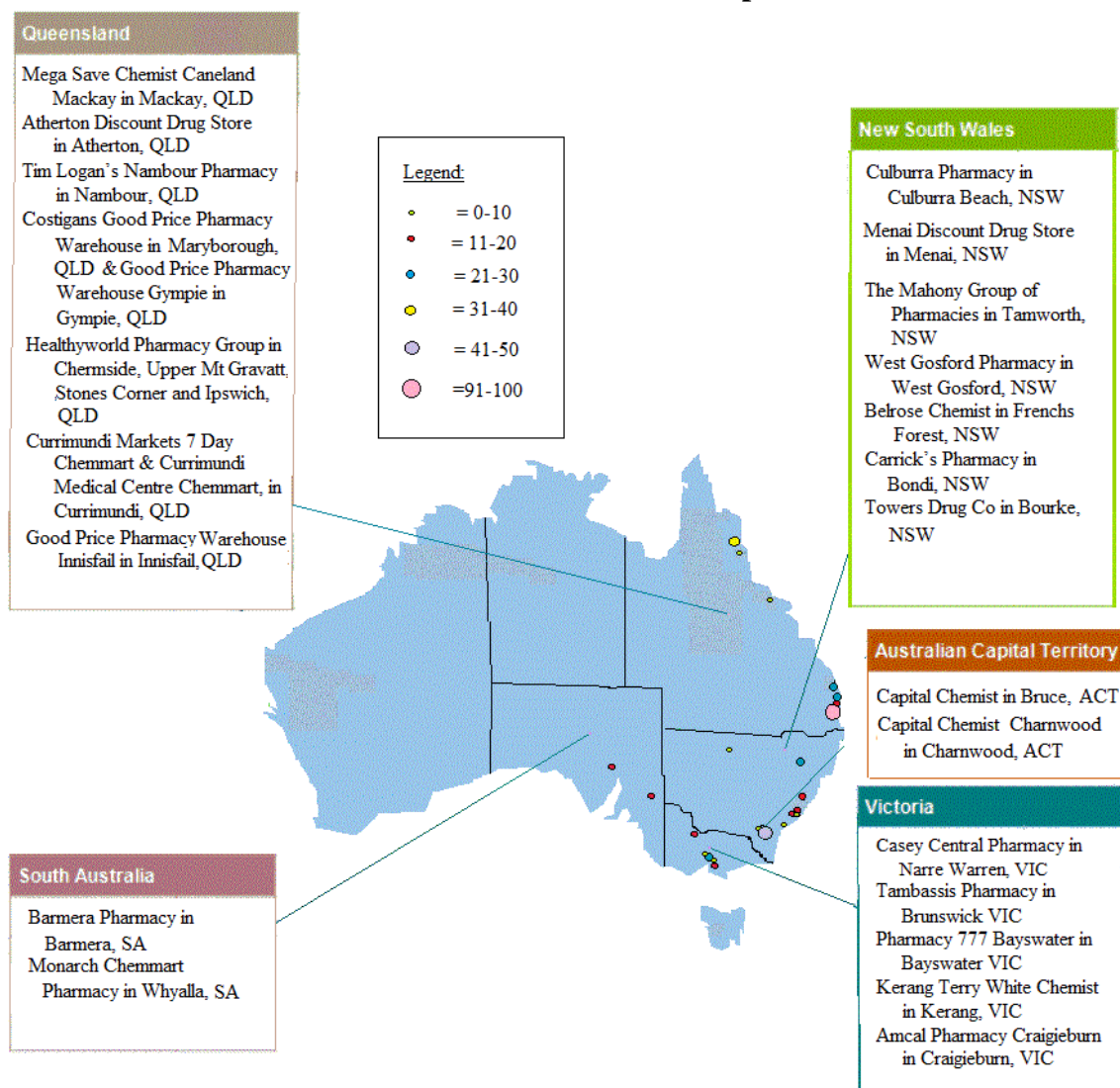
- Anthony Tassone, co-proprietor of Casey Central Pharmacy in Narre Warren South, Victoria;¹⁵⁸⁸
- Paul Keane, owner and manager of Barmera Pharmacy in Barmera, SA;¹⁵⁸⁹
- Angelo Pricolo, partner in Tambassis Pharmacy in Brunswick, Victoria;¹⁵⁹⁰
- Gregory Da Rui, owner of Pharmacy 777 Bayswater in Bayswater, WA;¹⁵⁹¹
- David Heffernan, proprietor of Culburra Pharmacy in Culburra Beach, NSW;¹⁵⁹²
- Quinn On , proprietor of Menai Discount Drug Store in Menai, NSW;¹⁵⁹³
- Samantha Kourtis, partner and pharmacist in charge of Capital Chemist Charnwood in Charnwood, ACT;¹⁵⁹⁴

- Kin Chong, partner in Kerang Terry White Chemist in Kerang, Victoria;¹⁵⁹⁵
- Lia Mahony, owner of The Mahony Group of Pharmacies in Tamworth, NSW;¹⁵⁹⁶
- Hassan El–Ahmad, co-proprietor of Amcal Pharmacy Craigieburn in Craigieburn, Victoria;¹⁵⁹⁷
- Michael Farrell, manager of Mega Save Chemist Caneland Mackay in Mackay, QLD;¹⁵⁹⁸
- Trent Playford, owner of West Gosford Pharmacy in West Gosford, NSW;¹⁵⁹⁹
- Craig Bird, proprietor of Belrose Chemist in Frenchs Forest, NSW;¹⁶⁰⁰
- Michelle Spiro, owner of Carrick’s Pharmacy in Bondi, NSW;¹⁶⁰¹
- Peter Crothers, owner and manager of Towers Drug Co in Bourke, NSW;¹⁶⁰²
- John Cagney, part owner of Monarch Chemmart Pharmacy in Whyalla, SA;¹⁶⁰³
- Dean Pollock, owner of Atherton Discount Drug Store in Atherton, QLD;¹⁶⁰⁴
- Timothy Logan, owner of Tim Logan’s Nambour Pharmacy in Nambour, QLD;¹⁶⁰⁵
- Patrick Costigan, owner of Costigans Good Price Pharmacy Warehouse in Maryborough, QLD, and Good Price Pharmacy Warehouse Gympie in Gympie, QLD;¹⁶⁰⁶
- Maria Xynias, human resources manager of the Healthyworld Pharmacy Group, which manages five pharmacies in Chermside, Upper Mt Gravatt, Stones Corner and Ipswich, QLD;¹⁶⁰⁷
- Ian Lewellin, proprietor of Currimundi Markets 7 Day Chemmart, and Currimundi Medical Centre Chemmart, in Currimundi, QLD;¹⁶⁰⁸
- Georgina Twomey, proprietor of Good Price Pharmacy Warehouse Innisfail in Innisfail, QLD;¹⁶⁰⁹ and
- Andrew Topp; owner of Capital Chemist in Bruce, ACT and with interests in 5 pharmacies in NSW.¹⁶¹⁰

[1755] The PGA lay witnesses gave evidence in respect of the operations of various pharmacies covered by the *Pharmacy Award*, the impact of penalty rates on their business and changes which they may adopt in the event that the PGA proposal was adopted.

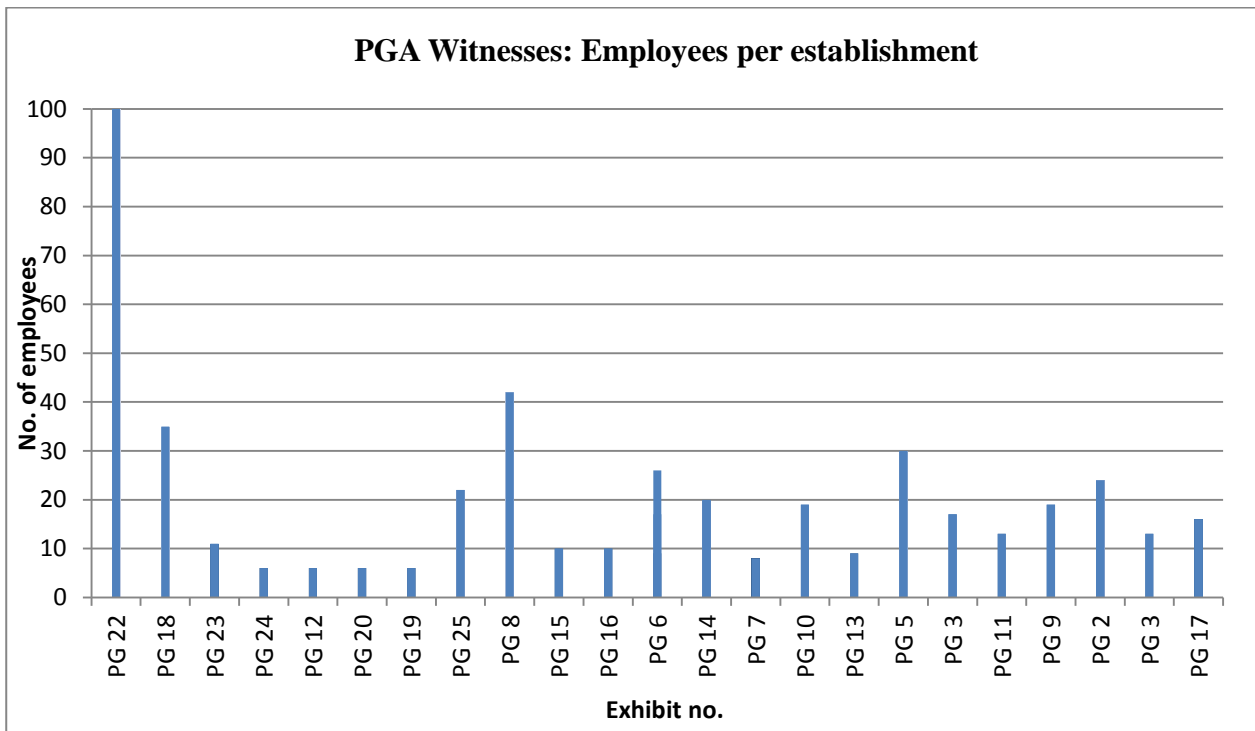
[1756] Evidence was given about pharmacies in most States and in the ACT, as well as from a range of rural, regional and capital city locations (as shown in Chart 60 below).

Chart 60
PGA evidence – size and location of pharmacies



[1757] There was also considerable diversity in the size of pharmacies (in terms of numbers of employees) which were the subject of the PGA's lay evidence. Chart 61 shows the number of employees per pharmacy for each of the witnesses, in one instance only aggregated employment data was available, across 5 pharmacies.¹⁶¹¹ The evidence related to 29 pharmacies, employing between 6 and 42 employees.

Chart 61



[1758] Under cross-examination most of the PGA’s lay witnesses generally conceded that they had not undertaken specific calculations as to the precise monetary value of the proposed reduction in penalty rates.¹⁶¹² A number of the lay witnesses conceded that they had not undertaken any sort of cost-benefit analysis associated with increasing the level and range of their services, additional staff, offering existing staff more hours, or extending trading hours in the event the PGA’s proposed variations were accepted.¹⁶¹³

[1759] We note that many of the lay witnesses gave evidence to the effect that their businesses were profitable and that they would benefit from the introduction of the 6th Community Pharmacy Agreement. We have had regard to this evidence, but note that this is not a capacity to pay case.

[1760] It was also generally conceded that the level of penalty rates is only one factor among a range of factors which affect the ability of the business to trade longer hours, particularly on Sundays and public holidays.¹⁶¹⁴ For example a number of witnesses, particularly in rural and regional areas acknowledged that their trading hours were influenced by the trading patterns of other stores in their locations. Most witnesses conceded that if penalty rates were reduced the level of demand for their services would also be a factor in determining whether to extend hours, as well as (for some) contractual terms in their lease which compelled particular times of operation.

[1761] A number of witnesses gave evidence that staffing levels and trading hours have remained relatively unchanged since the introduction of the *Pharmacy Award* and the reduction in penalty rates (other than public holiday rates). This evidence casts some doubt on the proposition that a reduction in weekend penalty rates would have a positive impact on employment and would increase trading hours.¹⁶¹⁵

[1762] In light of the concessions made, we accept that much of the evidence of the PGA's lay witnesses may be regarded as speculative in nature. As was the case with other employer lay evidence in these proceedings, evidence about intentions in light of proposed changes is necessarily speculative, as it is difficult to predict, with any certainty, what precise actions would be taken in response to a particular change.

[1763] While the PGA lay evidence cannot be said to be statistically representative of the employers covered by the *Pharmacy Award*, the diversity of the enterprises referred to in the PGA lay evidence is relevant to the weight to be attributed to this evidence.

[1764] The SDA submits that the evidence of the PGA's lay witnesses does not support the findings proposed by the PGA as to the claimed negative impact of penalty rates.¹⁶¹⁶ In particular, the SDA submits that:

- (i) the claims by many of the proprietors that the penalty rate provisions of the *Pharmacy Award* were having an adverse effect on their businesses were significantly overstated, without foundation or based on a misunderstanding of the applicable award provisions; and
- (ii) there is little evidence to support a finding that, in the event the PGA's claims were granted, there would likely be an increase in employment or hours of work in the community pharmacy sector.¹⁶¹⁷

[1765] Contrary to the SDA's submissions, we are satisfied that a number of general propositions can be drawn from the PGA lay evidence. The following aspects of the PGA's lay witness evidence are cogent, relevant and persuasive.

[1766] First, there were some instances of business owners performing work on Sundays and public holidays which would usually be performed by employees, to reduce costs. For example:

- Ms Michelle Spiro (Carrick's Pharmacy, Bondi, NSW) said that in an attempt to save costs she and her partner work on Sundays.¹⁶¹⁸
- Mr Kin Chong (Kerang Terry White Chemist, Kerang, Vic) said that in an attempt to save costs and reduce the impact of penalty rates on the business he and his business partners work some days that attract penalty rates. He also opens for reduced hours despite the community demand that the pharmacy stay open.¹⁶¹⁹

[1767] Second, the current penalty rate regime has led employers to take measures to reduce labour costs associated with trading at times when penalty rates apply (particularly in respect of Sundays). In particular, the evidence discloses that a range of operational limitations are imposed on Sundays in order to reduce labour costs, namely restricting trading hours; lower staffing levels or service delivery restrictions.

(i) ***Restricting trading hours***

[1768] Most of the pharmacies which were the subject of the lay evidence opened on both Saturdays and Sundays (25 out of 29 pharmacies). But 18 of these 25 pharmacies opened for

fewer hours on Sundays than on Saturdays.¹⁶²⁰ For example, the 5 pharmacies that were the subject of Ms Xynia's evidence opened from 8.30 am to 5.00 pm on Saturdays but only from 10.00 am to 4.00 pm on Sundays.¹⁶²¹ Further, a number of the witnesses gave evidence about the impact of Sunday penalty rates on Sunday trading hours:

- Mr David Heffernan (Culburra Pharmacy, Culburra Beach, NSW) said that the '[p]harmacy is generally not open on Sundays...due to the penalty rates and staff availability...on these days. The rates make it unprofitable to open'.¹⁶²²
- Mr Kin Chong (Kerang Terry White Chemist, Kerang, Vic) said that due to penalty rates, he has had to restrict the pharmacy's opening hours, especially on Sundays and public holidays.¹⁶²³
- Mr Michael Farrell (Mega Save Chemist Caneland, Mackay, Qld) said that due to Sunday penalty rates he has reduced the hours the pharmacy is open on Sundays to 10.00 am to 2.00 pm (he used to trade until 4.00 pm on Sundays).¹⁶²⁴
- Mr Trent Playford (West Gosford Pharmacy, West Gosford, NSW) said that due to the cost to the business of penalty rates, it was necessary to reduce the trading hours on a Sunday from 9.00 am to 5.00 pm to 10.00 am to 4.00 pm.¹⁶²⁵
- Mr Dean Pollock (Atherton Discount Drug Store, Atherton, Qld) said that he was considering ceasing Sunday trading altogether as the amount they are required to pay on that day '...is simply too expensive. Our pharmacy does not make enough profit on a Sunday to make up for the amount we spend in wages'.¹⁶²⁶
- Mr Timothy Logan (Tim Logan's Nambour Pharmacy, Nambour, Qld) said that the current Sunday penalty rates are putting at risk the service he currently provides on Sundays: 'At present, trading on a Sunday is breakeven but if current trends continue it will cease to be profitable'.¹⁶²⁷

(ii) Lower staffing levels or sub-optimal staffing arrangements

- Mr Paul Keane (Barmera Pharmacy, Barmera, SA) said that due to the current penalty rates, rosters are mostly equalised across employed staff to avoid any overtime hours and that '[s]taff hours have been cut to save costs'.¹⁶²⁸
- Mr Angelo Pricolo (Tambassis Pharmacy, Brunswick, Victoria) said that he does not always have the 'most appropriate people on the floor outside of ordinary hours as the cost of doing so outweighs any profit made from trading'.¹⁶²⁹
- Mr Gregory Da Rui (Pharmacy 777, Bayswater, WA) said that current penalty rates have forced him to reduce staff and that it is impossible to make a profit after 7.00 pm and on Sundays and Public Holidays due to the penalty rates. He said that he opens at these times as a service to the public, but waiting times have increased.¹⁶³⁰
- Mr Quinn On (Menai Discount Drug Store, Menai, NSW) said that due to weekend penalty rates, he generally rosters on junior pharmacy assistants to work these times

as they are less expensive than having more experienced staff: ‘[u]nfortunately this compromises the service that we are able to offer to patients and they simply work the registers rather than also being able to assist with patient queries’.¹⁶³¹ In response to a question on cross-examination, Mr Quinn said ‘well if the penalty rates were lower, then that means I can actually put on more pharmacists – an extra pharmacist on the weekend to help put that service together because it’s actually quite time consuming’.¹⁶³²

- Ms Lia Mahony (The Mahony Group of Pharmacies, Tamworth, NSW) said that her pharmacy employs more junior team members to reduce the impact of penalty rates, ‘however on weekends it is the time when customers often have more time to shop and thus come in with more complex problems relying on senior or more experienced team members’.¹⁶³³
- Mr Michael Farrell (Mega Save Chemist Caneland, Mackay, Qld) said that due to the cost of penalty rates on weekends, it is not financially viable to employ students and train them.¹⁶³⁴
- Mr Craig Bird (Belrose Chemist, Frenchs Forest, NSW) said that because of penalty rates incurred on weekends and public holidays, he arranges rosters so that the minimum number of staff required to open the Pharmacy are rostered on.¹⁶³⁵
- Mr Dean Pollock (Atherton Discount Drug Store, Atherton, Qld) said that he will usually roster his more junior employees to work on weekends: ‘[t]he downside of that approach is those employees are not as fast or experienced as my more senior staff, and when it is busy (which weekends often are) the level of customer service can be compromised’.¹⁶³⁶
- Ms Maria Xynias (Healthyworld Pharmacy Group, Brisbane Pharmacies, Qld) said that due to the cost to the business, at times when penalty rates are incurred, the minimum number of staff required to open the pharmacy are rostered on.¹⁶³⁷

(iii) Restrictions on the type and range of services provided

- Ms Samantha Kourtis (Capital Chemist Charnwood, Charnwood, ACT) runs the pharmacy on skeleton staff at times when penalty rates are incurred: ‘[g]iven staffing is kept to a minimum at times when penalty rates are incurred, it is difficult for pharmacists to spend time with patients and provide them with the best healthcare service possible’.¹⁶³⁸
- Mr Michael Farrell (Mega Save Chemist Caneland, Mackay, Qld) limits the times when additional services are offered. For example, dose administration aid services are not offered on weekends or public holidays, and nor are flu vaccinations.¹⁶³⁹
- Mr Trent Playford (West Gosford Pharmacy, West Gosford, NSW) runs on a skeleton staff (mostly junior pharmacy assistants) at times that incur penalty rates as it is otherwise not financially viable to open, this means that the pharmacy is not able to offer additional services on weekends to patients such as medical certificates and Webster packs’.¹⁶⁴⁰

- Mr Craig Bird (Belrose Chemist, Frenchs Forest, NSW) said that ‘patients have less access to a Pharmacist on weekends to ask questions and seek advice as the Pharmacist is needed to dispense prescriptions’.¹⁶⁴¹
- Mr Patrick Costigan (Costigan’s Good Price Pharmacy Warehouse, Maryborough, Qld) said that due to the penalty rates imposed on a Sunday, it is necessary to run the pharmacy ‘on the bare minimum number of staff required’ which ‘compromises the service that we are able to offer to our patients. It also increases the risk of security issues such as theft’.¹⁶⁴²

[1769] Third, the PGA lay witnesses gave evidence about the likely effect of a reduction in penalty rates on employment levels and service. The evidence of the lay witnesses generally supports the proposition that a lower Sunday penalty rate would increase the level and range of services offered, with a consequential increase in employment (in terms of hours worked by existing employees or the engagement of new employees). The types of suggested changes to the level and range of services in the event that the PGA’s proposed changes to penalty rates were implemented, are summarised below.

(iv) Extend operating hours

- Mr Anthony Tassone (Casey Central Pharmacy, Narre Warren, Vic) said that it would be possible to extend trading hours on weeknights, weekends and possibly Public Holidays as there is a late night/365 day a year medical centre opening at the shopping centre soon’.¹⁶⁴³ In cross-examination Mr Tassone conceded that the more significant factor bearing upon the extent of any change in his commercial operations is what happens with the neighbouring medical care facilities.¹⁶⁴⁴
- Mr Paul Keane (Barmera Pharmacy, Barmera, SA) said he would open his pharmacy earlier, close later on Saturdays and also open on Sundays and Public Holidays: ‘[i]t would also be possible to hire new staff to work on Sundays and Public Holidays’.¹⁶⁴⁵ During cross-examination, Mr Keane said that he had done a cost benefit analysis of the increased trading hours in the event penalty rates were reduced and that the business ‘would be better than the current situation’.¹⁶⁴⁶ Mr Keane also said: ‘[w]e have been asked by the local doctors to provide a Sunday and public holiday service and I get repeated requests from customer. They say to me, well, why don’t you open on Sundays anymore? And I said, it is purely the cost of the wages’.¹⁶⁴⁷
- Mr Angelo Pricolo (Tambassis Pharmacy, Brunswick, Vic) said that he would ‘...consider reverting back to 24 hour trading’.¹⁶⁴⁸ On cross-examination, Mr Pricolo conceded that there were ‘a lot of considerations’ in deciding to revert back to 24 hour trading, however, asserted the change in penalty rates would make it more feasible.¹⁶⁴⁹
- Mr David Heffernan (Culburra Pharmacy, Culburra Beach, NSW) said that it would mean that his pharmacy could open every day of the year except for Christmas Day: ‘[t]his would provide an invaluable service to the local Culburra Beach community. It would also be of great assistance to the Culburra Retirement Village’.¹⁶⁵⁰

- Mr Quinn On (Menai Discount Drug Store, Menai, NSW) would be able to immediately extend the trading hours of the Menai DDS and it would also mean that he could hire additional staff.
- Ms Samantha Kourtis (Capital Chemist Charnwood, Charnwood, ACT) said that it would allow her to extend the trading hours even further to open from 7.30 am to 9.00 pm every day.¹⁶⁵¹
- Mr Kin Chong (Kerang Terry White Chemist, Kerang, Vic) he would consider opening longer on weekdays, weekends and public holidays to provide increased access to pharmacy services and would also consider offering more hours to his current employees, in addition to hiring new staff: '[t]hose new positions and longer hours will be mainly focused on weekends and public holidays as they are the days hours during which extended trading hours are most needed'.¹⁶⁵²
- Ms Lia Mahony (The Mahony Group of Pharmacies, Tamworth, NSW) said that 'it would make these extended hours more profitable and I would be able to offer some of my current team members more weekend shifts and later shifts that suit their desired working conditions'.¹⁶⁵³
- Mr Hassan El-Ahmad (Amcal Pharmacy Craigieburn, Craigieburn, Vic) said that he could immediately look at extending the trading hours and would like to trade until 9.00 pm on weekdays and until 6.00 pm on weekends to provide a greater service to patients who attend nearby medical centres: 'This would also mean that I could employ more staff and offer current staff additional hours'.¹⁶⁵⁴
- Mr Michael Farrell (Mega Save Chemist Caneland, Mackay, Qld) said 'it would mean that we could extend the Mega Save Chemist's trading hours. This in turn would mean that we could offer existing staff members additional hours and potentially hire new staff members'.¹⁶⁵⁵
- Ms Michelle Spiro (Carrick's Pharmacy, Bondi, NSW) would consider increasing the pharmacy's trading hours from 7.00 am to 7.00 pm. However, on cross examination she confirmed her current trading hours were 9.00 am – 7.00 pm weekdays and she was unaware that she could open at 8.00 am without paying an additional penalty.¹⁶⁵⁶ Ms Spiro says 'I would also offer more hours to my existing staff which would enable me to open earlier in the morning and make a big difference on Sundays as I would not have to work every Sunday myself!'.¹⁶⁵⁷
- Mr Peter Crothers (the Towers Drug Co., Bourke, NSW) could consider opening the pharmacy for extended trading hours, particularly on Sundays: '[t]his would provide greater access for patients to a very important health care service in the remote area of Bourke'.¹⁶⁵⁸ However, in the course of cross examination Mr Crothers said that any decision to open on Sundays would be 'multi-factorial' and, further, while lower penalty rates would make it more feasible to trade on Sundays that was not the major factor.¹⁶⁵⁹

- Mr John Cagney (Monarch Chemmart Pharmacy, Whyalla, South Australia) could potentially extend the Monarch Pharmacy's trading hours to include evenings and Sundays: '[i]f this was possible, it would mean that more staff would be employed'.¹⁶⁶⁰
- Mr Timothy Logan (Tim Logan's Nambour Pharmacy, Nambour, Qld) would open for longer hours on Saturdays and Sundays and would employ additional staff (particularly trainees) and provide existing staff with additional hours particularly on Saturdays and Sundays.¹⁶⁶¹
- Mr Patrick Costigan (Costigan's Good Price Pharmacy Warehouse, Maryborough, Qld) would look at rostering on an additional staff member at each pharmacy on a Sunday to assist with patient requirements.¹⁶⁶²
- Ms Maria Xynias (Healthyworld Pharmacy Group, Brisbane Pharmacies, Qld) would look at extending trading hours, particularly on Sundays.¹⁶⁶³

(v) *Provide additional services or a higher level of service*

- Mr Gregory Da Rui (Pharmacy 777, Bayswater, WA) said that patients would have better access to improved healthcare: '[i]t would allow me to roster on additional Pharmacists meaning that they could spend more time with patients to answer their questions. I would also look at hiring new staff'.¹⁶⁶⁴
- Mr David Heffernan (Culburra Pharmacy, Culburra Beach, NSW) said that the pharmacy may be able to provide the following services to the community: MedsChecks; medical certificates; Webster packs; wound dressing; and flu vaccinations'.¹⁶⁶⁵
- Ms Samantha Kourtis (Capital Chemist Charnwood, Charnwood, ACT) could roster more staff on and hire additional staff members: '[t]his would have the flow on effect of allowing pharmacists time to spend valuable one on one time with patients at all times and provide a high level healthcare service to patients at all times'.¹⁶⁶⁶
- Ms Lia Mahony (The Mahony Group of Pharmacies, Tamworth, NSW) said 'customers would have access to greater services through the ability to hire more experienced staff and more staff to be able to devote more time to the consumer in each occasion'.¹⁶⁶⁷
- Mr Michael Farrell (Mega Save Chemist Caneland, Mackay, Qld) said it would be possible to offer customers additional services: '[f]or example, it would be possible to offer MedsChecks and dose administration aid services on Sundays. It would also be possible to provide discharge services for rehabilitation hospitals on weekends. This would be of great benefit to the community'.¹⁶⁶⁸
- Mr Craig Bird (Belrose Chemist, Frenchs Forest, NSW) would change the composition of staff rostered on weekends and public holidays. Rather than only rostering on junior staff, he would also roster on more senior staff who have greater

professional knowledge and would also consider rostering on two pharmacists which would enable additional services to be offered to patients on weekends and public holidays.¹⁶⁶⁹

- Mr Timothy Logan (Tim Logan’s Nambour Pharmacy, Nambour, Qld): ‘...it would mean that our customers will have greater access to medication checks, urgent home deliveries, influenza vaccinations and CPAP sleep apnoea checks. This is because these services would be available on weekends and Public Holidays as I would be in a position to employ an additional Pharmacist and other staff to assist with the provision of these services’.¹⁶⁷⁰
- Mr Patrick Costigan (Costigan’s Good Price Pharmacy Warehouse, Maryborough, Qld) would look at rostering on an additional staff member at each Pharmacy on a Sunday to assist with patient requirements.¹⁶⁷¹
- Ms Maria Xynias (Healthyworld Pharmacy Group, Brisbane Pharmacies, Qld): ‘It would also be possible to roster additional staff to work on weekends and public holidays so that services such as webster packs, flu vaccinations, blood pressure monitoring and MedsChecks could be more readily offered to patients. Also, by rostering on additional staff, pharmacists could spend more time with patients answering their questions and assisting them with their medication’.¹⁶⁷²
- Mr Andrew Topp (Capital Chemist, Bruce, ACT) would look in the long term to staffing the pharmacy properly, especially on weekends, and probably use more student pharmacists which would be a benefit to the community. ‘We would also be able to offer more services to more people, using a greater number of better qualified staff because we could afford to hire them’.¹⁶⁷³

[1770] In addition to the lay witness evidence the PGA also relied on evidence given by Mr Stephen Armstrong, economist and¹⁶⁷⁴ upon the expert evidence given by Ms Margaret Lynne Pezzullo, of Deloitte Access Economics. Ms Pezzullo provided two reports for the Commission: ‘The effect of Pharmacy Industry Award 2010 on community pharmacy in Australia’¹⁶⁷⁵ and ‘The modern face of weekend work: survey results and analysis’. We considered Ms Pezzullo’s second report in Chapter 6.¹⁶⁷⁶

[1771] Mr Armstrong is a former Chief Economist at the PGA and currently works as a consultant economist and in that capacity consults to the PGA. As we have mentioned, Mr Armstrong’s evidence deals with the nature of the community pharmacy sector and the regulatory environment in which it operates. While Mr Armstrong was cross examined, particularly as to the impact of the 6th Community Pharmacy Agreement, much of his evidence was unchallenged. We have summarised aspects of Mr Armstrong’s evidence below.

Overview of community pharmacy

[1772] Pharmacy businesses vary in size from those with an annual turnover of around half a million dollars, to a small number with a turnover of over \$15 million a year. The majority of pharmacies have turnovers of between \$1.5 million and \$4 million, inclusive of all payments from Government in relation to PBS dispensing. Small pharmacies may have only 2 or 3 employees (including the owner(s) of the pharmacy), while the largest pharmacies employ in excess of 10 pharmacists and 40 or more other employees employed as dispensary assistants.

[1773] In addition to dispensing medications, community pharmacies also provide a range of community health services as part of public health campaigns, including:

- (i) Baby and maternal health services;
- (ii) Home deliveries to the elderly, disabled or infirm;
- (iii) Blood pressure monitoring;
- (iv) Cholesterol monitoring;
- (v) Blood glucose monitoring;
- (vi) International Normalised Ratio (INR) monitoring;
- (vii) Chronic disease support services;
- (viii) Staged supply of medicines at the request of the prescriber;
- (ix) Wound care services;
- (x) Adherence and compliance support for patients with chronic conditions;
- (xi) Weight management and nutrition services;
- (xii) Bone density testing;
- (xiii) Pain management services;
- (xiv) Palliative support services;
- (xv) Respiratory monitoring and support;
- (xvi) Assistance with using drug delivery devices (.such as for asthma and chronic obstructive pulmonary disease patients);
- (xvii) Methadone or buprenorphine dosing; and
- (xviii) Needle exchange.

[1774] Most of the services mentioned above are low-margin or loss-making and in many cases are provided free of charge and without remuneration from government. Mr Armstrong notes that:

‘In this sense, community pharmacists do not operate in accordance with a standard corporatised profit-driven model but, as a result of government regulation, fulfil an important public health function that supplements the services provided by other fee-for-service healthcare professionals.’¹⁶⁷⁷

[1775] Dispensary sales amount to around 70 per cent of a pharmacy’s turnover, and Pharmaceutical Benefits Scheme (PBS) prescriptions account for more than 90 per cent of dispensary sales. Hence around 60 to 65 per cent of a pharmacy’s sales are derived from PBS prescriptions.¹⁶⁷⁸

Regulatory Framework

[1776] Pharmacies can only be owned and operated by registered pharmacists. Ownership rules have prevented the same type of concentration in the pharmacy sector that has occurred in many other sectors of the Retail industry.

[1777] Pharmacies are solely responsible for dispensing medicines pursuant to a prescription (that is, drugs schedule from 4 to 8 in the *Standard for the Uniform Scheduling of Medicines and Poisons*) and scheduled drugs in respect of which a prescription is not required (that is, Schedule 2 and 3 medicines).

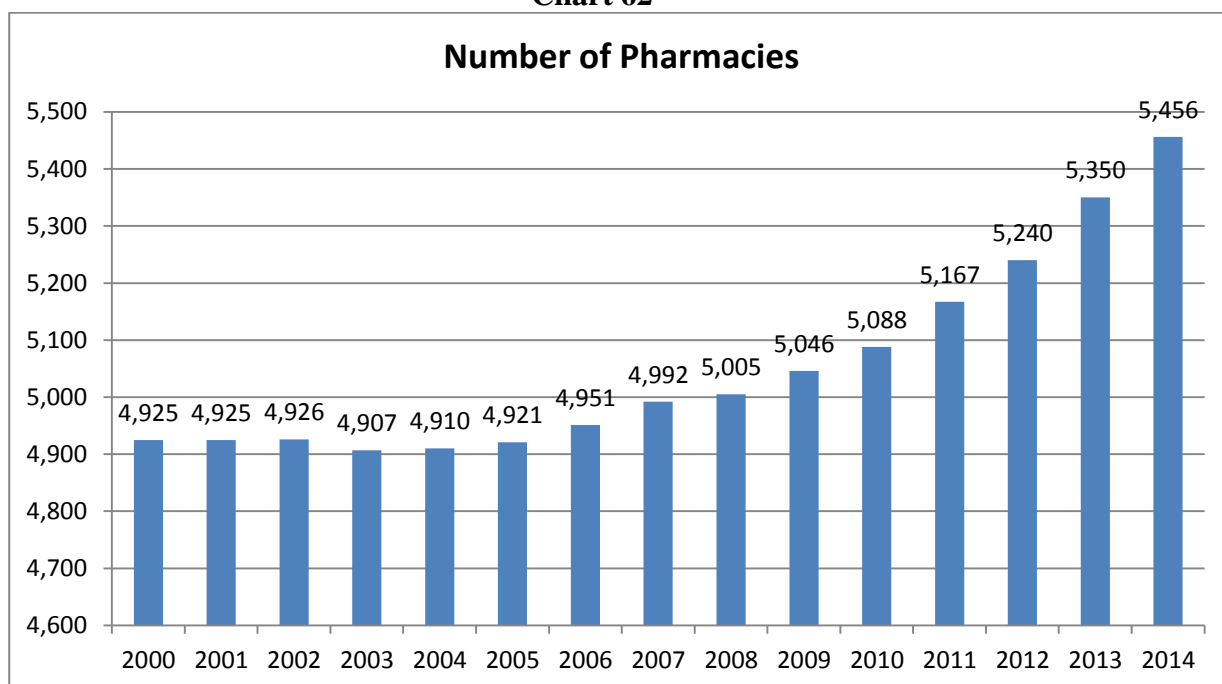
[1778] Existing ownership restrictions are found in State and Territory legislation, and take the following forms:

- (i) Restrictions on who can own pharmacies;
- (ii) Restrictions on the numbers of pharmacies in which a registered pharmacist may have a proprietary interest;
- (iii) Restrictions on the ownership structures of pharmacy businesses; and
- (iv) Pecuniary interest measures to prevent persons and corporations other than registered pharmacists having an indirect interest in a pharmacy business.

[1779] State and Territory legislation also requires that a pharmacy be supervised and managed by a registered pharmacist, and be owned either by a pharmacist or by some form of legal entity in which pharmacists have effective control.

[1780] Between 2000 and 2008, there were around 5,000 pharmacies but that number has risen in recent years and in 2014 there were 5,456 pharmacies. Chart 62 below shows the number of pharmacies in Australia between 2000 and 2014.

Chart 62¹⁶⁷⁹



[1781] The increase in the number of pharmacies can be largely attributed to the 2011 changes in the ‘location rules’ that govern where pharmacies that dispense PBS medicines can be located.

[1782] Under the *National Health Act 1953* (Cth) the Commonwealth imposes strict controls on approving a new pharmacy, and on relocating existing pharmacies, for PBS purposes (the ‘location rules’).

[1783] The ‘location rules’ were reviewed in 2010, and amended to simplify the application process and encourage pharmacies to be established in areas of community need. A pre-existing PBS approval number is now no longer required before a new pharmacy can be established in facilities such as shopping centres, large medical centres and private hospitals, or in towns where there is only one pharmacy. These changes have been a primary driver behind the increase in the number of PBS approved pharmacies nationally in the recent years. The increase in the number of pharmacies has been almost as high as the rate of increase in the volume of prescriptions dispensed nationally. As a result on average each pharmacy has seen very little growth in prescription volume, with annualised growth of less than one per cent.¹⁶⁸⁰

Price disclosure

[1784] Price disclosure arrangements first commenced as part of 2007 PBS reforms, and were expanded from 1 December 2010.

[1785] Price disclosure requires suppliers of certain PBS listed brands of medicines to advise the Commonwealth Government of the price at which their brands are sold to the market. That involves submitting data regarding sales revenue, sales volume, and the value of incentives (such as bonus stock) for each PBS medicine subject to price disclosure.

[1786] As a result of price disclosure, the amount the Government pays for the PBS listed medicines from suppliers reflects the price at which they are supplied to the market, as opposed to the recommended retail price. The practical effect is that where discounting is occurring as a result of competition, price disclosure progressively reduces the price of PBS medicines and ensures better value for money for the Government.

[1787] Under the 5th CPA (and all previous CPAs), one component of PBS remuneration for dispensing was linked to the price of the drug. Referred to as the Pharmacy Mark-up, this remuneration component was calculated as a percentage of the price of the medicine (15%, 10% or 4%, depending on the price of the medicine). For that reason price disclosure had a significant impact on pharmacy revenue as the amount they were receiving for scripts declined during the term of the 5th CPA in line with the reducing price of PBS medicines. During the five years of the 5th CPA average remuneration per prescription declined. That is, it was lower in 2014-15 than it was in either 2009-10 or 2010-11.

Community pharmacy agreements

[1788] Section 98BAA of the *National Health Act 1953* (Cth) facilitates the Minister (acting on the Commonwealth's behalf) and the PGA entering into an agreement regarding how the price of pharmaceutical benefits is to be determined for the purpose of the Commonwealth making payments to pharmacists that supply those pharmaceutical benefits. Effectively this is an agreement on what remuneration will be received by pharmacists approved to provide medicines under the PBS. That agreement is called the Community Pharmacy Agreement and it is currently in its sixth iteration, the 6th Community Pharmacy Agreement (6th CPA), which took effect from 1 July 2015.

[1789] Under these agreements, remuneration is determined for pharmacies dispensing PBS medicines on behalf of the Government. The PBS is a government-subsidised scheme that provides subsidised or free medicines for pensioners and a schedule of essential medicines subsidised or free of charge for others in the community.

The 6th CPA

[1790] In addition to setting the level and structure of remuneration for PBS medicines, under the 6th CPA the Commonwealth will make available up to \$1.26 billion in funding for Community Pharmacy Programs (CPPs) over the term of the agreement. That funding is conditional on the achievement of 'real improvement in patient access to community pharmacies (including through increased opening hours)'.

[1791] Following the making of the 6th CPA, the Guild created an online resource called the 6th CPA Forecaster. The function of the 6th CPA Forecaster tool is to compare a pharmacy's 2014-15 dispensary remuneration with projected dispensary remuneration in the future, under 6th CPA, and then compare the 6th CPA projection with the estimated value of remuneration in future years had 5th CPA continued unchanged.¹⁶⁸¹ The underlying capability of the 6th CPA Forecaster is based on the forecasting capacities of the ScriptMAP tool.¹⁶⁸²

[1792] One of the tools which has been developed to support modelling and analysis of that kind, is ScriptMAP. Mr Armstrong explained that that tool has been in use since about 2008. The ScriptMAP tool 'provides information to members based on their own prescription

volume information of the impact of changes to pricing of medicines on the PBS'.¹⁶⁸³ The ScriptMAP tool is designed to model the effect on individual pharmacies of changes in the prices of PBS medicines and the remuneration received for dispensing PBS medicines.

[1793] The 6th CPA Forecaster tool is hosted on the Guild's website and permits the entry of a number of variables to reflect the dispensing characteristics of an individual pharmacy. The output includes a projection of increases in dispensing remuneration over the five year life of 6th CPA.

[1794] A copy of a 6th CPA Forecaster tool output, based on inputs said to be reflective of an 'average' pharmacy, is Exhibit SDA 38.¹⁶⁸⁴ Mr Armstrong agreed that the inputs of historical dispensing characteristics were, to his understanding, reflective of those of an 'average' pharmacy, with one exception. He said that he thought that the 'growth' value was higher than average.¹⁶⁸⁵ Mr Armstrong did not know the proportion of pharmacies that were likely to exercise a new option of applying a co-payment discount of up to \$1¹⁶⁸⁶ and nor was he in a position to describe how the Forecaster had been constructed, or how its default values had been selected, as he had left the PGA's employment before that tool was created.

[1795] The forecast given by the 6th CPA Forecaster is that, for an average pharmacy with the default values provided, the 6th CPA would deliver an increase in dispensing remuneration, over the five year life of that agreement, compared to 2014-15 remuneration, of some \$662,619 (or, an average increase of about \$132,500 per year). The forecast difference between the projected trajectory of remuneration under 6th CPA, compared to projected trajectory if 5th CPA arrangements had remained undisturbed, was an amount of some \$509,211 over the life of 6th CPA (about \$100,000 per year).

[1796] In effect, the 6th CPA Forecaster output reflects an analysis by the PGA that 6th CPA will deliver substantial increases in dispensing remuneration, both in absolute terms and also when compared to the remuneration trajectory under a hypothetical extension of 5th CPA operation. The outputs from the 6th CPA Forecaster are dependent on the particular characteristics of individual pharmacies and the extent to which those characteristics depart from the 'default' settings.

[1797] There is one final aspect of Mr Armstrong's evidence to which we wish to refer.

[1798] Annexure C to Mr Armstrong's first statement¹⁶⁸⁷ sets out the results of the April 2014 'Pharmacy Services Expectations Survey'. In its submission the PGA refers to one aspect of the survey results, namely that '1 in 10 pharmacies intend to reduce trading by at least one day per week due to revenue pressures'.

[1799] We note that the survey was conducted in advance of the PGA's negotiations with the Commonwealth for the 6th CPA and that the material accompanying the survey made it clear that the PGA would use the survey results 'to advocate for you to key decision makers'.¹⁶⁸⁸ We also note that, as submitted by the SDA,¹⁶⁸⁹ that the survey result referred to was inconsistent with the PGA's lay witness evidence.

[1800] We do not propose to place any weight on the survey data annexed to Mr Armstrong's statement. We accept the SDA's critique of the survey and, importantly, that the data refers to the expectations of pharmacy operators *before* the 6th CPA came into operation. Given the timing of the survey, it is of very little relevance to the present proceeding and the

methodological limitations (together with the PGA's lay witness evidence) cast doubt on the reliability of the results.

[1801] We now turn to Ms Pezzullo's evidence.

[1802] As mentioned earlier, Ms Pezzullo, Lead Partner and Director, Health Economic and Social Policy, Deloitte Access Economics, provided a report titled: 'The effect of the Pharmacy Industry Award 2010 on community pharmacy in Australia 25 June 2015'¹⁶⁹⁰ (the '*Pezzullo Pharmacy Report*').

[1803] The SDA called two expert witnesses who provided a critique of the *Pezzullo Pharmacy Report*, Ms Bartley¹⁶⁹¹ and Dr O'Brien,¹⁶⁹² and Ms Pezzullo provided a subsequent report responding to those criticisms.¹⁶⁹³

[1804] The *Pezzullo Pharmacy Report* relies on the results of an online survey of pharmacy proprietors conducted during August 2014. Statistical and regression analysis was conducted on the survey data. The analysis sought to assess the impact of the *Pharmacy Award* on wage costs, trading hours, employment and working hours of proprietors.

[1805] The online survey was sent to 5,350 pharmacies across Australia, by the PGA and its State branches. Responses were received from 302 pharmacies, a response rate of 5.6 per cent.

[1806] The various methodological limitations of the online survey and regression analysis in the *Pezzullo Pharmacy Report* are fully canvassed in the evidence of Ms Bartley and Dr O'Brien and in the SDA's written submissions of 21 March 2016 (at [514]–[561]). We only propose to refer briefly to some of those limitations.

[1807] First, there are a number of reasons to doubt the results from the regression analysis. As noted by Dr O'Brien and conceded by Ms Pezzullo,¹⁶⁹⁴ the variable capturing the effects of the introduction of the *Pharmacy Award* does not accurately measure any effect flowing from the implementation of the *Pharmacy Award* and is instead likely to capture other prevailing factors that affected the pharmacy industry between 2009 and 2014. In effect, the variable is merely an indicator of whether the year is 2009 or 2014 and cannot measure any direct effect of the *Pharmacy Award* on the dependent variable chosen for analysis.

[1808] Second, in relation to the results of the online survey, the low response rate and even lower sample size for some questions due to non-response, significantly limit the weight that can be attributed to the results.

[1809] As noted by the SDA, the claimed sample size of 302 is misleading, as it represents the number of survey responses that answered any of the survey questions. SDA noted that none of the survey questions had 302 responses, with the average sample size across all questions being around 175.

[1810] Regarding the qualitative component of the survey, the sample sizes for respondents to these subjective questions were significantly lower than the total number of respondents to the survey, with sample sizes decreasing to around 75 responses for certain questions and on that basis, cannot be regarded as representative of community pharmacies.

[1811] Further, as the SDA noted, the data collection methodology was modified half way through the survey (due to the low response rate), so that Banner Groups were asked to provide responses for multiple pharmacies.

[1812] As the SDA submits, the responses from Banner Groups ‘appeared to be comprised of “uniform” expressions of opinion’.¹⁶⁹⁵ This is significant because the responses from the Banner Groups accounted for 25 per cent of survey responses. The SDA goes on to submit that ‘it is impossible to rely upon the Banner Group proportion of the survey responses, and it is impossible to disaggregate those responses from the total survey sample...The survey data is polluted and unreliable’.¹⁶⁹⁶ There is considerable force in the SDA’s submission.

[1813] These issues raise concerns that the data from the survey were not representative of community pharmacies, and in turn, that any analysis of that data would not yield robust estimates.

[1814] In addition to the matters we have identified, a significant limitation of the *Pezzullo Pharmacy Report* is that it is out of date and does not represent an accurate reflection of the current state of community pharmacy in Australia. In particular, the report does not take into account or analyse what Ms Pezzullo acknowledged to have been the ‘substantial changes’ brought about by the 6th CPA. Further, in the course of her evidence Ms Pezzullo maintained that, in addressing the current state of the commercial position of the community pharmacy sector, it is important to consider history and context, as well as analysing current events.¹⁶⁹⁷ Ms Pezzullo accepted that her report was a ‘purely historical’ document.¹⁶⁹⁸

(ii) *The SDA*

[1815] In opposing the claims to vary the *Pharmacy Award* the SDA called one lay witness, a Pharmacy Assistant Level 2. The name, address and workplace are confidential per the Order of Catanzariti VP of 25 February 2016.¹⁶⁹⁹ It is convenient to refer to this witness as SDA Pharmacy witness 1.

*SDA Pharmacy Witness 1*¹⁷⁰⁰

[1816] The SDA Pharmacy witness has worked for her present employer for 24 years and currently works on average of 25 hours per week as a part-time pharmacy assistant (a Pharmacy Assistant Level 2) on a 4 weekly roster, as follows:

- Weeks 1 & 3: Monday 9.00 am–5.00 pm (with an unpaid break of 1 hour); Friday 9.00 am–5.30 pm (with an unpaid break of 1 hour); Saturday 12.30 pm–9.00 pm (with an unpaid break of 1 hour) and Sunday 12.30 pm–9.00 pm (with an unpaid break of 1 hour) (29.5 hours in total).
- Weeks 2 & 4: Monday 12.00 pm–9.00 pm (with an unpaid break of 1 hour); Friday 10.00 am–3.00 pm and Saturday 9.00 am–5.30 pm (with an unpaid break of 1 hour) (20.5 hours in total).

[1817] As to the impact of working on Sundays the witness says:

‘I work on the weekends, particularly on Sundays, and on public holidays because of the penalty rates. Sundays are normally the days on which my family has celebrations and I do not enjoy

missing out on these events. I've often also wished I could participate in a walking club or attend our local agricultural shows and markets which are held on the weekends, most often on Sundays.¹⁷⁰¹

[1818] At paragraphs 7 and 8 of her statement, the witness recounts her financial circumstances and the impact upon her of a reduction in penalty rates:

‘Nearly all of my income is spent on the basics - electricity, gas, water and phone charges, strata fees, council rates, the emergency services levy, registration costs for my car and insurance. I spend what I can save on small luxuries or gifts for my grandchildren. I cannot afford private health cover or contents insurance. If the penalty rates I receive were reduced, I would experience a significant reduction in my take home pay and I would find it yet harder to manage financially.’¹⁷⁰²

(iii) *APESMA*

[1819] APESMA also called one lay witness, a pharmacist, to give evidence before the Commission. The company name, trading name, employee name and business address are confidential per the Order of Catanzariti VP of 9 March 2016.¹⁷⁰³ It is convenient to refer to this witness as APESMA Pharmacy Witness 1.¹⁷⁰⁴

*APESMA Pharmacy Witness 1*¹⁷⁰⁵

[1820] The APESMA Pharmacy witness is a full-time community pharmacist with almost 6 years post graduate experience. He does not work on weekends at present but after he graduated he regularly worked on Saturdays for about 5 and a half years. He describes the inconvenience of Saturday work and the disruption to his social activities in the following terms:

‘When I worked at [REDACTED] I worked 41 Saturdays per year. I had one Saturday off every month, excluding December when I worked every Saturday. I did not work Saturday by choice. My boss did not want to work on Saturday so he rostered me on this day instead.

Weddings, engagement and birthday parties and the vast majority of social events for our family and friends all occur more often on weekends and public holidays than during the week. I used not to be able to attend many of these important events and I missed out on being part of the lives of my close friends and relatives. Often, at family functions, my children used to be seen without their father and my wife without her husband. This had a negative effect on the relationship I had with many members of our extended family. It is only now that I have stopped working on Saturdays that I am beginning to attend these functions and re-build these relationships.’¹⁷⁰⁶

[1821] The APESMA witness has never worked on a Sunday as a pharmacist¹⁷⁰⁷ and said that he would find working weekends, especially Sundays and public holidays, ‘very disruptive’. In particular:

‘Church services are almost universally held on weekends, the majority on Sundays. If I were unable to attend Sunday church on a regular basis, it would have a significant effect on me and also on my wife and children. I set an example for, encourage and have a responsibility for the spiritual life of my family and Sundays are a vital part of allowing me to fulfil this role. Working public holidays such as Christmas, Good Friday and Easter would also make it difficult for me to participate in my family’s church community.

I am also involved in my local community theatre groups. In order for these groups to function, they need a large group of people who are available to volunteer for several hours at a time each week. Every production in which I have played some role has involved a regular rehearsal on Sunday. If I had to work on Sunday, I would not be able to be part of these groups and contribute to the social and creative wellbeing of my local community.¹⁷⁰⁸

The APESMA witness has not pursued other employment opportunities because they involved working on Sundays¹⁷⁰⁹ and as to that choice he says: ‘It was one I felt I had to make for the sake of my life and my family’.¹⁷¹⁰

8.3.5 Consideration

(i) *The Sunday penalty rate*

[1822] We turn first to that part of the PGA’s claim which relates to the Sunday penalty rate.

[1823] The *Pharmacy Award* currently provides a 200 per cent loading for Sunday work (225 per cent for casuals). The PGA seeks to replace these provisions with rates payable at different times of the day:

- Before 7.00 am: 200 per cent for all employees,
- Between 7.00 am and 9.00 pm: 150 per cent for all employees, and
- Between 9.00 pm and midnight: 175 per cent for all employees

[1824] For reasons we set out later (at [1886]–[1892]), we propose to focus on the PGA’s proposal in respect of the Sunday penalty rate between 7.00 am and 9.00 pm. At present the award provides a rate of 200 per cent for work performed at this time and the PGA seeks to reduce that rate to 150 per cent.

[1825] We propose to deal with the s.134 considerations first.

[1826] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. 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). As shown in Chart 55 (see [1459]) a substantial proportion of award-reliant employees covered by the *Pharmacy Award* are ‘low paid’. A number of the higher classifications in the *Pharmacy Award* were above the definition of ‘low paid’, namely the ‘Pharmacist’, ‘Experienced Pharmacist’, ‘Pharmacist in Charge’ and the ‘Pharmacist Manager’ classifications.

[1827] As stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs. The evidence of the SDA lay witness provides an individual perspective on the impact of the proposed changes.

[1828] As we have mentioned, the extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.

[1829] 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 of pay (independent of penalty rates).

[1830] We are conscious of the adverse impact of a reduction in Sunday penalty rates on the earnings of pharmacy workers who work on Sundays and this will be particularly relevant to our consideration of the transitional arrangements associated with any such reduction.

[1831] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[1832] The PGA submits that s.134(1)(b) is a 'neutral' consideration.¹⁷¹¹

[1833] It is important to appreciate that s.134(1)(b) speaks of 'the need to *encourage* collective bargaining'. As we are not persuaded that a reduction in penalty rates would '*encourage* collective bargaining' it follows that this consideration does not provide any support for a change to Sunday penalty rates.

[1834] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).

[1835] On the basis of the common evidence we conclude that a reduction in the Sunday penalty rate in the *Pharmacy Award* is likely to lead to some additional employment, in terms of additional persons employed and additional hours worked. We are fortified in that conclusion by the evidence of the lay witnesses called by the PGA. As mentioned earlier, that evidence supports the proposition that a lower Sunday penalty rate would increase the level and range of services offered, with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees)(see [1769])

[1836] This consideration lends support to a reduction in Sunday penalty rates.

[1837] It is convenient to deal with the considerations s.134(1)(d) and (f) together.

[1838] Section 134(1)(d) requires that we take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’. The PGA submits that this consideration is *not* relevant to this review.¹⁷¹²

[1839] Section 134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[1840] It is self-evident that if the Sunday penalty rate was reduced then employment costs would reduce. It was not contended that a reduction in the Sunday penalty rate would impact on the regulatory burden. In addition to the impact on employment costs it is also apparent that a reduction in the Sunday penalty rate would have other positive effects on business.

[1841] The evidence of the lay witnesses called by the PGA supports the proposition that the current level of Sunday penalty rates has led employers to reduce labour costs associated with Sunday trading by restricting the trading hours, lowering staffing levels or imposing service delivery restrictions.

[1842] As to the likely impact of reduced Sunday penalty rates on productivity the PGA submits:

‘The evidence reveals that Guild’s proposal will reduce employment costs and make it profitable for community pharmacies to open for extended trading hours. This will result in higher business productivity as the fixed costs of running a pharmacy such as licenses, franchise fees leasing and rental costs, fittings and equipment, repairs, insurance premiums etc, are spread over longer opening times and higher demand.’¹⁷¹³

[1843] As mentioned earlier, the Productivity Commission makes a similar point in noting that there would be potential productivity improvements from a reduction in Sunday penalty rates:

‘...as the fixed costs of running a business would be spread over greater opening times and demand...’¹⁷¹⁴

[1844] We are satisfied that a reduction in penalty rates will have a positive effect on business. This consideration lends support to a reduction in Sunday penalty rates.

[1845] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on weekends’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[1846] It is convenient to deal with matters (ii) and (iii) first.

[1847] As to matter (ii), the minimum wage rates in the *Pharmacy Award* do not already compensate employees for working on weekends. We note that the *Pharmacy Award* makes provision for annualised salary arrangements (for pharmacists only) under which a pharmacist is paid a salary which is inclusive of, among other things, penalty rates for weekend work. An annualised salary arrangement is subject to the proviso that the annual salary paid over a year is sufficient ‘to cover what the employee would have been entitled to if all award entitlements had been complied with when calculated on an individual basis according to the hours work’ (see clause 27.1 of the *Pharmacy Award*). But such arrangements are not the focus of the matter referred to in (ii) above.

[1848] It is also relevant to observe that there are terms in the *Pharmacy Award* which operate to minimise the incidence and impact of weekend work. In particular, clause 25.4 provides:

‘25.4 Rostering—Permanent employees

- (a) The following roster requirements will apply to permanent employees:
- (i) Ordinary hours will be rostered so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.
 - (ii) Ordinary hours and any reasonable additional hours may not be rostered over more than six consecutive days.
 - (iii) Ordinary hours may not be rostered over more than five days in a week, provided that ordinary hours may be rostered on six days in one week where ordinary hours are rostered on no more than four days in the following week.
 - (iv) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.
- (b) A 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. The notice need not be given where the agreement terminates on an agreed date or at the end of an agreed period. For the avoidance of doubt this provision does not apply to part-time employees’ agreed pattern of work under clause 12.2.

(d) The rostering provision of clause 25.4(a)(iv) does not apply to a part-time employee whose agreed hours under clause 12.2(b) provides that the employee will work on either or both Saturday and Sunday each week and where the agreement provides that the employee will have at least two consecutive days off work each week.’

[1849] We note that clause 25.4 does not apply to part-time or casual employees.

[1850] In relation to matter (iii), weekend work is a feature of the Pharmacy sector. As mentioned earlier (see [1432]) enterprises in the Retail sector operate on an average of 6.2 days per week and just over 40 per cent of enterprises operate 7 days a week. As mentioned earlier, the PGA lay evidence suggests that a substantial proportion of pharmacies operate 7 days per week. The lay evidence related to 29 pharmacies, of which 25 operate 7 days a week¹⁷¹⁵ (save that 9 of these pharmacies¹⁷¹⁶ do not open on public holidays or only open on a limited number of public holidays).

[1851] We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA and APESMA (albeit limited) spoke to the adverse impact of weekend work on the ability of pharmacy employees to engage in social and family activities.

[1852] We note that in the event Sunday penalty rates were reduced (but not removed entirely) employees working on Sundays would still receive ‘additional remuneration’.

[1853] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in Sunday penalty rates would apply equally to men and women workers. For the reasons given earlier we regard s.134(1)(e) as neutral to our consideration of the claims before us.

[1854] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’. We regard s.134(1)(g) as neutral to our consideration of the claims before us. No party contended to the contrary.

[1855] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’.

[1856] The PGA submits that the penalty rate reductions it proposes will result in lower employment costs which will lead to:

- (a) higher capital utilisation placing downward pressure on average unit costs and prices and therefore leads to lower inflation;
- (b) more hours of work available for employees and therefore higher employment growth and higher overall wages for employees; and
- (c) lower health care costs because community pharmacies are more accessible to those in need at times of need.¹⁷¹⁷

[1857] In our view, the PGA’s submission significantly overstates the effects of the reduction in employment costs consequent upon a reduction in penalty rates. The purported impact of inflation, higher capital utilisation placing downward pressure on average unit costs and

prices and therefore leads to lower inflation, ignores the fact that the price for PBS medication is controlled by the Commonwealth Government. As Mr Tassone observes in his statement, '[f]or the most part, pharmacies are price 'takers' not price 'makers''.¹⁷¹⁸

[1858] The proposition that a reduction in penalty rates will lead to 'higher overall wages for employees' (at [1856](b)) is predicated on the notion that lower wages will induce greater demand for labour on Sundays and hence more hours for those employees who currently work on Sundays. In our view, the additional hours provided are unlikely to offset the reduction in income resulting from reduced penalty rates; at least not for all employees.

[1859] As mentioned earlier, the reduction in Sunday penalty rates is likely to lead to some additional employment, in terms of additional persons employed and additional hours worked by existing employees. It is also likely that such a change will result in 'winners' and 'losers'. For example, a change in the staffing mix on Sundays may result in *some* existing employees receiving additional hours; others may experience *no change* in their hours or may be offered *less hours* (as their labour is substituted by higher skilled labour).

[1860] We also note that the proposition advanced by the PGA is inconsistent with the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earning as a consequence of reduced Sunday penalty rates as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.

[1861] As to the third point advanced by the PGA (see [1856](c) above), we accept that a reduction in Sunday penalty rates is likely to lead to some additional operating hours on Sundays and hence make community pharmacies 'more accessible to those in need in times of need'. That is, extending the operation hours of community pharmacies will improve access to health care and is likely to improve the range of health care services available at particular times (namely Sundays). This is a factor which supports a reduction in the Sunday penalty rate. However, the proposition that this would result in 'lower health care costs' is simply conjecture and the link to 'lower health care costs' is not made out on the evidence before us.

[1862] We have concluded that a detailed assessment of the impact of a reduction in Sunday penalty rates in the *Pharmacy Award* on the national economy is not feasible on the basis of the limited material before us.

[1863] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us.

[1864] The central issue in these proceedings is whether the existing Sunday penalty rate provides a 'fair and relevant minimum safety net'.

[1865] The PGA's principal contention is that the existing penalty rate is inconsistent with the modern awards objective and does not establish a 'fair and relevant safety net of conditions of employment'. In short, the existing Sunday penalty rate is not 'proportional to the disability'. In this context the PGA point to the fact that the existing Sunday loading (100 per cent) is four times the loading for Saturday work (25 per cent).

[1866] As set out earlier, the PGA propose that the Sunday penalty rate be reduced from 200 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees). No change is proposed to Saturday penalty rates.

[1867] It is implicit in the claim advanced that the PGA accepts the proposition that the disutility associated with Sunday work is *higher* than the disutility associated with Saturday work. If this was not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same.

[1868] We note that the PC Final Report recommended that for full-time and part-time employees the Sunday penalty rates be set at the higher rate of 125 per cent and the existing Saturday penalty rate.

[1869] In the *Pharmacy Award* the existing Saturday penalty rate for full-time and part-time employees is 125 per cent. Hence, if adopted the Productivity Commission recommendation would result in the reduction of the Sunday penalty rate for full-time and part-time employees from 200 per cent to 125 per cent.

[1870] As mentioned earlier, in the Review the Commission is not constrained by the terms of a particular application, it may vary a modern award in whatever terms it considers appropriate, subject to procedural fairness considerations. Accordingly, if we were satisfied of the merit of doing so, it would be open to us to adopt the recommendation in the PC Final Report (and reduce the Sunday penalty rate to 125 per cent). But as we are not satisfied of the merit of doing so, we have decided not to adopt that course.

[1871] As set out in Chapter 6, there is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Further, generally speaking, for most workers Sunday work has a higher level of disutility than Saturday work, though the extent of that disutility is much less than it was in times past.

(iii) Saturday penalty rates and Morning and evening work Monday to Friday penalties

[1872] Clause 26.2(c) of the *Pharmacy Award* deals with the loadings applicable to Saturday work, as follows:

26.2 Overtime and penalty

(c) Saturday work

A loading of 100% (casuals 125%) will apply for hours worked before 8.00 am, and a loading of 25% (casuals 50%) will apply for hours of work from 8.00 am to 6.00 pm on a Saturday. A loading of 50% (casuals 75%) will apply from 6.00 pm to 9.00 pm, and a loading of 75% (casuals 100%) for hours from 9.00 pm to midnight.

[1873] The PGA seeks to replace clause 26.2(c) with a provision which will:

- Adjust the span of hours for the morning loading, so that it is paid for work performed ‘before 7.00 am’ (rather than before 8.00 am) and reduce the current loading paid to casuals, during this period from 225 per cent to 200 per cent (no change in the loading for full-time and part-time employees, it remains at 200 per cent).
- Remove the current loading for work performed between 8.00 am and 6.00 pm, and remove 6.00 pm and 9.00 pm and replace with a loading of 125 per cent for work performed between 7.00 am and 9.00 pm for all employees.
- Reduce the rate payable for work performed between 9.00 pm and midnight from 175 per cent (200 per cent for casuals) to 150 per cent for all employees.

[1874] Clause 26.2(b) of the *Pharmacy Award* deals with the loadings applicable for work performed before 8.00 am between 7.00 pm to 9.00 pm and from 9.00 pm to midnight, as follows:

26.2 Overtime and penalty

(b) Morning and Evening work Monday to Friday

A loading of 50% (casuals 75%) will apply for hours worked before 8.00 am and a loading of 25% (casuals 50%) for hours between 7.00 pm to 9.00 pm. A loading of 50% will apply to hours worked from 9.00 pm to midnight (casuals 75%).

[1875] The PGA seeks to replace clause 26.2(b) with a provision which will:

- Adjust the span of hours for the morning loading, so that it is paid for work performed ‘before 7.00 am’ (rather than before 8.00 am).
- Remove the current 125 per cent loading (150 per cent for casuals) for work performed between 7.00 pm and 9.00 pm.
- Reduce the current loading for work performed between 9.00 pm and midnight, from 175 per cent (200 per cent for casuals) to 125 per cent (150 per cent for casuals).

[1876] For the reasons set out below, we have concluded that these elements of the PGA’s claims should be the subject of further proceedings.

8.3.6 Conclusion

[1877] Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, we have concluded that the existing Sunday penalty rate between 7.00 am and 9.00 pm is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The word ‘relevant’, in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances. We have decided to reduce the Sunday penalty rate for full-time and part-time employees (between 7.00 am and 9.00 pm), from 200 per cent to 150 per cent.

[1878] We now turn to the application of weekend penalty rates in the *Pharmacy Award* to casual employees. The *Pharmacy Award* provides that casual employees are paid a casual loading of 25 per cent.

[1879] Casuals are currently paid the applicable Saturday penalty rate *plus* the 25 per cent casual loading. Further, the existing Sunday rate for casuals for work performed between 8.00 am and 6.00 pm is 225 per cent (that is the 200 per cent loading that applies to full-time and part-time employees *plus* the 25 per cent casual loading). The PGA is seeking a Sunday penalty rate for casuals (for work between 7.00 am and 9.00 pm) of 150 per cent, which is the same as the proposed rate for full-time and part-time employees.

[1880] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.

[1881] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits. Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on Sundays.

[1882] As we have mentioned we have a preference for what the Productivity Commission calls the 'default' approach to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is *added* to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals.

[1883] In our view, the casual loading should be *added* to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission's 'default' approach. Accordingly, in the *Pharmacy Award* the Sunday rate for casual employees for work performed between 7.00 am and 9.00 pm on Sundays will be $25 + 150 = 175$ per cent.

[1884] The Sunday rate (7.00 am to 9.00 pm) for full-time and part-time employees will be reduced to 150 per cent and the equivalent rate for casual employees will be reduced to 175 per cent.

[1885] We deal with the transitional arrangements associated with the reduction in the *Pharmacy Award* Sunday penalty rate in Chapter 13 of our decision.

[1886] We now turn to the proposed loadings for work before 7.00 am and between 9.00 pm and midnight, on weekends and Monday to Friday.

[1887] At this stage, we are not persuaded to make the changes proposed.

[1888] In relation to the proposed Sunday rates, we do not understand why additional penalties should be imposed on Sunday work performed before 7.00 am and after 9.00 pm. The current award terms provides for the same loading throughout the day – what then is the logic behind providing different loadings for different times on a Sunday?

[1889] In this context, we note that the *Retail Award* provides that ordinary hours (for non-shiftworkers)¹⁷¹⁹ may be worked within the following spread of hours:

27.2 Ordinary hours

- (a) Except as provided in clause 27.2(b), ordinary hours 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	9.00 am–6.00 pm

- (b) Provided that:

- (i) the commencement time for ordinary hours of work for newsagencies on each day may be from 5.00 am;
- (ii) the finishing time for ordinary hours for video shops may be until 12 midnight; and
- (iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

- (c) Hours of work on any day will be continuous, except for rest pauses and meal breaks.

[1890] Overtime rates are prescribed for hours worked outside the span of hours (*Retail Award* clause 29.2) and a penalty payment of an additional 25 per cent applies to ordinary hours worked after 6.00 pm Monday to Friday (*Retail Award* clause 29.4(a) – this entitlement does not apply to casuals).

[1891] The difference in the evening and morning penalty rate provisions between the *Retail Award* and the *Pharmacy Award* requires further examination. This is particularly so given the close alignment between the wages structure for Pharmacy Assistants (levels 1–4) and the Retail Employee levels 1–4, as shown in Table 71 below.

Table 71
Comparison of the *Pharmacy Award* and *Retail Award* wage rates

Pharmacy Award wage rates		Retail Award wage rates	
17. Minimum weekly wages		17. Minimum weekly wages	
Classifications	Per week \$	Classifications	Per week \$
Pharmacy Assistants			
Level 1	738.80	Retail Employee Level 1	738.80
Level 2	756.40	Retail Employee Level 2	756.40
		Retail Employee Level 3	768.20
Level 3	783.30	Retail Employee Level 4	783.30
Level 4	815.40	Retail Employee Level 5	815.40

[1892] The PGA’s claims in respect of Sunday work before 7.00 am and after 9.00 pm; Saturday work and the morning and evening work penalties applying Monday to Friday, will be the subject of further proceedings. A mention will be held shortly with interested parties to discuss the further hearing of these matters.

9. Public Holiday Penalty Rates

9.1 Background

[1893] As mentioned in Chapter 3, the modern awards objective provides that the Commission ‘must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions’ (emphasis added) (s.134(1)). The National Employment Standards (the ‘NES’) are set out in Part 2-2 of the FW Act. The NES are 10 minimum standards that apply to all ‘national system employers’ (see s.44). The NES are legislative minimum standards which cannot be excluded by a modern award or enterprise agreement (s.55). Modern awards or enterprise agreements may include terms permitted by the NES or terms that are ancillary or incidental to the operation of an entitlement under the NES, or that supplement the NES (but only if those terms are not detrimental to an employee in any respect, when compared to the NES) (see s.55(2)–(4)). Relevantly for present purposes, Division 10 of Part 2-2 (ss.114–116) sets out the NES provisions in respect of public holidays.

[1894] Section 114(1) establishes an entitlement to be absent on a day or part-day that is a ‘public holiday’ in the place where the employee is based for work purposes. Section 114(2) provides that an employer may request an employee to work on a public holiday (if the request is reasonable). An employee may refuse such a request if the request is not reasonable or if the refusal is reasonable (s.114(3)). Section 114(4) sets out a non-exhaustive list of matters to be taken into account when determining whether a request, or a refusal of a request, to work on a public holiday is reasonable. The factors to be taken into account are:

- (a) the nature of the employer’s workplace or enterprise (including its operational requirements) and the nature of the work performed by the employee;
- the employee’s personal circumstances, including family responsibilities;
- (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
- (e) the type of employment of the employee (e.g. full-time, part-time, casual or shiftwork);
- (f) the amount of notice in advance of the public holiday given by the employer when making the request;
- (g) in relation to the refusal of a request – the amount of notice in advance of the public holiday given by the employee when refusing the request; and
- (h) any other relevant matter.

[1895] Section 116 entitles an employee to payment when absent from work on a day or part-day that is a public holiday. An employee is not entitled to any payment for absence on a public holiday if they would not ordinarily have worked on that day.

[1896] Section 115 sets out the meaning of ‘public holiday’ (only s.115(1) is relevant for present purposes):

‘115 Meaning of *public holiday*

The public holidays

(1) The following are public holidays:

(a) each of these days:

(i) 1 January (New Year’s Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.’

[1897] Section 115(1)(a) specifies 8 particular days as public holidays, throughout Australia. Section 115(1)(b) provides that other days or part-days declared or prescribed by or under a law of a State or Territory to be observed generally, or within a region of that State or Territory, are also considered public holidays. Regulations may exclude a day or part-day (or a kind of day or part-day) from the definition of a public holiday.

[1898] The number and timing of State and Territory declared public holidays vary depending on the particular State and Territory. Further, there are different substitution and additional day provisions that vary from one jurisdiction to the next. Table 72 below illustrates the pattern of public holidays for 2017, including some that operate on a limited basis.

Table 72
Public Holidays listed by State and Territory 2017

Date	Holiday	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
		<i>Holidays Act 1958</i>	<i>Public Holidays Act 2010</i>	<i>Public Holidays Act 1981</i>	<i>Holidays Act 1983</i>	<i>Holidays Act 1910</i>	<i>Statutory Holidays Act 2000</i>	<i>Public Holidays Act 1993</i>	<i>Public and Bank Holidays Act 1972</i>
1-Jan	New Year's Day	✓	✓	✓	✓	✓	✓	✓	✓
2-Jan	Additional Holiday	✓	✓	✓	✓	✓	✓	✓	✓
26-Jan	Australia Day	✓	✓	✓	✓	✓	✓	✓	✓
13-Feb	Regatta Day						✓		
6-Mar	Labour Day								✓
13-Mar	Canberra Day	✓							
13-Mar	March Public Holiday					✓			
13-Mar	Eight Hours Day						✓		
13-Mar	Labour Day							✓	
14-Apr	Good Friday	✓	✓	✓	✓	✓	✓	✓	✓
15-Apr	Easter Saturday	✓	✓	✓	✓	✓		✓	
16-Apr	Easter Sunday	✓	✓					✓	
17-Apr	Easter Monday	✓	✓	✓	✓	✓	✓	✓	✓
18-Apr	Easter Tuesday						✓*		
1-May	May Day			✓					
1-May	Labour Day				✓				
25-Apr	Anzac Day	✓	✓	✓	✓	✓	✓	✓	✓
5-Jun	Western Australia Day								✓
12-Jun	Queen's Birthday	✓	✓	✓		✓	✓	✓	
7-Aug	Bank Holiday		✓**						
7-Aug	Picnic Day			✓					
25-Sep	Family and Community Day	✓							
25-Sep	Queen's Birthday								✓
29-Sep	AFL Grand Final Eve Holiday							✓	
2-Oct	Labour Day	✓	✓			✓			
2-Oct	Queen's Birthday				✓				
7-Nov	Melbourne Cup							✓	
24-Dec	Christmas Eve			✓***		✓***			
25-Dec	Christmas Day	✓	✓	✓	✓	✓	✓	✓	✓
26-Dec	Boxing Day	✓	✓	✓	✓	✓	✓	✓	✓
31-Dec	New Year's Eve			✓***		✓***			

Notes:

- Holidays provided by s.115(1)(a).
- Additional State and Territory holidays (s.115(1)(b)).
- * Only applies under certain awards or agreements and to the State public service
- ** Applies to banks and certain financial institutions
- *** Part-day public holiday from 7pm to midnight

[1899] In addition to the public holidays listed in the table above, some States and Territories have additional public holidays particular only to certain regional areas. The NT has five show days for different regions of the Territory.¹⁷²⁰ Regatta Day applies only to Hobart, while employees from other regions in Tasmania who do not observe Regatta Day have a substitute holiday called Recreation Day on 6 November 2017. Additionally, Tasmania has a number of regional statutory holidays.¹⁷²¹ Royal Queensland Show Day only applies to Brisbane;¹⁷²² but there are around 60 agricultural show public holidays in different regional areas of Queensland.¹⁷²³

[1900] Additionally, South Australia and the NT have two part-day public holidays on Christmas Eve and New Year's Eve.¹⁷²⁴

[1901] The NES does not deal with the level of payment to be made to an employee who works on a public holiday. For most employees the level of payment for work on a public holiday is prescribed in a modern award or enterprise agreement. In respect of modern awards s.139(1)(e)(ii) provides:

‘A modern award may include terms about any of the following matters:

...

(e) penalty rates, including for any of the following:

...

(ii) employees working on... public holidays.’

[1902] Further, the modern awards objective (s.134(1)) requires the Commission to take into account:

‘(da) the need to provide additional remuneration for:

...

(iii) employees working on... public holidays.’

[1903] The contemporary standard for the public holiday penalty rate (250 per cent) was initially set in 1970 by the NSW Commission in Court Session in *re Electricians (State) Award (No. 3)*.¹⁷²⁵ In the course of its judgment the Court observed that there was no element of deterrence in the rate fixed¹⁷²⁶ and in increasing the public holiday penalty rate from 200 per cent to 250 per cent, said:

‘...we are all of the opinion that for the work in question some improvement in the rate presently paid is justified... the employee who is required to work on such a day is at present inadequately compensated for the deprivation or curtailment of his holiday.’¹⁷²⁷

[1904] Each of the modern awards in these proceedings prescribes a penalty rate for work performed on a public holiday, as summarised in Table 73 below.

Table 73
Current public holiday penalty rates in the Hospitality and Retail awards

Award title	Public holiday penalty rates (%)	
	Full-time & part-time	Casual
<i>Hospitality Award</i> (cl. 32)	250	275
<i>Restaurant Award</i> (cl. 34)	250	250
<i>Clubs Award</i> (cl. 29)	250	250
<i>Retail Award</i> (cl. 29)	250	275/250 ¹
<i>Fast Food Award</i> (cl. 30)	250	275
<i>Pharmacy Award</i> (cl. 31)	250	275

¹ The public holiday penalty rate provisions for casuals are not clearly expressed in the *Retail Award*. The FWO ‘Pay Guide’ to the award assumes casuals are paid 275 per cent on public holidays, but see *Modern Awards Review 2012 – Public Holidays* [2013] FWCFCB 2168 at [141]–[150].

[1905] The creation of additional public holidays by States and Territories creates extra obligations on the employers whose employees are covered by modern awards which prescribe public holiday penalty rates.

[1906] The 2012 post-implementation review of the FW Act¹⁷²⁸ recommended capping the number of public holidays each year (suggested at 11 days) for which penalty rates are payable:¹⁷²⁹

‘The FW Act includes an entitlement under the NES to eight public holidays, as well as any further days prescribed as public holidays under state or territory legislation, and provides a right to be absent (subject to a reasonable request to work) and paid at the base rate on a public holiday (ss. 114–116). Penalty rates for working on a public holiday are provided for in industrial instruments, principally modern awards and enterprise agreements, rather than in the FW Act. Modern awards and enterprise agreements typically provide for a penalty rate payable for working on any public holiday...

A large number of employers indicated concern about arrangements for the payment of public holidays. Employers’ concerns were generally about the ability for state and territory governments to declare additional public holidays under s. 115 (1)(b) of the FW Act to those provided under s. 115 (1)(a), and the resultant increase in wage costs due to penalty rates then applying under modern awards. Some employer and employee representatives indicated that the current system had resulted in confusion and called for a national standard to be developed.

The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days).

Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on

the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day.

The issue of public holidays was identified as important for many stakeholders in submissions and discussions with the Panel. Current arrangements have meant that the number of public holidays in each jurisdiction can vary widely. For example, in 2012 the number is expected to range from between 10 and 13 days, depending on the state or territory. The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel. To overcome these concerns, the Panel's view is that under the NES, there should be a nationally consistent number of public holidays each year for which penalty rates are payable, and that the number of days for which penalty rates are payable should not be able to be increased by declaring additional or substitute days by state and territory governments. This would not prevent employers and employees entering agreements to provide for penalty rates to be payable on a greater number of public holidays, nor to specify additional days as public holidays.

Recommendation 8: The Panel recommends that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11.¹⁷³⁰

[1907] We would also observe that the PC Final Report recommends that s. 115(1)(b) be amended so that newly designated State and Territory public holidays¹⁷³¹ are not subject to public holiday penalty rates¹⁷³² or a paid day of leave.¹⁷³³

[1908] The above recommendations have not been implemented.

[1909] We now turn to the applications to vary public holiday provisions in each of the modern awards before us.

9.2 The Claims

[1910] The claims in relation to the Hospitality and Retail awards seek to vary the public holiday penalty rates for full-time, part-time employees and casual employees, by various amounts. There is very little consistency in respect of the claims advanced by the various employer interests. For example, in the *Restaurant Award* RCI seeks a public holiday penalty rate at 150 per cent for all employees, whereas ABI seeks a public holiday penalty rate of 200 per cent for full-time and part-time employees and *no* additional payment for casuals who work on a public holiday (other than the 25 per cent casual loading).

[1911] The claim in relation to the *Hospitality Award* is quite different to the claims in respect of the other modern awards before us.

[1912] The Hospitality Employers seek to introduce a two-tiered public holiday penalty rate regime. The 'first tier' public holidays are those 8 public holidays specified in s.115(1)(a) (that is, New Year's Day; Australia Day; Good Friday; Easter Monday; Anzac Day; the Queen's Birthday holiday; Christmas Day and Boxing Day). Under the proposal advanced by the Hospitality Employers work performed on these public holidays would attract loadings of 225 per cent (for full-time and part-time employees) and a 175 per cent loading (for casual employees, inclusive of the 25 per cent casual loading).

[1913] The ‘second tier’ public holidays are those public holidays declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory (or a region of the State or Territory) as a public holiday. The Hospitality Employers claim refers to these public holidays as ‘Additional holidays’. It is proposed that work performed on these ‘Additional holidays’ would attract a loading of 200 per cent (for full-time and part-time employees). Casual employees would receive their 25 per cent casual loading for work performed on an ‘Additional holiday’, but *no* additional payment.

[1914] The claims before us are summarised in the table below.

Table 74
Summary of public holiday penalty rates claims

Award title and claims	Clause number	Public holiday	
		Full-time & part-time	Casual
<i>Hospitality Award</i>	32	250	275
Claim by Hospitality Employers		225	175
-Tier 1 Public Holidays		200	125
-Tier 2 Additional holidays			
<i>Restaurant Award</i>	34	250	250
Claim by RCI		150	150
Claim by ABI		200	125
<i>Clubs Award</i>	29	250	250
Claim by CAI		200	200
<i>Retail Award</i>	29	250	275/250
Claim by ABI		200	125
<i>Fast Food Award</i>	30	250	275
Claim by RCI		150	150
Claim by NRA		150	175
<i>Pharmacy Award</i>	31	250	275
Claim by PGA		200	125

[1915] The observations and conclusions which follow are directed at all of the above modern awards, with the exception of the *Clubs Award*. We have decided to defer our consideration of the public holiday penalty rates in the *Clubs Award* until other penalty rate claims in respect of that award have been determined. As we observe in Chapter 9.4, one of the bases for changing the public holiday penalty rates in the other awards before us is the concept of proportionality. As the Sunday penalty rates in these awards have been reduced it is appropriate to reconsider the relationship (or proportionality) between the Sunday and public

holiday penalty rates. At this stage there has been no determination in respect of the Sunday penalty rate in the *Clubs Award*. It is convenient to refer to the 5 remaining awards as, collectively, the *Hospitality and Retail Awards*.

[1916] The submissions advanced in support of the claims can be broadly summarised as follows:

(i) The disability associated with working on public holidays varies according to the particular public holiday. Certain public holidays appear to have universal importance, but this is not a feature shared by all public holidays.

(ii) The ‘Rose Report’ supports the proposition that employees wish to be paid a premium for working on public holidays and the premium is greater than that sought for weekend work. Further, employees consider that the amount required to compensate for the disabilities associated with working on public holidays is less than the penalty rate currently prescribed for public holiday work in the *Hospitality and Retail Awards*.

(iii) The existing public holiday penalty rate (250 per cent) was determined in a context where employees could be compelled to work on a public holiday. Section 114(1) of the FW Act entitles all employees to a day off on a public holiday. Where an employer requests the employee to work, the employee is protected by a requirement that such a request is reasonable and, further, the employee can refuse the request if it is reasonable to do so (see s.114(3)).

(iv) For a casual employee the decision to work on a public holiday is a voluntary one and as such does not require compensation beyond the payment of the 25 per cent casual loading.

(v) The current level of public holiday penalty rates adversely impacts on decisions by employers to trade and engage employees on these days. (ABI relies on the result of the Retail Survey in this regard) and reducing the penalty rate will increase employment by increasing the hours offered to employees on public holidays.

[1917] The ABI and Retail Employers rely on the evidence of Professor Rose to support their claims for a reduction in the Sunday and public holiday penalty rates under the *Retail Award*. Professor Rose’s report, titled ‘Value of Time and Value of Work Time during Public Holidays, 3 July 2015’ (Rose Report) seeks to examine the importance and value employees covered by the *Restaurant Award* and the *Retail Award* place on time including working on public holidays. The research conducted by Professor Rose took the form of a survey comprised of two discrete “choice experiments” designed to illicit the hourly rate for which employees were willing to work during both a normal work week and during a week in which one or more public holidays fell. We have dealt with the Rose Report, and the various criticisms of it, in Chapter 6.2. Two aspects of the report are relevant for present purposes.

[1918] First, the Rose Report considered the level of knowledge employees had about particular public holidays and the importance of each public holiday to them. Professor Rose’s conclusions in respect of this issue are as follows:

‘Unsurprisingly Christmas Day and Easter holidays were the most commonly recalled holidays, followed by ANZAC day, Australia day, the Queen’s birthday, and then New Year’s Day. State specific public holidays received the lower average importance ratings than nationwide public holidays. On average, Christmas day was rated the most important public holiday, followed by News [sic] Year’s Eve, Boxing Day, ANZAC Day and then Australia Day. For Easter, Good Friday was rated as being more important than Easter Monday on average. In a similar vein to the unprompted recall task, respondents, respondents tended to rate state based public holidays much lower than nationwide public holidays.’¹⁷³⁴

[1919] The second aspect of the Rose Report which is relevant for present purposes is the value employees place on working at certain times, in particular public holidays. As to that matter the Rose Report concludes:

‘The results of this modelling exercise suggest that the average threshold value of hourly pay at which they would elect to work is actually the average level of pay currently being paid to the sample. This suggests that the employees value their time at precisely their current wage rate. Also based on the model results, it was found that on average, respondents value working on Saturdays as being somewhere between 106 to 135 percent their current normal hourly pay, and for working on Sundays somewhere between 126 and 165 percent of the average current normal hourly pay rate. The hourly rate for working on a public holiday was valued as being between 124 and 224 percent of the average current normal hourly pay rate, with the later higher value being for working on a Public holiday that falls on a Sunday.’¹⁷³⁵

[1920] The Hospitality Employer’s principal contention in support of their proposed two-tiered approach is that the current level of public holiday penalty rates deter employment on public holidays and are neither fair nor relevant in the context of the contemporary hospitality industry. It is accepted that there is a disability associated with working on public holidays and that there is a need to compensate employees for that disability, however the Hospitality Employers submit that:

‘...the additional remuneration for work on public holidays should be compensatory and sufficient to induce employees to voluntarily work the days; however it should not discourage opportunities for work. In short, it should not deter the hospitality employer from providing employment.’¹⁷³⁶

[1921] The differential rates proposed in respect of the ‘Additional holidays’ are said to be justified having regard to the following matters:

- ‘(a) The substantial costs and consequences of the current loading,
- (b) The lesser significance of the additional days,
- (c) The fact that additional days can be declared at any time by State and Territory governments,
- (d) The declaration of additional public holidays is not uniform across the States and Territories (refer table of days in the outline of submissions filed 3 July 2015),
- (e) That in the absence of working the day, the permanent employee is entitled to the holiday without loss of ordinary pay.

In contrast to the position of the permanent employee, the casual employee— by virtue of the casual nature of the employment—is not entitled to the day as a holiday without loss of ordinary pay. Therefore, there is no need to include such a component in the additional remuneration for work on the additional day. The proposed rate of 125% takes into account the casual nature of the employment. The rate will promote opportunities for employment on these days. The evidence supports this.¹⁷³⁷

[1922] United Voice and the SDA oppose the employer claims.

[1923] The SDA submits that, contrary to ABI’s contention, there is no proper basis for the Commission to ‘review and reframe’ public holiday rate entitlements. The SDA advances the following points in support of its position:

- (i) the existing public holiday penalty rates have been stable for 30 to 40 years;
- (ii) public holidays are a public recognition of events of community significance and community participation;
- (iii) the distinction between public holidays declared by State and Territory governments compared with those declared by the Commonwealth is a distinction without a difference for the purpose of penalty rates;
- (iv) the arguments advanced in respect of the impact of weekend work, particularly regarding asynchronicity and arrhythmia, and the inability to offset the impact working on those days, have particular application to public holidays given their limited and unique character.

[1924] As to the two-tiered proposal advanced by the Hospitality Employers, United Voice submits:

‘The differential is illogical. If, as the AHA claims, penalty rates are required to compensate employees for “the disability of the time at which work is performed,” then the disability is experienced regardless of the nature of the public holiday. To suggest otherwise is to stray into the area of subjective value judgments about which public holidays are ‘worth more’. The perils of this approach can be illustrated with one example. Employers attribute the decline in value of Sundays to, among other reasons, the decline in church attendance rates. But nearly half the Commonwealth public holidays are explicitly religious holidays, including Good Friday, Easter Monday, and Christmas Day. The AHA cannot, and should not, submit that religion or the rest associated with traditionally religious days is irrelevant when considering Sunday penalty rates, but is important when considering penalty rates for working on Good Friday. Other examples are numerous: it is probable that few people could identify the significance of Easter Monday (a Commonwealth holiday) compared to Easter Sunday (a state holiday); republicans may object to celebrating the Queen’s Birthday but place a high value on Labour Day; those concerned with indigenous rights may object to Australia Day as a day of public celebration. Further, there is no basis for the AHA’s complaint about the ‘unpredictability’ of state or territory public holidays. Such days are set in advance and are well known.’¹⁷³⁸

[1925] We also note that in the PC Final Report the Productivity Commission recommended that: ‘The Fair Work Commission should *not* reduce penalty rates for existing public holidays’,¹⁷³⁹ noting that, by definition:

‘... genuine public holidays are intended to serve a special community role and, as such, there are strong grounds to limit the expectation that they are for working. In that sense, the original concept of deterrence continues to have relevance.’¹⁷⁴⁰

9.3 Consideration

[1926] We propose to deal with the s.134 considerations first.

[1927] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. 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). As mentioned earlier, a substantial proportion of award-reliant employees covered by the *Hospitality and Retail Awards* are ‘low paid’.

[1928] The extent to which lower wages induce a greater demand for labour on public holidays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. But it is improbable that, as a group, existing workers’ hours would rise sufficiently to offset the income effects of the penalty rate reduction.

[1929] The ‘needs of the low paid’ is a consideration which weighs against a reduction in public holiday penalty rates. However, the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on public holidays rather than to address the needs of the low paid.

[1930] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’. A reduction in public holiday penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[1931] We are not persuaded that a reduction in public holiday penalty rates would ‘encourage collective bargaining’, it follows that this consideration does not provide any support for a change to Sunday penalty rates.

[1932] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. Obtaining employment is the focus of s.134(1)(c).

[1933] On the basis of the common evidence we conclude that a reduction in public holiday penalty rates in the *Hospitality and Retail Awards* is likely to lead to some additional employment. We are fortified in that conclusion by the employer lay witness evidence. That evidence supports the proposition that lower public holiday penalty rates would increase the level and range of services offered by some hospitality and retail enterprises, with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees).

[1934] It is convenient to deal with the considerations in s.134(1)(d) and (f) together.

[1935] It is self-evident that if public holiday penalty rates were reduced then the employment costs of those hospitality and retail businesses that trade and engage employees on public holidays would reduce. This consideration supports a reduction in public holiday penalty rates. As we have mentioned, s.134(1)(f) is not confined to a consideration of the impact of the 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’. In addition to the impact on employment costs a reduction in public holiday penalty rates is also likely to have other positive effects on business.

[1936] The evidence of the employer lay witnesses supports the proposition that the current level of public holiday penalty rates has led some employers to reduce labour costs associated with trading on public holidays by either not trading at all or restricting the availability of services on public holidays.

[1937] The evidence of these lay witnesses also supports the proposition that lower public holiday penalty rates would *increase* the level and range of services offered on public holidays. On this basis, it may be said that a reduction in public holiday penalty rates will promote flexible modern work practices. This consideration lends support to a reduction in those penalty rates.

[1938] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on... public holidays’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) 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.

[1939] It is convenient to deal with matters (ii) and (iii) first.

[1940] As to matter (ii), the minimum wage rates in the *Hospitality and Retail Awards* do not already compensate employees for working on public holidays. No party contended to the contrary.

[1941] In relation to matter (iii), public holiday work is a not uncommon feature of the Hospitality and Retail sectors.

[1942] We now turn to matter (i), the extent of the disutility of, relevantly, working on public holidays. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA and United Voice spoke to the adverse impact of public holiday work on the ability of retail and hospitality sector employees to engage in social and familial activities.

[1943] We note that in the event public holidays penalty rates were reduced (but not removed entirely) employees working on public holidays would still receive ‘additional remuneration’.

[1944] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in public holidays penalty rates would apply equally to men and women workers. For the reasons given earlier we regard s.134(1)(e) as neutral to our consideration of the claims before us.

[1945] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’. We regard s.134(1)(g) as neutral to our consideration of the claims before us. No party contended to the contrary.

[1946] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’. A detailed assessment of the impact of a reduction in public holiday penalty rates in the *Hospitality and Retail Awards* on the national economy is not feasible on the basis of the limited material before us.

9.4 Conclusion

[1947] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us. The central issue is whether the public holiday penalty rates in the *Hospitality and Retail Awards* provide a ‘fair and relevant minimum safety net’.

[1948] We have concluded that the existing public holiday penalty rates for full-time and part-time employees in the *Hospitality and Retail Awards* are neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The word ‘relevant’, in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.

[1949] As mentioned in Chapter 3, we accept that public holidays, by their nature, are intended to serve a special community role and that the expectation (and practice) is that the vast majority of employees do not work on public holidays. These features are relevant to the determination of the level of compensation to be provided to employees who work on public holidays. There is an additional disutility associated with working on a day when the vast majority of other employees (and, it may be inferred, a substantial proportion of their friends and family) are enjoying a day of leisure. Contrary to the views expressed by the Productivity Commission, deterrence is not an appropriate consideration in setting public holiday penalty

rates – the disutility associated with working on public holidays is a primary consideration in setting the appropriate penalty rate.

[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’.¹⁷⁴¹

[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 mechanically 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).

[1955] We note that the disutility in relation to public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on such days, on reasonable grounds. Contrary to ABI’s submission, we would not characterise s.114(3) as making public holiday work ‘voluntary’ (it is a limited right to refuse to work, on reasonable grounds), but it is still a significant contextual matter which was not taken into account when the existing 250 per cent penalty was set.

[1956] In addition, the Hospitality and Retail sectors have a number of features which distinguish them from other industries. In particular, public holiday work is more common and, on the evidence before us, reducing the public holiday penalty rate will increase employment and have a number of positive effects on business.

[1957] The claims before us vary in respect of the public holiday penalty rate proposed for full-time and part-time employees, and range from 150 per cent to 225 per cent. We accept

that a degree of subjective judgement is involved in fixing an appropriate public holiday penalty rate. Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, and all of the considerations to which we have referred, we have decided to reduce the public holiday penalty rates for full-time and part-time employees in the *Hospitality and Retail Awards* from 250 per cent to 225 per cent.

[1958] Further, we have concluded that the two-tiered approach advanced by the Hospitality Employers lacks merit. We have considered the arguments advanced in support of the proposal, but find them unpersuasive. The distinction sought to be drawn between those public holidays expressly mentioned in s.115(1)(a) and the other days declared or prescribed by or under a law of a State or Territory as a public holiday (s.115(1)(b)), is illusory.

[1959] It is relevant to observe that during the Transitional Review, various employer interests sought to vary the *Hospitality, Retail, Fast Food* and *Hair and Beauty Awards* to provide that where a public holiday falls on a weekend and an additional public holiday is declared or gazetted, the public loading will only apply to the actual public holiday. In the *Modern Awards Review 2012 – Public Holidays* decision,¹⁷⁴² the Full Bench rejected these applications, in the following terms:

‘Although the incidence and level of the public holiday penalties is a matter for the Commission, the issue of additional public holidays arises directly from the scheme of the FW Act and in particular, the NES reliance upon the State and Territory laws to establish the actual days.

In its Award Modernisation decision concerning the making of the priority modern awards, the Full Bench of the AIRC said in respect of public holidays that:

A number of requests were made that we supplement the public holiday entitlements in the NES by including in awards some days that are observed as public holidays but not gazetted as such. We have decided against that course as it is apparent that the NES governs the question of the number of public holidays to which employees should be entitled.’

The conclusions of that Full Bench remain apposite.¹⁷⁴³ (footnotes omitted).

[1960] Further, as noted in the *1994 Public Holidays Test Case decision*, ‘the declaration of public holidays, by whatever legal instrument, is the prerogative of the various Governments’.¹⁷⁴⁴

[1961] We concur with the views expressed in the 1994 and 2012 decisions. This does not mean that the number and standardisation of public holidays across Australia is not a legitimate issue. Rather, it is one primarily for the Commonwealth, State and Territory legislatures. In this context, we note that s.115(1)(b) provides, in effect, that particular State or Territory declared public holidays can be excluded by regulation from counting as a public holiday for the purpose of the FW Act. No such regulations have been made.

[1962] We now turn to the public holiday penalty rate for casuals. As shown in Table 73, most (4 out of 5) of the *Hospitality and Retail Awards* under consideration currently provide that casual employees receive the public holiday penalty rate prescribed for full-time and part-time employees *in addition to* the 25 per cent casual loading.

[1963] The effect of the claims advanced by ABI in respect of the *Restaurant and Retail Awards* and the PGA in respect of the *Pharmacy Award* is that other than the 25 per cent casual loading, casual employees would not be entitled to any additional payment for working on a public holiday.

[1964] Further, the claims advanced by the Hospitality Employers (in respect of the *Hospitality Award*) and RCI (in respect of the *Restaurant and Fast Food Awards*) provide a lower public holiday penalty rate for casual employees, when compared to full-time and part-time employees. The claim advanced by the Hospitality Employers is internally inconsistent in this regard. For ‘tier 1’ public holidays the proposed penalty rates are 225 per cent (for full-time and part-time employees) and 175 per cent for casuals – effectively a 150 per cent public holiday penalty rate for casual employees. Yet for ‘tier 2’ ‘Additional holidays’ full-time and part-time employees would be entitled to a penalty rate of 200 per cent (i.e. 25 per cent less than the rate on tier 1 public holidays) and casuals receive *no* additional payment (other than the casual loading). There is no logic to the position taken in respect of casuals working on ‘Additional holidays’. If the approach taken to tier 1 penalty payments was applied to ‘Additional holidays’ then casuals would be entitled to a loading of 150 per cent (inclusive of the casual loading).

[1965] In support of its claim that casual employees receive no additional remuneration for working on a public holiday (i.e. they only receive the 25 per cent casual loading), ABI submits:

‘In respect of casual employment, as a matter of law, casuals are not obligated to accept any particular shift and are not contractually guaranteed, nor required to undertake, ongoing work. Casuals are further protected by the terms of s 114(1) of the FW Act which entitles a casual employee a day off on a public holiday. In the submission of ACCI, ABI and NSWBC, this means that under the FW Act, the decision to work on a public holiday for a casual employee is a voluntary one, and not one which requires compensation beyond that which the employee would be entitled to for their work. For those casual employees with no entitlement to payment when not working, this means that performance of work on a public holiday should, in the submission of ACCI, ABI and NSWBC, be paid out at 125%.¹⁷⁴⁵

[1966] We note that during the course of oral argument ABI and RCI appeared to retreat somewhat from the proposition that casual employees should receive *no* additional remuneration (apart from the 25 per cent casual loading) for working on public holidays.¹⁷⁴⁶

[1967] We also note that the proposition that casuals receive *no* additional compensation for public holiday work is inconsistent with the concession made by all of the employer parties that there is a disability associated with public holiday work and that employees should receive additional remuneration to compensate for that disability.

[1968] ABI’s contention that the nature of casual employment means that working on public holidays is voluntary and hence does not warrant additional remuneration, is unpersuasive.

[1969] While as a legal construct it is correct to characterise casual employment as being for each engagement, as a practical matter the ‘choice’ to work at particular times or on particular days is likely to be constrained by economic necessity. A casual who refuses to work at particular times or on particular days may find that they are not offered any further shifts. The

lay hospitality employee evidence confirms the constrained nature of the choice to be exercised in these circumstances. It is also considered in Professor Altman's evidence.

[1970] In any event, whether workers 'choose' to work on a public holiday or not, it is common ground that there is a disutility associated with such work and that employees should be compensated for that disutility.

[1971] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits. Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on public holidays.

[1972] In the *Casual Loading Test Case Decision*¹⁷⁴⁷ the Full Bench increased the casual loading in the *Metal Industries Award 1998*, to 25 per cent, and said:

'... we are satisfied that paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects, should constitute the main components to be assessed in determining casual loading...'¹⁷⁴⁸

[1973] The distinct purpose of the casual loading is also made clear from clause 13.1 of the *Hospitality Award*:

'The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment'

[1974] A clause in similar terms is also found in the *Restaurant Award*, at clause 13.1.

[1975] As we have mentioned, in the PC Final Report the Productivity Commission recommended that modern awards be amended to ensure that casual loadings are applied to penalty rates in the same way across all awards. It 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. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee. It would also be consistent with the desirability of 'equal pay for equal' work.'¹⁷⁴⁹

[1976] The PC Final Report sets out the three methods currently used for determining the rate of pay for casual employees in the modern awards relevant to the penalty rates case. Each method arrives at a different rate of pay for casual employees during times when weekend penalty rates apply. The method preferred by the Productivity Commission is the 'default' approach where the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.

[1977] The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee,¹⁷⁵⁰ the 'default' method should be preferred.

[1978] The ‘default’ method proposed by the Productivity Commission also provides a casual loading that is simple and easy to understand, consistent with s.134(1)(g) of the FW Act.

[1979] In our view, the casual loading should be *added* to the public holiday penalty rate when calculating the public holiday rate for casual employees. We propose to adopt the Productivity Commission’s ‘default’ approach. Accordingly, the public holiday rate for casual employees in the *Hospitality and Retail Awards* will be $25 + 225 = 250$ per cent.

[1980] The effect of our decision in respect of public holiday penalty rates is shown (in marked up format) in Table 75 below.

Table 75
Proposed public holiday penalty rates in the *Hospitality and Retail Awards*

Award title	Public holiday penalty rates (%)	
	Full-time & part-time	Casual
<i>Hospitality Award</i> (cl. 32)	250 225	275 250
<i>Restaurant Award</i> (cl. 34)	250 225	250
<i>Clubs Award</i> (cl. 29)	250	250
<i>Retail Award</i> (cl. 29)	250 225	275/250 250
<i>Fast Food Award</i> (cl. 30)	250 225	275 250
<i>Pharmacy Award</i> (cl. 31)	250 225	275 250

[1981] We acknowledge that a number of ancillary claims were advanced in respect of the public holiday terms in some of the *Hospitality and Retail Awards*. The argument in respect of these claims was very limited and we do not propose to determine those matters in this decision. A conference will be convened in the coming weeks, to ascertain whether any of the claims we have not dealt with are still being pressed. Any outstanding claims may be referred to the Public Holidays Full Bench.

10. The Right to Refuse Work

[1982] We now turn to the proposal that employees be granted a right to refuse to work on Sundays.

[1983] In the course of their final written submissions, the SDA submits that while it opposes any reduction in Sunday penalty rates in the *Retail Award*, should we be minded to vary the award to reduce Sunday penalty rates then we should also vary the award to provide that work on Sundays is voluntary.¹⁷⁵¹

[1984] In support of this proposition, the SDA drew our attention to the proceedings of *SDAEA v \$2 and Under* and the two resulting decisions of the AIRC.¹⁷⁵² As mentioned earlier these decisions concerned an application by the SDA in 1998 for the grant of a roping-in award of businesses in Victoria whose employees were covered by the minimum standards of the *Workplace Relations Act 1996* applying to Victorians.¹⁷⁵³ The decision in *\$2 and Under (No. 1)* roped some 17,000 employers into the coverage of the *Victorian Shops Interim Award*.¹⁷⁵⁴ At the time, the *Victorian Shops Interim Award* included a provision at clause 19 that provided that ‘An employer shall not require any employee to work on a Sunday but an employee may elect to work a Sunday’.¹⁷⁵⁵ The effect of this provision was that Sunday work was voluntary, and an employer could not compel an employee to work on a Sunday (although the employee could volunteer).

[1985] In deciding to grant the roping-in award, the AIRC departed from the established conditions of the existing award in that, among other things, the following conditions were imposed upon the newly roped-in enterprises:

- ordinary hours could be worked on Sundays between 9.00 am and 6.00 pm; and
- work during ordinary hours on Sunday was non-voluntary.¹⁷⁵⁶

[1986] As to these changes, the SDA submits:

‘Critically, the change from voluntary to non-voluntary Sunday work directly formed part of the Commission’s assessment of the disability associated with working on that day. In referring to the evidence as showing a “very substantial disability endured by persons working on a Sunday, “ the majority identified that that disability:

... would be heightened in the context whereby provision is made in the roping-in award for the non-voluntary working of ordinary hours on a Sunday.

The current provision of double time for Sunday under the modern Retail Award is based on the same premise: Sunday work is not voluntary. The only relevant protection provided to employees in respect of Sunday work is an entitlement to have one Sunday off in four. Similar provisions in effect mandating a minimum number of Sundays off are of long standing under previous retail awards.

This analysis demonstrates that the contemporary assessment of the disabilities associated with Sunday work undertaken in *\$2 and under* was premised in part on the important recognition that Sunday work under the roping-in award would not be voluntary. On that (and other bases) the Commission found double time to be the appropriate and fair payment to compensate employees for the disabilities of working on that Sunday.

It follows from the direct connection identified in *\$2 and under* between double time for Sunday work and such work being “non-voluntary” that, in the event that the Commission in this Review determines to reduce Sunday penalty rates, it should also vary the Retail Award to provide that the performance of ordinary hours of work on a Sunday be voluntary...¹⁷⁵⁷

[1987] During the course of oral argument the Commission raised with the parties the option of a suitably drafted award term providing an employee with the right to refuse to work on a Sunday, on reasonable grounds.¹⁷⁵⁸ It was intended that such a term would be analogous to s.114 of the FW Act, to which we have referred in Chapter 9: Public Holiday Penalty Rates. Directions were issued on 29 April 2016 for the filing of written submissions in relation to this matter.

[1988] Written submissions were filed by the various employer parties: the Retail Employers, ABI, Ai Group, the Hospitality Employers, PGA, RCI, CAI and by the SDA and United Voice.

[1989] The primary position of the various employer parties was that it was not necessary to introduce any additional rights for employees that would constrain the use of Sunday labour.

[1990] ABI and the Retail Employers advanced an alternate position, in respect of the *Retail Award*, in the event that their primary position was not accepted. The alternate position was for the insertion of an award term providing employees with the right to refuse to work on Sundays, on reasonable grounds, subject to various limitations including:

- the alternate clause only applies to full-time and part-time existing employees classified at level 3 or below;
- in determining whether the refusal is reasonable the following factors are to be taken into account:
 - (a) the nature of the employer’s workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
 - (b) the employee’s personal circumstances, including family responsibilities;
 - (c) whether the employee could reasonably expect that the employer might direct work to be performed on the Sunday;
 - (d) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
 - (e) the amount of notice in advance of the Sunday given by the employer when making the direction to work the Sunday;
 - (f) in relation to the refusal of a direction to work – the amount of notice given by the employee when refusing the direction;
 - (g) any other relevant matter; and
- where an employee refuses to work hours on a Sunday or Sundays and those hours form part of the employee’s ordinary hours of work, the employer is not obliged to

pay the employee for the hours that have been refused, nor to provide that employee with an equivalent number of hours at an alternative time in the employer's roster.

[1991] In addition, the Retail Employers proposed that the alternate term have a finite life, of 2 years, and ABI proposed that the alternate term *not* apply to:

‘any employee who, prior to the employee's commencement of employment (or upon the commencement of this provision), was notified by the employer that he/she would be regularly required to work on Sundays.’

[1992] The Hospitality Employers and CAI advanced a similar position to that put by the Retail Employers and ABI, and proposed similar alternate clauses for insertion into the *Hospitality Award* and the *Clubs Award*.

[1993] Ai Group, RCI and the PGA maintained their opposition to the insertion of any award term into the *Fast Food Award*, the *Restaurant Award* and the *Pharmacy Award*, which provided employees with a right to refuse to work on Sundays.

[1994] The SDA did not really engage with the proposition put – that is, that the right to refuse Sunday work would be analogous to s.114 of the FW Act – and maintained the view expressed in its earlier written submission, namely, that Sunday work be voluntary. The term proposed by the SDA provided that:

- ‘... (ii) An employer shall not require any employee to work on a Sunday.
- (i) An employee may, on the request of an employer, agree to work on a Sunday:
- A on a single occasion;
- B for a specified period of time; or
- C on an ongoing basis.
- (ii) An employee's agreement to work on a Sunday must be recorded in writing. If the agreement is to work on a Sunday for a specified period of time, the relevant period is to be identified...¹⁷⁵⁹

[1995] United Voice submits that:

‘... if the Commission is minded to include a clause in the hospitality modern awards that has the effect of making Sunday work voluntary, then it should have regard to the evidence about the nature of employee ‘choice’ to work on Sundays, and that the operation of any clause could not offset the disutility of Sunday work. Further, any clause based on s.114 should not be restricted in the manner sought by the employer parties, and should not replicate the criteria in s.114(a), (c) and (d) if the clause is to have any practical value to employees.’¹⁷⁶⁰

[1996] We are not persuaded to vary the *Retail Award* to include a term of the type proposed by the SDA. On the basis of the evidence before us (that weekend work is now a feature of the Retail Sector) and having regard to the current terms of the award (which minimise the incidence of Sunday work and provide full-time employees with 2 consecutive days off per week or 3 consecutive days off in a 2 week period (see [1675]–[1676] above), we are not satisfied that the term sought is necessary to achieve the modern awards objective.

[1997] Further, having regard to the submissions put (and having given the matter further consideration) we do not propose to proceed with the insertion of an award term providing a right to refuse Sunday work on reasonable grounds. On the material before us we are not persuaded that such a term is necessary (within the meaning of s.138).

11. Transitional Arrangements

[1998] A substantial proportion of the employees covered by the modern awards which are the subject of these proceedings are ‘low paid’ (within the meaning of s.134(1)(a)). The award variations we propose to make are likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs.

[1999] The evidence of the United Voice and SDA lay witnesses puts a human face on the data and provides an eloquent individual perspective on the impact of the award variations. Many of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress. We are conscious of the adverse impact the award variations we propose to make upon these employees.

[2000] The immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. There is plainly a need for appropriate transitional arrangements to mitigate such hardship.

[2001] The extent of such transitional provisions depends on, among other things, the nature of the modern award variation. The variations we propose fall into 3 categories: Sunday penalty rates; public holiday penalty rates and late night penalties.

(i) *Sunday penalty rates*

[2002] We have decided to reduce the Sunday penalty rates in 4 of the modern awards before us:

Award	Sunday Penalty Rate
<i>Hospitality Award</i>	
full-time and part-time employees (no change for casuals)	175 per cent → 150 per cent
<i>Fast Food Award</i>	
(Level 1 employees only)	
Full-time and part-time employees	150 per cent → 125 per cent
Casual employees	175 per cent → 150 per cent
<i>Retail Award</i>	
Full-time and part-time employees	200 per cent → 150 per cent
Casual employees	200 per cent → 175 per cent

Award

Sunday Penalty Rate

Pharmacy Award

(7.00 am – 9.00 pm only)

Full-time and part-time employees

Casual employees

200 per cent → 150 per cent

225 per cent → 175 per cent

[2003] A substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates are likely to reduce the earnings of those employees who currently work on Sundays. As observed in the PC Final Report, the extent of the reduction in earnings depends on the:

- new regulated Sunday penalty rates for each relevant award;
- extent to which some negotiated weekend wages might lie above a new lower penalty rate for Sundays;
- timing of new enterprise agreements, as any penalty rates in existing agreements would continue to apply;
- relative proportion of an employee's time spent working on Sundays; and
- extent to which lower wage rates induced greater demand for labour on Sundays.¹⁷⁶¹

[2004] As to the last point, the Productivity Commission concludes that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of penalty rate reductions.

[2005] Further, our decision to adopt the Productivity Commission's proposal in respect of the 'neutral treatment' of casual penalty rates for Sunday work has diminished the impact of these changes on casual employees.

[2006] In the numerous submissions before us little attention was given to the implementation of any variations to Sunday penalty rates arising from these proceedings. One exception was the Productivity Commission 'submission'. The PC Final Report recommends that 12 months' notice of any change be given, rather than an extended transition process involving staggered small changes to Sunday penalty rates:

'... a particular concern in making any changes to penalty rates is that there will be significant income effects for some people (chapter 14). That suggests an adjustment process so that people can seek other jobs, increase their training and make other labour market choices. An extended transition that involves staggered small changes to Sunday rates would replicate some of the uncertainties and compliance costs associated with award modernisation. Moreover, it would reduce the scope for new employment, increased hours of work for existing employees, workload relief for owners, and the benefits from permanent/casual substitution. A preferred approach would be to give advance notice of a change so that employers and employees can review their circumstances, and then introduce the change in a single step.

Part of this notice period will arise naturally from the workload associated with the FWC's broader suite of award assessment (chapter 8). It appears unlikely that any decision could be

practically implemented before early 2017. If an adjustment period of a year was added, this would provide more than two years before changes were made.¹⁷⁶²

[2007] We also note that some submissions¹⁷⁶³ alluded to the need to protect the take home pay of workers affected by any changes to penalty rates. We deal later with the potential use of ‘take home pay orders’.

[2008] We note that the general issue of transitional arrangements was considered during the award modernisation process.

[2009] The creation of modern awards led to some award conditions increasing and others decreasing. Transitional arrangements were put in place to mitigate the impact of these changes on employers and employees. The matters which were the subject of transitional arrangements included penalty rates.¹⁷⁶⁴ The Award Modernisation Full Bench decided to generally phase in adjustments to penalty rates in 5 equal instalments, over a 5 year period:

‘[28] We have decided that phasing should apply both to increases in the specified wages and conditions and reductions in those wages and conditions and in most cases will be in five equal instalments. We have decided to utilise five instalments because that number was the one most commonly selected by parties who supported phasing. It also appears to us to be simpler on the balance to divide differential amounts or percentages by five, yielding five amounts of 20%, than to utilise any other figure. We have also decided to provide for 12 months between instalments. This will spread the impact of changes over almost the whole of the five year period permitted by s.576T of the WR Act.

[29] A number of employers proposed that the introduction of new wages and conditions should be delayed for a period to enable employers to make necessary arrangements. This approach has merit. There should be adequate lead time to prepare for the operation of the modern awards after their finalisation. In this regard we note that the Stage 4 awards are not scheduled for publication until the end of 2009. There is another important consideration. As we have indicated, the phasing arrangements will not apply to all changes in minimum conditions. We consider it desirable that before phasing commences there be an opportunity for employers and employees to come to terms with the other changes which might have a significant impact. Yet another consideration is that Fair Work Australia is required to conduct an annual review of minimum wages in modern awards and any increase resulting from such review is to operate from 1 July in the year in question. There is some advantage in synchronising the operation of the phasing provisions with increases in minimum wages.

[30] We have decided that phasing should commence on 1 July 2010. The effect will be that where the phasing provisions are included in an award the pre-modern award conditions relating to minimum wages, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances will continue to apply until 1 July 2010 when the modern award obligations will commence. Despite the fact that the legislation contemplates the introduction of modern awards from 1 January 2010, a delay of six months in the implementation of the phasing arrangements is reasonable when the range and nature of the changes which will be required are properly taken into account. There will be a further four instalments on 1 July of each year concluding on 1 July 2014. Consistent with s.287 of the Fair Work Act, the changes in wages and conditions covered by the phasing arrangements will operate from the first pay period on or after 1 July in each year.¹⁷⁶⁵

[2010] We now turn to the issue of ‘take home pay orders’. In short, the purpose of a take home pay order is to compensate an employee for any reduction in their pay as a result of the

making of a modern award or the transitional arrangements in a modern award. The relevant statutory provisions are not without a degree of complexity.

[2011] Take home pay orders are dealt with in several sections of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the TPCA Act), as modified by the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the TP Regulations).

[2012] Item 9 of Schedule 5 to the TPCA Act provides that if the Commission is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a modernisation related reduction in take-home pay the Commission may make a take home pay order concerning the payment of an amount(s) to the employee(s) which the Commission considers appropriate to remedy the situation. Item 9 limits the power to make a take home pay order to orders remedying ‘modernisation related’ reductions in take home pay. Item 8(3) sets out the circumstances where an employee suffers a ‘modernisation related’ reduction in take home pay. Item 8(3) requires, relevantly, that the employee be employed in the same position (or comparable position) that they were employed in immediately before the modern award came into operation. Hence persons employed after the commencement of the modern award are not eligible for an Item 9 take home pay order.

[2013] Part 3A of Schedule 5 was inserted by amendments to the TP Regulations made by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (the TP Amendment Regulations).

[2014] Regulation 3B.04 of the TP Regulations modifies Schedule 5 of the TPCA Act by inserting Part 3A, after Part 3. Item 13A(1) of Part 3A of Schedule 5 to the TPCA Act provides that:

‘A modern award may include terms that give FWA power to make an order (a **take-home pay order**) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).’¹⁷⁶⁶

[2015] Item 13A(1) restricts the type of reduction that it applies to as one that occurs ‘as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award’. Accordingly, it may be that it was not intended that awards would include terms that allow for making of take-home pay orders in all circumstances. The purpose of the amendments made by the TP Amendment Regulations is discussed in the Explanatory Statement accompanying the TP Amendment Regulations.

[2016] The vast majority of modern awards (including the modern awards which are the subject of these proceedings) include a clause in the following terms:

‘Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, the Fair Work Commission may make any order it considers appropriate to remedy the situation.’

[2017] In a decision in the Review dealing with a range of common general drafting and technical issues in respect of Group 1A and 1B awards the Commission decided that the take home pay clause set out above would remain in all modern awards, until the next 4 yearly review.¹⁷⁶⁷

[2018] Since 2010 about 140 applications have been made for take home pay orders¹⁷⁶⁸ (5 applications have been granted; 12 refused and the remainder either withdrawn, settled or adjourned indefinitely). The most recent take home pay order was made on 13 November 2013¹⁷⁶⁹ and concerned the hourly rate of pay for a casual employee working on a Saturday under the *Social, Community, Home Care and Disability Services Industry Award 2010*.

[2019] It is unclear whether ‘take home pay orders’ are an available option to mitigate the impact of the reductions in Sunday penalty rates we propose. We would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework).

[2020] If ‘take home pay orders’ were available, and it was considered that they were appropriate in these circumstances, then the period over which the reductions are to be phased in may be shorter than it would otherwise be.

[2021] We have given some consideration to the form of the transitional arrangements to apply to the reductions in Sunday penalty rates we propose. We have concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays. We have not reached a concluded view as to the form of those transitional arrangements and we propose to seek submissions from interested parties as to that issue. For the assistance of those parties who wish to make submissions as to the form of the transitional arrangements we express the following *provisional* views:

- (i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission’s proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.

The Productivity Commission suggests that a 12 month delay would allow the affected employees to ‘review their circumstances’ so that they ‘can seek other jobs, increase their training and make other labour market adjustments’.

As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.

Further, workers in the Accommodation and Food Services and Retail sectors have lower levels of educational attainment than the total workforce,¹⁷⁷⁰ which is likely to limit their capacity to obtain other employment. As noted in the Peetz and Watson Report:

‘... while a majority of tertiary students who are employed work in either retail or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need ...

Pay rates in retail therefore affect not only tertiary students but also a significant number of other people who are likely to be dependent on earnings from this industry as their principal or sole source of income.’¹⁷⁷¹

- (ii) If ‘take home pay orders’ are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any general ‘red circling’ term which would preserve the current Sunday penalty rates for all existing employees. A consequence of such a term would be that different employees of the one employer may be employed on different terms and conditions. Such an outcome would add to the regulatory burden on business (a relevant consideration under s.134(1)(f)).
- (iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.
- (iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of ‘take home pay orders’ and the circumstances applying to each modern award. The most significant reduction is for full-time and part-time employees covered by the *Retail Award* (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award.

[2022] As we have mentioned, we will invite submissions in response to the provisional views we have expressed.

(ii) ***Public holiday penalty rates***

[2023] We have decided to reduce the public holiday penalty rate for full-time and part-time employees (from 250 per cent to 225 per cent) in the following modern awards:

- *Hospitality Award*
- *Restaurant Award*
- *Fast Food Award*
- *Retail Award*
- *Pharmacy Award*

[2024] The impact of these changes will be greater than the changes to late night penalties, but less than the changes to Sunday penalty rates.

[2025] Balancing the need to provide some notice of these changes with our desire to avoid the added complexity of transitional provisions where appropriate, we have decided that the reduction in public holiday penalty rates will commence on 1 July 2017.

(iii) *Late night penalties*

[2026] We have decided to vary the late night penalties in the *Fast Food Award* and the *Restaurant Award*. At present, both awards provide an additional payment of 15 per cent of the standard hourly rate between midnight and 7.00 am.¹⁷⁷² We have decided to vary the span of hours which attract the 15 per cent loading such that it applies for work performed between midnight and 6.00 am (not 7.00 am).

[2027] We have also decided to vary the *Fast Food Award* to provide that the 10 per cent evening work loading applies to work between 10.00 pm and midnight (as is currently the case in the *Restaurant Award*). It appears that the existing 9.00 pm threshold for the payment of the evening work loading in the *Fast Food Award* was simply an error. At the time the modern award was made the Full Bench clearly intended to align the evening penalty rate provisions in the *Fast Food* and *Restaurant Awards*, but for whatever reason that intention was incompletely implemented.

[2028] A substantial proportion of award-reliant employees covered by the *Fast Food* and *Restaurant Awards* are low paid and the variations to the late night penalty provisions will reduce the earnings of those employees, but not to a significant extent. The variations will only effect those *Fast Food* and *Restaurant Award* employees who work between 6.00 am and 7.00 am, and those *Fast Food Award* employees who work between 9.00 pm and 10.00 pm Further, the variations will only reduce the earnings of those employees for the hours worked between 9.00 pm and 10.00 pm, and between 6.00 am and 7.00 am.

[2029] The limited impact of the variations and the need to ensure a ‘simple, easy to understand... modern award system’ (s.134(1)(g)) have led us to conclude that it is not necessary to prescribe transitional arrangements in respect of these variations. It is our intention that, following a period of consultation, these variations will commence operation on 27 March 2017.

12. Next Steps

[2030] This Chapter deals with the steps we propose to take to finalise the matters before us, in particular:

- the making of variation determinations in respect of the matters that have been decided;
- the process for making submissions about various provisional views we have expressed in this decision;
- the future conduct of the review of penalty rates in the *Clubs Award*;
- the future conduct of the review of penalty rates in the *Restaurant Award*;
- the future conduct of the review of penalty rates in the *Pharmacy Award*;
- the proposed change in terminology: from ‘penalty rates’ to ‘additional remuneration’;
- the review of other modern awards; and
- further consideration of the use of ‘loaded rates’.

(i) *Variation determinations*

[2031] Draft variation determinations in respect of the late night penalty provisions in the *Fast Food* and *Restaurant Awards* will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

[2032] As mentioned in Chapter 9, we have decided to reduce the public holiday penalty rate for full-time and part-time employees (from 250 per cent to 225 per cent) in a number of modern awards before us. These variations will commence on 1 July 2017. Draft variation determinations will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

(ii) *Provisional views*

[2033] We have expressed some *provisional* views in respect of some of the matters before us. For the convenience of interested parties, we set out these provisional views below.

Fast Food Award

[2034] In the *Fast Food Award*, it appears that there is a different method for calculating the payment to casual employees for weekend work, depending on whether it is Saturday work or Sunday work. (see [1403]–[1405]).

[2035] For Sunday work, the Productivity Commission’s ‘default’ approach is applied. But for Saturday it appears that the Saturday work loading (25 per cent) is applied to the casual rate of pay for ordinary hours (that is, the relevant minimum hourly rate of pay + the 25 per

cent casual loading). Hence in respect of Saturday work there is a degree of compounding by applying a penalty upon a penalty.

[2036] At [1406] we express the *provisional* view that clause 25.5(a) be amended, as follows:

(iii) Saturday work

- (iv) A 25% loading will apply for all hours of work on a Saturday for full-time and part-time employees.
- (v) A 50% loading will apply for all hours of work on a Saturday for casual employees, inclusive of the casual loading.

[2037] The other matter in relation to the *Fast Food Award* concerns the NRA's proposed amendment to clause 26, Overtime. The proposed variation seeks the deletion of the last sentence of clause 26: 'Casual employees shall be paid 275% on a Public Holiday'. For the reasons expressed at [1407], we express the *provisional* view that the last sentence of clause 26 be deleted.

[2038] Interested parties are to file written submissions in relation to the provisional views set out at [1406]–[1408] by **4.00 pm Friday, 24 March 2017**. If there are no objections to the provisional views, final determinations will be published.

Transitional arrangements: Sunday penalty rate reductions

[2039] As mentioned in Chapter 11, we have concluded that appropriate transitional arrangements are necessary in respect of the reductions in Sunday penalty rates we proposed in order to mitigate the hardship cause to employees who work on Sundays.

[2040] We have not reached a concluded view on the form of these transitional arrangements but have expressed the following *provisional* views:

- (i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission's proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.

The Productivity Commission suggests that a 12 month delay would allow the affected employees to 'review their circumstances' so that they 'can seek other jobs, increase their training and make other labour market adjustments'.

As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.

Further, workers in the Accommodation and Food Services and Retail sectors have lower levels of educational attainment than the total workforce,¹⁷⁷³ which

is likely to limit their capacity to obtain other employment. As noted in the Peetz and Watson Report:

‘... while a majority of tertiary students who are employed work in either retail or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need ...

Pay rates in retail therefore affect not only tertiary students but also a significant number of other people who are likely to be dependent on earnings from this industry as their principal or sole source of income.’¹⁷⁷⁴

- (ii) If ‘take home pay orders’ are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any general ‘red circling’ term which would preserve the current Sunday penalty rates for all existing employees. A consequence of such a term would be that different employees of the one employer may be employed on different terms and conditions. Such an outcome would add to the regulatory burden on business (a relevant consideration under s.134(1)(f)).
- (iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.
- (iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of ‘take home pay orders’ and the circumstances applying to each modern award. The most significant reduction is for full-time and part-time employees covered by the *Retail Award* (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award, than for the other awards before us.

[2041] We seek submissions from interested parties in respect of the above provisional views. Further, as mentioned at [2019] it is unclear whether ‘take home pay orders’ are an available option to mitigate the impact of the reductions in Sunday penalty rates we propose. We would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework).

[2042] Interested parties are to file written submissions in relation to the transitional arrangements to apply to the reduction in Sunday penalty rates by **4.00 pm Friday, 24 March 2017**, with reply submissions to be filed by **4.00 pm on Friday, 7 April 2017**. The matter will be listed for hearing in early May 2017.

[2043] The written submissions should address the provisional views expressed above (at [2040]) and the issue of whether take home pay orders are an available option to mitigate the impact of the reductions in Sunday penalty rates.

(iii) The Clubs Award

[2044] In Chapter 7.3.6 we conclude that CAI has not established a merit case sufficient to warrant the variation of the *Clubs Award*. We also express the view that there are 2 options in respect of the future conduct of the penalty rates review of the *Clubs Award*:

- Option 1: determinations could be made revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employers and employees presently covered by the *Clubs Award*. Such a course would obviously avoid the need for any further Review proceedings in respect of the *Clubs Award*.
- Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.

[2045] At [1000] we express the *provisional* view that option 1 has merit and warrants further consideration. We propose to provide an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, we invite submissions on the two options set out above.

[2046] Short submissions setting out the position of the interested party are to be filed at amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We will list this matter for mention on **Tuesday, 28 March 2017**.

(iv) The Restaurant Award

[2047] In Chapter 7.4.6 we conclude that RCI has not established a merit case sufficient to warrant varying the Sunday penalty rates in this award.

[2048] We will provide RCI (and any other interested party) a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a ‘fair and relevant minimum safety net’. In the event that a party wishes to take up this opportunity, it will need to address the deficiencies in the case put to date, as set out above at [1142]–[1153]. In particular, any such case will need to:

- provide material which would enable us to assess the impact of the variations proposed (see [1151]);
- provide evidence as to the effects (in terms of employment and service levels of the reductions in Sunday penalty rates consequent on the *Restaurants 2014 Penalty Rates decision* (see [1152]–[1153]));
- provide a cogent argument as to why we should depart from the *Restaurants 2014 Penalty Rates decision* in respect of Sunday penalty rates; and
- address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.

[2049] In relation to the provision of additional evidence as to the effects of the 2014 reduction in Sunday penalty rates, we are not suggesting that quantitative evidence (or ‘natural experiment’ evidence) as to the impact of these changes is required. However we do expect significantly more extensive lay evidence as to this issue than was presented in these proceedings.

[2050] The RCI is to provide an indication as to whether it wishes to press its claim in light of the comments above at [2047]–[2049], by filing correspondence at amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We will list this matter for mention on **Tuesday, 28 March 2017**.

(v) *Proposed change in terminology*

[2051] The Hospitality Employers seek the removal of the reference to ‘penalty’ and ‘penalty rates’ in clause 32 of the *Hospitality Award* and the insertion of references to ‘additional remuneration’. A similar variation is proposed by the PGA in respect of the *Pharmacy Industry Award 2010*.

[2052] The changes proposed appear to be sought on the basis that s.134(1)(da)(iii) of the FW Act speaks of ‘the need to provide *additional remuneration* for ... employees working on weekends’. The changes proposed would also be consistent with the contemporary purpose of ‘penalty rates’. As mentioned in Chapter 3, the purpose of such rates is not to penalise employers for rostering employees to work at such times, it is to compensate employees for the disutility of working on weekends.

[2053] The submissions in respect of the proposed change in terminology were very limited. Further, the change in terminology proposed is only advanced in respect of 2 modern awards. The introduction of different expressions (which have the same meaning) in different modern awards is apt to confuse. Such an outcome would not be consistent with ‘the need to ensure a simple, easy to understand ... modern award system’ (s.134(1)(g)). Further, if changes of the type proposed were to be made then, *prima facie*, they should be made in all modern awards which currently provide for ‘penalty rates’ (see generally [901]–[906]).

[2054] We invite further submissions in respect of this issue. As the issue potentially affects a large number of modern awards it will be the subject of a separate statement and directions.

(vi) *The Review of Other Awards*

[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.¹⁷⁷⁵

[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*.

[2057] The *AER Award* was initially the subject of an application by Australian Federation of Employers and Industries (AFEI) but the application was subsequently withdrawn on 26 June 2015. We note that the Sunday penalty rates in the award are 150 per cent for full-time and part-time employees and 175 per cent for casual employees, which are consistent with the rates we have determined for the *Hospitality Award* as part of this decision.

[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. We will list this matter for mention on **Tuesday, 28 March 2017**.

(vii) *Loaded rates*

[2063] As mentioned in Chapter 4, in the Transitional Review a Full Bench¹⁷⁷⁶ dealt with a number of applications to vary penalty rates in 5 modern awards, including the *Hospitality Award*, *Fast Food Award* and *Retail Award*. In the course of its decision rejecting the various claims, the Full Bench said:

[329]... we consider that there is merit in the parties discussing the concept of incorporating loaded rates within the General Retail and Fast Food awards.

[330] Any such loaded rates would need to recognise the application of the existing penalty rates regime and apply fairly across the range of employees and working hours patterns that might be considered as applicable to the concept. Subject to those considerations, our preliminary view is that the establishment of loaded rates within these awards would have the capacity to reduce the complexity of their application, particularly for small businesses.

[331] In order to explore this concept further, the Commission will facilitate some conciliation discussions between the major parties with a view to seeking a degree of consensus. Commissioner Hampton will convene a conference for this purpose in the near future.¹⁷⁷⁷

[2064] A ‘loaded rate’ in this context refers to a rate which is higher than the applicable minimum hourly rate specified in the modern award and is paid for all hours worked instead of certain penalty rates (such as the penalty rates for Saturday and Sunday work).

[2065] Commissioner Hampton subsequently convened a conference of the parties to earlier proceedings and provided a report to the Full Bench on 13 June 2013. The Commissioner’s report indicated that, at least at that time, there was not a great deal of interest from the major parties in pursuing the insertion of loaded rates into the awards under consideration. The Commissioner concluded his report as follows:

‘Given the attitude of the major parties and the absence of specific proposals, I recommend to the Full Bench that no further action be taken in relation to these particular matters as part of the Modern Award Review 2012.’¹⁷⁷⁸

[2066] We note that the lack of enthusiasm at that time occurred in the context of the 2012 Transitional Review, with the prospect of a more comprehensive review of penalty rates during the 4 yearly Review.

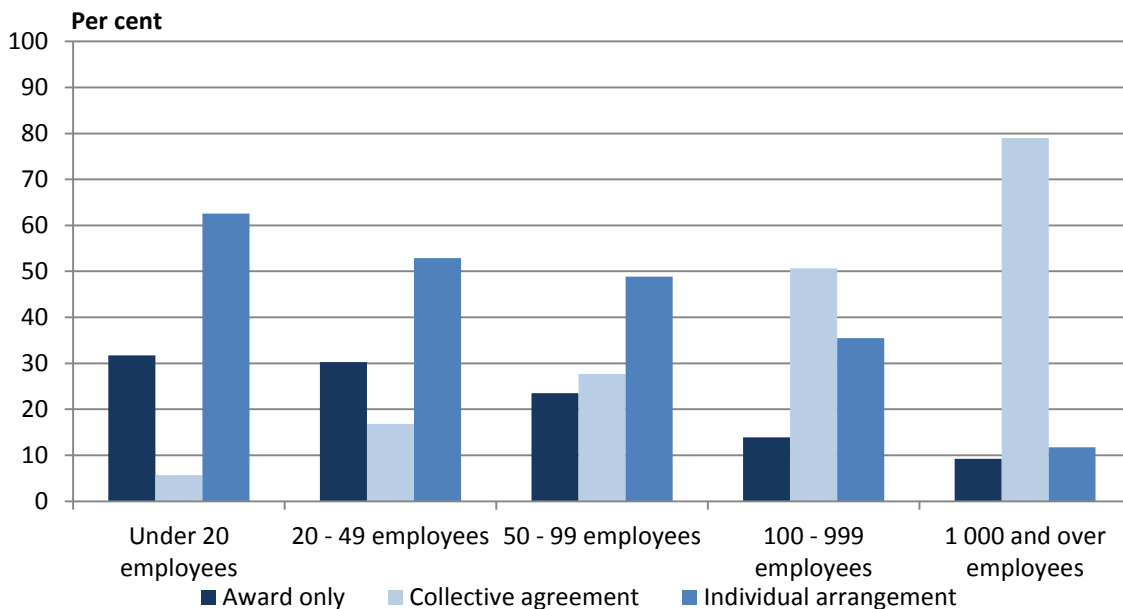
[2067] We agree with the view expressed by the Transitional Review Full Bench that there is merit in considering the insertion of appropriate loaded rates into the relevant awards. We note that the *Hospitality Award* already has a form of loaded rate. Clause 27.1 of that award provides that an employer and employee can enter into an ‘alternative arrangement to the payment of the minimum weekly wages, penalty rates and overtime payments prescribed in the award. In essence, and subject to some important safeguards, an employer and employee can enter into an agreement to pay a ‘loaded rate’ which is 25 per cent above the minimum weekly wage instead of penalty rates and overtime.

[2068] We are not suggesting that a provision such as clause 27.1 of the *Hospitality Award* is necessarily appropriate for other Hospitality and Retail awards. But *subject to appropriate safeguards*, schedules to these awards could be developed which provide that if employee are paid a higher (‘loaded’) rate of pay then they would not be entitled to certain penalty payments. It seems to us that, subject to the inclusion of appropriate safeguards, schedules of ‘loaded rates’ may make awards simpler and easier to understand, consistent with the consideration in s.134(1)(g).

[2069] It is also relevant that the businesses covered by the modern awards before us are predominately small businesses. About two-thirds of businesses in the Hospitality sector and over half of the businesses in the Retail Sector are small businesses.¹⁷⁷⁹

[2070] Small businesses face a number of practical impediments to entering into enterprise agreements. This is reflected in the positive correlation between business size and collective agreement making. An increase in business size is associated with an increase in the proportion of employees covered by collective agreements. As demonstrated by Chart 3 in the June 2015 ‘4 yearly review of modern awards – Annual leave’ decision¹⁷⁸⁰, which is reproduced below, as Chart 63.

Chart 63¹⁷⁸¹
Proportion of employees with their pay set by method of setting pay and business size—May 2014



Note: Data on method of setting pay by business size exclude owner managers of incorporated businesses.

[2071] Schedules of ‘loaded rates’ would allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.

[2072] The insertion of ‘loaded rates’ schedules into these modern awards may also have a positive effect on award compliance.

[2073] The Fair Work Ombudsman (FWO) has reported significant levels of non-compliance in the hospitality and retail awards which are the subject of these proceedings.

[2074] The FWO’s ‘National Hospitality Industry Campaign 2012-2014’ was developed in response to a number of factors in the hospitality industry, including:

- Given the size of the hospitality industry the campaign was split into 3 industry sub categories and comprised of a communication program and an audit of businesses

for compliance with wages and record keeping obligations. The results of the audit in each industry sub category are set out below.

- *Accommodation, pubs, taverns and bars (Wave 1 Report)*¹⁷⁸²
 - 30 per cent of pubs, taverns and bars and 35 per cent of accommodation businesses were found to be non-compliant;
 - Of the businesses in contravention, 53 per cent had monetary contraventions (19 per cent of contraventions related to penalty rates).
- *Restaurants, Cafes and Catering (Wave 2 Report)*¹⁷⁸³
 - 58 per cent of businesses had *not* met all of their workplace relations obligations (46 per cent of businesses were not paying their employees correctly)
- *Takeaway Foods (Wave 3 Report)*¹⁷⁸⁴
 - 67 per cent of business had *not* met all of their workplace relations obligations (47 per cent of businesses were not paying their employees correctly).

[2075] Some of the observations made in these reports are particularly relevant for present purposes. The Wave 3 Report notes (at p. 7):

‘The most commonly identified error related to wages (45%), specifically to underpayment of hourly rates, whereas penalty rates and loadings were a lower proportion (15%). Fair Work Inspectors (FWIs) found some businesses providing flat rates of pay for all hours worked, with many advising they had adopted this practice to simplify their payroll process. In nearly one third of cases, the hourly rate paid was not enough to cover hours attracting penalty rates and loadings, resulting in additional errors.’

[2076] A similar observation was made in the Wave 2 Report (at p. 7):

‘The most commonly identified errors were employers providing flat rates of pay for all hours worked with many employers advising they had adopted this practice to simplify their payroll process. In many cases the hourly rate paid was not enough to cover hours attracting penalties, loadings or overtime.’

[2077] Similar FWO campaigns have been conducted in the retail sector and the results are set out below:

- *National Retail Industry Campaign 2010-11*¹⁷⁸⁵
 - 26 per cent of employers were non-compliant (this percentage was expected to rise due to a number of ongoing investigations into expected breaches.
- *National Pharmacy Campaign 2012-13*¹⁷⁸⁶
 - 25 per cent of businesses were non-compliant;

- Of the businesses in contravention, 76 per cent had monetary contraventions (most related to wages, 54 per cent, followed by penalties and loadings, 22 per cent).

[2078] The Pharmacy report contained the following observation (at p. 13):

‘We also found some businesses were not paying pharmacists weekend penalty rates. Instead they were paying an above Award flat-rate for all hours worked which we determined did not result in any overall underpayment of entitlements.

However we found that pharmacy assistants that were being paid an above Award flat-rate for all hours worked were being underpaid, especially where they worked many shifts that attracted penalties.’

[2079] It appears from these FWO reports that some businesses in the Hospitality and Retail sectors already provide ‘flat’ (or ‘loaded’) rates of pay, in order to simplify their payroll process, but they underestimate the additional premium (or loading) required in order to compensate employees for the loss of penalty rates, resulting in non-compliance.

[2080] In raising this matter, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. Determining an appropriate loaded rate would not be straightforward. For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday.

[2081] It has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant.

[2082] To deal with this challenge it may be necessary to consider a number of loaded rates to match particular roster configurations. It is likely that there are commonly used roster configurations in the industries under consideration. So, by way, of example, there may be a loaded rate struck for employees who work no more than two Saturdays in any 28 day cycle, and another rate for employees who work every Sunday, but not Saturdays.

[2083] Any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees. Accordingly, there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries so that appropriate rates can be developed.

[2084] We envisage that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.

PRESIDENT

Appearances:

C Acev for United Voice, Liquor and Hospitality Division.

L Izzo with J Arndt, E Baxter and N Ward for Australian Business Industrial and the New South Wales Business Chamber.

L Izzo for Australian Chamber of Commerce and Industry.

J Baulch for The Association of Professional Engineers, Scientists and Managers, Australia.

S Moore QC (of counsel), *T Borgeest, D Macken, A Forsyth* (of counsel) and *S Burnley* for the Shop, Distributive and Allied Employees Association.

N Tindley, C Brehas, S Elliffe and G Frankford for the National Retail Association.

N Tindley, P Wheelahan (of counsel) and *M Brown* for Master Grocers Australia.

C Dowling of (of counsel), *K Burke* (of counsel), *R Robson* and *S Bull* for United Voice.

E Van der Linden and *R Cairney* for the South Australian Employers Chamber of Commerce and Industry trading as Business SA.

R Tait, H Carayannis, R Warren (of counsel) for Clubs Australia Industrial.

R Clancy and *N Ward* for the Australian Chamber of Commerce and Industry.

R Clarke, G Parkes and B Rauf (of counsel) for Restaurant & Catering Industrial.

S Crawford, J Gherjestani and G Starr for The Australian Workers' Union.

H Dixon SC (of counsel) with *A Gotting, L Cruden and V Paul* for the Australian Industry Group.

T Cush and *S Forster* for the Australian Amusement, Leisure and Recreation Association.

J Dolan, O Fagir and G Starr for the Australian Council of Trade Unions.

N Ward and *S Elliffe* for the Hair and Beauty Industry Association.

S Forster for the Australian Federation of Employers and Industry and the Drycleaning Institute of Australia.

G Johnston for the Australian Meat Industry Council.

M Seck (of counsel) with *S Wellard, J Light and J Stanton* (of counsel) for The Pharmacy Guild of Australia.

B O'Halloran for Deloitte Touche Tohmatsu.

J Stanton (of counsel) with *S Wellard* and *G Parkes* for the Accommodation Association of Australia; The Motor Inn, Motel and Accommodation Association.

J Stanton (of counsel) with *S Wellard* for the Australian Hotels Association.

L Svendson for the Health Services Union of Australia.

N Tindley and *P Wheelahan* (of counsel) for The Australian Retailers Association.

N Tindley for the Australian National Retail Association.

V Wiles for the Textile, Clothing and Footwear Union of Australia.

Hearing details:

Before the Full Bench:

2015.

Melbourne, Brisbane, Sydney, Canberra, Darwin, Adelaide, Perth, Hobart, Bathurst, Cairns, Kununurra, Rockhampton (video hearing)

August 21;

September 8–11, 14–18, 22, 23, 25;

October 1, 12–15, 19–21, 26–30;

November 4–6;

December 15, 16, 21.

2016.

Sydney, Melbourne, Brisbane, Canberra and Adelaide (video hearing):

April 11–15;

September 28.

Before Commissioner Johns:

2015.

Melbourne, Canberra, Sydney (video hearing)

September 9;

October 26;

November 12.

Final written submissions:

ABI Submission re updated statistical reports, 4 February 2017.

Final reports published:

Updated industry profiles, 20 January 2017.

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Endnotes

- ¹ The term ‘Commission’ has been used to describe the Fair Work Commission and its predecessor bodies including the Australian Industrial Relations Commission (AIRC) and Fair Work Australia.
- ² [\[2014\] FWCFB 916](#)
- ³ [\[2014\] FWCFB 916](#)
- ⁴ [Issues Paper, 4 Yearly Review of Modern Awards - Common issues](#), 24 February 2014
- ⁵ [\[2014\] FWC 1790](#) at [10]; [\[2014\] FWC 7742](#); [\[2014\] FWC 8575](#)
- ⁶ [\[2016\] FWCFB 7285](#)
- ⁷ [\[2014\] FWC 9175](#) at [4]
- ⁸ Re: *Amusement, Events and Recreation Award 2010*, see correspondence from AFEI and AALRA dated 26 June 2015; re: *Dry Cleaning and Laundry Industry Award 2010*, see [correspondence](#) from AFEI and the DIA dated 12 August 2015; re: *Hair and Beauty Industry Award 2010*, see [correspondence](#) from ABI dated 14 September 2016.
- ⁹ [\[2015\] FWC 1482](#)
- ¹⁰ [\[2015\] FWCFB 5357](#)
- ¹¹ [\[2014\] FWC 9175](#) at [15]
- ¹² See for example, Ai Group submission 8 February 2016 at [270]
- ¹³ [\[2016\] FWCFB 285](#) at [9]
- ¹⁴ Adelaide Advertiser, The Australian, Australian Financial Review, Courier Mail (Brisbane), Canberra Times, Daily Telegraph, Herald Sun, Hobart Mercury, The Age, NT News, Sydney Morning Herald and The West Australian
- ¹⁵ See [contributions received from interested persons](#)
- ¹⁶ See generally: Dawkins P, Rungie C and Sloan J (1986) ‘Penalty Rates and Labour Supply: Employee Attitudes to Non-Standard Hours of Work’, 28 *Journal of Industrial Relations*, pp. 564–587; Jones S (1981) ‘Penalty Rates under Challenge’, 23 *Journal of Industrial Relations*, pp. 504–507; Queensland Industrial Conciliation and Arbitration Commission (1981) Inquiry into Penalty Rates, QGIG, Vol. 1-08, 31 October, pp. 201–217; Productivity Commission, (2015) *Workplace Relations Framework, Final Report* chapter 10 pp. 405–421
- ¹⁷ Productivity Commission, (2015) *Workplace Relations Framework, Final Report* chapter 15 p. 503
- ¹⁸ [Ai Group final submission in reply –1 April 2016](#) at [6]
- ¹⁹ [\[2014\] FWCFB 1996](#)
- ²⁰ [\[2014\] FWCFB 1996](#) at [295]
- ²¹ CAI seeks to vary the Saturday penalty rates in the *Clubs Award* and the PGA seeks to vary the early morning and late night penalties on Saturdays in the *Pharmacy Award*. For the reasons set out at [994], a sufficient merit case has not been put in support of the changes proposed.
- ²² PC Final Report at p. 406
- ²³ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017
- ²⁴ Fair Work Commission, *Australian Workplace Relations Study*, 2014
- ²⁵ PC Final Report, at p. 493
- ²⁶ See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p. 408
- ²⁷ See *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [59]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 at [26]–[37]; *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139 at [16]–[19]
- ²⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]
- ²⁹ See *Prior v Sherwood* (1906) 3 CLR 1054; *R v Refshauge* (1976) 11 ALR 471 at p. 475
- ³⁰ (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ; also see *Taylor v The Owners – Strata Plan No 11564 253 CLR 531* at [65]–[66]

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- ³¹ *Ross v R* (1979) 141 CLR 432 at [440]; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at p. 479 per McHugh and Gummow JJ
- ³² (2009) 239 CLR 27 at [47]
- ³³ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [85]. Although the Court's observations were directed at the expression 'in its own right' in Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) they are apposite to s.156(5).
- ³⁴ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [86]. While the Full Federal Court was considering the meaning of the Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) the observations are also apposite to s.156(5) of the FW Act, which is in substantially the same terms.
- ³⁵ *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140]
- ³⁶ [2014] FWCFB 1788 at [19]–[24] (the *Preliminary Jurisdictional Issues Decision*)
- ³⁷ See *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J
- ³⁸ *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836; *National Retail Association v Fair Work Commission* [2014] FCAFC 118
- ³⁹ *Shop Distributive and Allied Employees Association v \$2 and Under* (2003) 135 IR 1
- ⁴⁰ *Ibid* at [11]. We note that Giudice J was in the minority in the result, but the observation cited is consistent with the views of the majority at [124].
- ⁴¹ [2015] FWCFB 8200 at [272]
- ⁴² (1994) 55 IR 144 at [147]–[149]
- ⁴³ Also see *Re AIRC Ex parte Metal Trades Industry Association of Australia* (1995) 62 IR 306 [331] per Keely J
- ⁴⁴ Also see 'Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces', April 2007 at p. 7, which states that awards play an important part in the safety net which will 'underpin' the collective bargaining system.
- ⁴⁵ Under s.57A certain out worker terms in a clothing industry award may continue to apply.
- ⁴⁶ [ACCI, NSWBC and ABI joint reply submission – 1 April 2016](#), at [5.6]–[5.9]
- ⁴⁷ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [18]
- ⁴⁸ *The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012* [2012] FWA 2556
- ⁴⁹ *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* (2012) 205 FCR 227
- ⁵⁰ *Ibid* at [35]–[37] and [46]
- ⁵¹ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227
- ⁵² [SDA final written submissions – 21 March 2016](#), at [264], [339], [690]; [United Voice final written submissions – 21 March 2016](#), at [18]; also see [APESMA final written submissions – 21 March 2016](#), at [31]
- ⁵³ [2014] FWCFB 1788 at [36]
- ⁵⁴ [2014] FCAFC 118 at [111]–[114]
- ⁵⁵ See generally: Dawkins P, Rungie C and Sloan J (1986) 'Penalty Rates and Labour Supply: Employee Attitudes to Non-Standard Hours of Work', 28 *Journal of Industrial Relations*, pp. 564–587; Jones S (1981) 'Penalty Rates under Challenge', 23 *Journal of Industrial Relations*, pp. 504–507; Queensland Industrial Conciliation and Arbitration Commission (1981) *Inquiry into Penalty Rates, QGIG, Vol. 1-08, 31 October*, pp. 201–217; Productivity Commission, (2015) *Workplace Relations Framework, Final Report* chapter 10 pp. 405–421
- ⁵⁶ [1947] 58 CAR 610 at [615]
- ⁵⁷ *Re Engine Drivers and General (State) Interim Award* [1950] AR (NSW) 260 at [268]. Also see the *FWC Background Paper on Penalty Rates*, 4 April 2016, for a discussion of other cases.
- ⁵⁸ *The Hotels, Resorts and Hospitality Industry Award 1992*, Print K7601 at [56], 7 July 1993 per Gay C
- ⁵⁹ PR941526, 3 December 2003 at [91]
- ⁶⁰ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [206]
- ⁶¹ [AHA and AAA final written submissions – 3 February 2016](#), at [24]

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- ⁶² See *ALDI Foods Pty Ltd v TWU* (2012) 227 IR 120; *Premier Pet Pty Ltd trading as Bay Fish v Brown (No 2)* [2013] FCA 167; and *Sagona v R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875
- ⁶³ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25 at [173]
- ⁶⁴ Productivity Commission, (2015) *Workplace Relations Framework, Final Report* chapter 15 p. 503
- ⁶⁵ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [105]–[106]
- ⁶⁶ *Ibid* at [109]; albeit the Court was considering a different statutory context, the observation at [109] is applicable to the Commission’s task in the Review.
- ⁶⁷ [2014] FWCFB 1788 at [33]–[34]
- ⁶⁸ [2013] FWCFB 4000 at [361]
- ⁶⁹ *Ibid* at [34], [362] and [419]
- ⁷⁰ See discussion in the [2015] FWCFB 3500 at [315]–[316]
- ⁷¹ ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013*, Catalogue No. 6310.0
- ⁷² ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁷³ ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0
- ⁷⁴ The HILDA survey is a household-based panel study which began in 2001 and collects information on economic and subjective well-being, labour market dynamics and family dynamics. Interviews are conducted annually with all adult members of each household with 14 years of data (2001 to 2014) publicly available.
- ⁷⁵ [2016] FWCFB 3500 at [365]–[369]
- ⁷⁶ ABS, *Characteristics of Employment, Australia, August 2015* Catalogue No. 6333.0, Table 9.1
- ⁷⁷ ABS, *Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0, Data Cube 5
- ⁷⁸ [2016] FWCFB 3500 at [371]
- ⁷⁹ *Ibid* at [372]
- ⁸⁰ *Ibid* at [285]
- ⁸¹ *Ibid* at [397]
- ⁸² *Ibid* at [458]
- ⁸³ *Ibid* at [377]–[389]
- ⁸⁴ *Ibid* at [67] and [415]
- ⁸⁵ See [2012] FWAFFB 5000 at [222]
- ⁸⁶ Buchanan J, Bretherton T, Frino B, Jakubauskas M, Schutz J, Garima V and Yu S (2013), *Minimum wages and their role in the process and incentives to bargain*, Research Report 7/2013, Fair Work Commission, December, Melbourne at p. xii
- ⁸⁷ [2014] FWCFB 3500 at [472]
- ⁸⁸ [2013] FWCFB 4000 at [100]–[102]
- ⁸⁹ A point raised by United Voice in closing oral submissions: transcript at PN27844
- ⁹⁰ For example, clause 27.1 of the *Hospitality Industry (General) Award 2010* provides that non-managerial employees may, by agreement between the employer and employee, be paid an annual salary of at least 25% or more above their minimum weekly wage times 52. Such an annualised salary relieves the employer of the requirement to pay penalty rates and overtime, provided the employee is not disadvantaged.
- ⁹¹ [2014] FWCFB 1996
- ⁹² *Ibid* at [295]
- ⁹³ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
- ⁹⁴ (1987) 16 FCR 167 at 184; cited with approval by Hely J in *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499 at [62] and by Katzmann J in *Construction, Forestry, Mining and Energy Union v Deputy President Hamberger* (2011) 195 FCR 74 at [103]
- ⁹⁵ [2015] FWCFB 4466 at [172]
- ⁹⁶ [Common Exhibit 1](#) at p. 408
- ⁹⁷ A point advanced by United Voice in closing oral submissions: transcript at PN27838
- ⁹⁸ See [ACCI, ABI and NSWBC final written submissions – 2 February 2016](#) at [35.5] and [35.6]

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- ⁹⁹ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [192]
- ¹⁰⁰ [United Voice final written submissions – 21 March 2016](#) at [453]
- ¹⁰¹ [Exhibit UV28](#) at Table 9 on p. 25
- ¹⁰² *Ibid* at Table 21 on p. 38
- ¹⁰³ [SDA final written submission – 21 March 2016](#) at [419]
- ¹⁰⁴ See transcript at PN27671–PN27693 and subsequent '[SDA note concerning para \[419\] of written submission](#)' dated 25 May 2016
- ¹⁰⁵ See [Exhibit SDA 39](#) Figure 8 on p. 23
- ¹⁰⁶ See [Exhibit SDA 36](#) Table 17 on p11, also see p. 22
- ¹⁰⁷ '[SDA Note concerning para \[419\] of written submission](#)' dated 25 May 2016
- ¹⁰⁸ [Exhibit SDA 36](#) at p. 16
- ¹⁰⁹ Productivity Commission, *What is productivity and how is it measured?*, PC News, May 2015
- ¹¹⁰ Treasury submission to House of Representatives Standing Committee on Economics Inquiry into 'Raising the level of productivity growth in the Australian economy', August 2009 at p. 3
- ¹¹¹ [2012] FWAFB 7858 at [45]–[46]
- ¹¹² [2015] FWCFB 620
- ¹¹³ [2015] FWCFB 1729
- ¹¹⁴ [ACTU final written submissions](#), 21 March 2016 at [2]
- ¹¹⁵ [SDA final written submissions](#), 21 March 2016_ at [18]–[20]
- ¹¹⁶ *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27 at [26]
- ¹¹⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]
- ¹¹⁸ *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at p. 579; *Bowling v General Motors Holden Ltd* (1980) 33 ALR 297 at [304]
- ¹¹⁹ *Mills v Meeking* (1990) 169 CLR 214 at [235] per Dawson J; *R v L* (1994) 49 FCR 534 at p. 538
- ¹²⁰ *Fair Work Act 2009* (Cth), s.2
- ¹²¹ [2015] FWCFB 8200
- ¹²² *Ibid* at [292]
- ¹²³ (2010) 272 ALR 750 at [40]
- ¹²⁴ *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042 at [16]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [68] per McHugh J; [136] per Gummow J; [173] per Kirby J and [204] per Hayne J. Also see *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135 at [6], [28] and [32]–[33] per Gleeson CJ, Gummow, Kirby and Hayne JJ
- ¹²⁵ *Ward v Williams* (1955) 92 CLR 496 at p. 505; *Re Metal Industry Award 1984 – Foreman and Supervisors and Other Awards (No2)* (1994) 56 IR 234; *Re AIRC Ex parte Metal Trades Industry Association of Australia* (1995) 62 IR 306 at pp. 315–319 per Wilcox CJ and Beazley J, at [326] per Keely J; *Shop, Distributive and Allied Employees Association v National Retail Association (No2)* (2012) 205 FCR 227 at [35] per Tracey J. See s.33(2A) *Acts Interpretation Act 1901* (Cth)
- ¹²⁶ *O'Sullivan v Farrer* (1989) 168 CLR 210 at [216] per Mason CJ, Brennan, Dawson and Gaudron JJ
- ¹²⁷ See *Preliminary Jurisdictional Issues* decision [2014] FWCFB 1788 at [40]–[48]
- ¹²⁸ Transcript at PN27249–PN27277
- ¹²⁹ (1987) 9 NSWLR 719
- ¹³⁰ *Ibid* at [722]–[724]
- ¹³¹ *Donohue v The Director of Public Prosecutions (WA)* [2011] WASCA 239; *Maroondah City Council v Fletcher & Anor* [2009] VSCA 250
- ¹³² See *Modern Awards Review 2012* [2012] FWAFB 5600 at [82]–[85]
- ¹³³ *Nguyen v Nguyen* (1990) 169 CLR 245 at 269; also see *Re v Moore; ex parte Australian Telephone and Phonogram Officers' Association* (1982) 148 CLR 600
- ¹³⁴ *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.

- ¹³⁵ (2003) 127 IR 205 at [48]
- ¹³⁶ *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C
- ¹³⁷ [2014] FWCFB 1788 at [23]–[27]
- ¹³⁸ [2015] FWCFB 620
- ¹³⁹ [2015] FWCFB 1729
- ¹⁴⁰ [2015] FWCFB 620 at [8]
- ¹⁴¹ [2015] FWCFB 620 at [40]
- ¹⁴² [2015] FWCFB 1729 at [142]–[143]
- ¹⁴³ *Ibid* at [156] and [161]
- ¹⁴⁴ [2014] FWCFB 1996 at [91]–[92]
- ¹⁴⁵ [SDA final written submissions – 21 March 2016](#) at [21]
- ¹⁴⁶ [United Voice final written submissions – 21 March 2016](#) at [33]
- ¹⁴⁷ (2014) 253 CLR 531
- ¹⁴⁸ *Ibid* at [38]
- ¹⁴⁹ Also see *JJ Richards and Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53 at [30] per Jessup J and at [33] per Tracey J; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 at [101]; *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at [71] per Buchanan J (with whom Barker J agreed)
- ¹⁵⁰ (1885) 29 ChD 50 at [58]
- ¹⁵¹ Applied in *Evans v Bartlam* [1937] AC 473 at 488 per Lord Wright and cited with approval in *Kostokanellis v Allen* [1974] VR 596 and *Dix v Crimes Compensation Tribunal* [1993] 1 VR 297. Also see *JJ Richards and Sons Pty Ltd v FWA* [2012] FCAFC 53 (20 April 2012) at [30] per Jessup J (with whom Tracey J agreed) and at [63] per Flick J (with whom Tracey J agreed); *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* [2015] FWCFB 210 at [58]–[59]
- ¹⁵² [Ai Group final submission in reply – 1 April 2016](#) at [6]
- ¹⁵³ *4 yearly review of modern awards – Award Flexibility* [2016] FWCFB 6178 at [60]–[61]
- ¹⁵⁴ See *Re Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C
- ¹⁵⁵ [2008] AIRC 387
- ¹⁵⁶ [2008] AIRCFB 550 at [10]
- ¹⁵⁷ [2008] AIRCFB 618
- ¹⁵⁸ Notional agreements preserving State awards (NAPSAs) were federal system instruments derived from awards previously operating in State jurisdictions
- ¹⁵⁹ See <http://www.airc.gov.au/awardmod/research.htm>
- ¹⁶⁰ Minister’s Request, at para 4
- ¹⁶¹ [\[2008\] AIRCFB 550](#), at [34]
- ¹⁶² [\[2008\] AIRCFB 717](#)
- ¹⁶³ [\[2008\] AIRCFB 1000](#), at [284]
- ¹⁶⁴ [\[2008\] AIRCFB 550](#)
- ¹⁶⁵ *Award modernisation – Stage 2 modern awards*, 2 September 2009, [\[2009\] AIRCFB 800](#)
- ¹⁶⁶ [\[2009\] AIRCFB 800](#)
- ¹⁶⁷ *Cafes and Restaurants (South Australia) Award* [AN150025], at cl. 6.5.1
- ¹⁶⁸ *Cafes and Restaurants (South Australia) Award* [AN150025], at cl. 6.1.2
- ¹⁶⁹ The Review does not include modern enterprise awards or State Reference Public Sector Awards
- ¹⁷⁰ [\[2012\] FWAFB 5600](#)
- ¹⁷¹ [2012] FWAFB 5600 at [99]
- ¹⁷² [\[2012\] FWAFB 5600](#) at [99]

¹⁷³ [2013] FWCFB 1635

¹⁷⁴ Additional applications to vary penalty rates in the *Hair and Beauty Industry Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010* were also dealt with by this Full Bench

¹⁷⁵ [\[2013\] FWCFB 1635](#)

¹⁷⁶ [\[2013\] FWCFB 1635](#) at [234]–[236]

¹⁷⁷ [2013] FWC 7840

¹⁷⁸ [2014] FWCFB 1996

¹⁷⁹ [NRA submissions and draft determination – 13 February 2015](#)

¹⁸⁰ [NRA final written submissions – 8 February 2016](#), Part 1: Overview

¹⁸¹ [\[2016\] FWCFB 6460](#) at [18]

¹⁸² [\[2016\] FWCFB 7285](#)

¹⁸³ [Exhibit ACTU 2](#)

¹⁸⁴ [Exhibit PG 34](#)

¹⁸⁵ [\[2016\] FWCFB 965](#)

¹⁸⁶ *Ibid* at [19]

¹⁸⁷ PC Final Report at p. 406

¹⁸⁸ *Ibid* at p. 411, Table 10.1

¹⁸⁹ *Ibid* at p. 497

¹⁹⁰ *Ibid* at p. 406

¹⁹¹ *Ibid* at p. 493

¹⁹² *Ibid* at p. 480–489

¹⁹³ *Ibid* at pp. 455 and 458

¹⁹⁴ See PC Final Report, Chapter 14 at pp. 461–465

¹⁹⁵ PC Final Report at p. 461

¹⁹⁶ *Ibid* at p. 465

¹⁹⁷ See PC Final Report Chapter 14 at pp. 469–480

¹⁹⁸ PC Final Report at p. 479

¹⁹⁹ *Ibid* at pp. 480–489

²⁰⁰ *Ibid* at pp. 480–481

²⁰¹ *Ibid* at p. 481

²⁰² *Ibid* at p. 461

²⁰³ *Ibid* at p. 411

²⁰⁴ *Ibid* at p. 495

²⁰⁵ *Ibid* at p. 493

²⁰⁶ *Ibid* at p. 496

²⁰⁷ The casual loading is the subject of AM2014/197—Casual employment. SDA are seeking to have the full 25 per cent casual loading plus penalty rate apply to weekend work, see [Submission of 13 May 2016](#). Decision pending.

²⁰⁸ Given that their skills and patterns of work are identical.

²⁰⁹ PC Final Report at p. 393; Estimates based on HILDA release 13

²¹⁰ *Ibid* at p. 394

²¹¹ *Ibid* at p. 396

²¹² *Ibid* at p. 404

²¹³ *Ibid* at p. 503

²¹⁴ *Ibid*

²¹⁵ See ss.6 and 8 of the *Productivity Commission Act 1998* (Cth) and the Terms of reference

²¹⁶ [\[2016\] FWCFB 965](#) at [22]

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- ²¹⁷ S.156(5) of the FW Act
- ²¹⁸ [CCIWA final written submissions – 8 February 2016](#) at [6]–[14]
- ²¹⁹ *Ibid* at [50]–[51]
- ²²⁰ *Ibid*, Appendix C, Question 5, at p. 5
- ²²¹ Transcript at paras PN27578–PN27579
- ²²² [CCIWA final written submissions – 8 February 2016](#) at [3]
- ²²³ [Busselton Chamber of Commerce and Industry final written submissions – 1 April 2016](#) at [17] and [21]
- ²²⁴ *Ibid* at [25]–[46]
- ²²⁵ [CCIQ final written submission – 29 June 2015](#) at [4]
- ²²⁶ *Ibid* at [13]
- ²²⁷ *Ibid* at [25]
- ²²⁸ *Ibid* at [26]
- ²²⁹ *Ibid* at [27]–[28]
- ²³⁰ *Ibid* at [29]
- ²³¹ *Ibid* at [38], [52]
- ²³² *Ibid* at [34]
- ²³³ *Ibid* at [35]
- ²³⁴ *Ibid* at [41]
- ²³⁵ [BSA final written submissions – 17 February 2016](#)
- ²³⁶ [VECCI final written submissions – 15 February 2016](#) at p. 2
- ²³⁷ See for example: [Gosford City Chamber of Commerce & Industry final written submissions – 8 February 2016](#)
- ²³⁸ [Melissa Price, Federal Member for Durack, written submissions – 15 December 2015](#) at p. 1
- ²³⁹ *Ibid* at p. 2
- ²⁴⁰ [Victorian Government final written submissions – 11 March 2016](#) at [6.1] on p. 34
- ²⁴¹ [Premier of Queensland final written submissions – 29 September 2016](#) at p. 2
- ²⁴² [Government of South Australia final written submissions – 22 August 2016](#) at p. 1.
- ²⁴³ [ACT Government final written submissions – 21 March 2016](#) at p. 2
- ²⁴⁴ [Anglican Diocese of Melbourne final written submissions – 17 February 2016](#) at pp. 3–4
- ²⁴⁵ [Baptist Churches of NSW & ACT final written submissions – 12 February 2016](#) at pp. 1–2
- ²⁴⁶ [Uniting Church in Australia, Burwood-Croydon Related Congregations final written submissions – 17 February 2016](#)
- ²⁴⁷ [Uniting Church in Australia, Synod NSW & ACT final written submissions – 17 February 2016](#) at p. 3
- ²⁴⁸ [Catholic Archdiocese of Sydney, Justice Peace Office final written submissions – 12 February 2016](#) at pp. 1–2
- ²⁴⁹ [Justice, Peace and Integrity of Creation Commission of the Australia and East Timor Leste Carmelite Order final written submissions – 17 February 2016](#) at p. 2
- ²⁵⁰ [Bosco Social Justice Group final written submissions – 16 February 2016](#)
- ²⁵¹ [Federal Opposition final written submissions – 21 March 2016](#) at [4] and [64]
- ²⁵² *Ibid* at [17] and [18]
- ²⁵³ [Asian Women at Work final written submissions – 17 February 2016](#) at p. 1
- ²⁵⁴ [National Foundation for Australian Women final written submissions – 15 March 2016](#)
- ²⁵⁵ Skinner N and Pocock B (2014), ‘The Persistent Challenge: Living, Working and Caring in Australia in 2014’, The Australian Work and Life Index, Centre for Work and Life University of South Australia.
- ²⁵⁶ [Exhibit SDA 43](#)
- ²⁵⁷ [National Union of Students written submissions – 4 September 2015](#) at [4] and [5]
- ²⁵⁸ [Curtin Student Guild final written submissions – 17 February 2016](#)
- ²⁵⁹ [Queensland Police Union of Employees final written submissions – 11 March 2016](#) at pp. 1–2
- ²⁶⁰ *Ibid* at p. 1

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- ²⁶¹ [\[2016\] FWCFB 285](#)
- ²⁶² Adelaide Advertiser, The Australian, Australian Financial Review, Courier Mail (Brisbane), Canberra Times, Daily Telegraph, Herald Sun, Hobart Mercury, The Age, NT News, Sydney Morning Herald and The West Australian.
- ²⁶³ See [contributions received from interested persons](#)
- ²⁶⁴ ABI, NSW BC, Ai Group, RCI, Clubs Australia, ARA, MGA, Retail Council, NRA
- ²⁶⁵ [Joint employer review of contributions received from interested persons](#), filed 8 April 2016, updated and refiled 2 May 2016
- ²⁶⁶ Ibid at [4.1]
- ²⁶⁷ [Australian Industry Group outline of submission on contributions – 29 April 2016](#) at [2]
- ²⁶⁸ [United Voice submissions in response to employer submissions on interested persons’ contributions – 16 May 2016](#)
- ²⁶⁹ [SDA submissions concerning public contributions – 17 May 2016](#)
- ²⁷⁰ [United Voice submissions in response to employer submissions on interested persons’ contributions – 16 May 2016](#) at [9]
- ²⁷¹ Ibid
- ²⁷² [SDA submissions concerning public contributions – 17 May 2016](#) at [5]
- ²⁷³ The SDA review only identified one contribution which expressed support for a reduction in penalty rates; see *ibid* at [7]
- ²⁷⁴ Ibid at [11]
- ²⁷⁵ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017
- ²⁷⁶ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017
- ²⁷⁷ Exhibit ABI 3 at p. 7
- ²⁷⁸ ABS, *Labour Force, Australia, Dec 2016*, Catalogue No. 6202.0
- ²⁷⁹ Exhibit ABI 3 at p. 5
- ²⁸⁰ Exhibit ABI 3 at p. 6
- ²⁸¹ ABS, *Labour Force, Australia, Nov 2016*, Glossary; Exhibit Ai Group 15, p. 23
- ²⁸² ABS, *Labour Force, Australia, Dec 2016*, Catalogue No. 6202.0
- ²⁸³ Exhibit ABI 3 at p. 6
- ²⁸⁴ ABS, *Labour Force, Australia, Jan 2017*, Catalogue No. 6202.0
- ²⁸⁵ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, Chart 2.2; ABS, *Labour Force, Australia, Aug 2016*, Catalogue No. 6202.0
- ²⁸⁶ ABS, *Australian Labour Market statistics, July 2011*, Catalogue No. 6105.0, Fact sheet: Employment classifications.
- ²⁸⁷ ABS, *Census Dictionary, 2011*, Catalogue No. 2901.0
- ²⁸⁸ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, Chart 2.6; ABS, *Australian Labour Market Statistics, July 2014*, Catalogue No. 6105.0; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0
- ²⁸⁹ Exhibit ABI 3 at p. 6
- ²⁹⁰ Exhibit ABI 3 at p. 6
- ²⁹¹ Exhibit ABI 3 at pp. 3–4
- ²⁹² Exhibit ABI 3 at p. 3; ABS, *Labour Force, Australia*, various years, Catalogue No. 6203.0, 6202.0
- ²⁹³ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, Chart 2.4; ABS, *Labour Force, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ²⁹⁴ Common Exhibit 1 at p. 1120
- ²⁹⁵ Common Exhibit 1 at p. 1120, Figure F.2; ABS, *Forms of Employment, Australia*, various, Catalogue No. 6359.0; *Working (Time) Arrangements*, various, Catalogue No. 6342.0
- ²⁹⁶ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, Tables 3.1–3.3; ABS, *Forms of Employment, Australia*, various, Catalogue No. 6359.0; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0
- ²⁹⁷ Common Exhibit 1 at p. 1116; ABS, *Forms of Employment, Australia, November 2013*, Catalogue No. 6359.0.
- ²⁹⁸ Common Exhibit 1 at p. 1117; ABS, *Forms of Employment, Australia, November 2013*, Catalogue No. 6359.0, unpublished data.

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- ²⁹⁹ Common Exhibit 1 at p. 1122; ABS, *Forms of Employment, Australia, November 2013*, Catalogue No. 6359.0
- ³⁰⁰ Exhibit Ai Group 15 at p. 24
- ³⁰¹ HILDA survey, Waves 6 and 15
- ³⁰² HILDA survey, Waves 6 and 15
- ³⁰³ ABS, *Labour Force, Australia*, various, Catalogue No. 6202.0, unpublished data
- ³⁰⁴ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, p. 21, Table 3.18; Exhibit SDA 36 at p. 7, Table 8
- ³⁰⁵ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- ³⁰⁶ The ABS data shows that the proportion of employees that work on weekends has increased over a longer period, although this highlights that the definition of employees affects the absolute proportions that work on weekends. The ABS data shows that a narrower definition of employees, excluding OMIEs, leads to a lower proportion of employees working on weekends. This makes sense as owner managers, or employers, may be more likely to work on weekends, whether as part of normal hours or outside of normal hours. Another reason is that the HILDA survey asked whether employees usually worked on weekends while the ABS surveys were confined to the reference week. This is also likely to lead to a higher proportion of workers reporting that they work on weekends
- ³⁰⁷ ABS, *Labour Force, Australia*, various, Catalogue No. 6202.0, unpublished data
- ³⁰⁸ Common Exhibit 1 at p. 427
- ³⁰⁹ Common Exhibit 1 at p. 424
- ³¹⁰ Common Exhibit 1 at p. 426, Figure 11.2
- ³¹¹ ABS, *How Australians Use Their Time, 2006*, Catalogue No. 4153.0
- ³¹² Bittman M (2005), ‘Sunday working and family time’, *Labour & Industry*, Vol. 16, No. 1, pp. 59–81. Two pages of the paper were tendered as Exhibit ABI 11, however, the paper is referred to in Exhibit UV 26 at paras 74–77; Exhibit ACTU 2 at para. 28.
- ³¹³ Exhibit ABI 13
- ³¹⁴ Bittman (2005) at p. 69
- ³¹⁵ Bittman (2005) at p. 74
- ³¹⁶ Bittman (2005) at p. 78
- ³¹⁷ Exhibit ABI 13
- ³¹⁸ Exhibit ABI 13 at p. 722
- ³¹⁹ Exhibit UV 26 at para. 11, p. 16
- ³²⁰ Dr Muurlink Cross Examination, 4 November 2015, PN20991–PN21000
- ³²¹ SDA final submission, 21 March 2016, at paras 350–351; United Voice final submission, 21 March 2016, at paras 353–354
- ³²² SDA final submission, 21 March 2016, at para. 349
- ³²³ Exhibit ABI 3 at p. 37
- ³²⁴ Exhibit ABI 3 at p. 38
- ³²⁵ Exhibit ABI 3 at p. 37
- ³²⁶ Exhibit UV 25
- ³²⁷ Exhibit UV 25 at para. 48
- ³²⁸ Exhibit UV 25 at para. 48
- ³²⁹ Exhibit ABI 3, p. 37; ABS, *Time Use on Recreation and Leisure Activities, Australia, 2006*, Catalogue No. 4173.0
- ³³⁰ CCIWA final submission, 8 February 2016, at pp. 17–18, para. 84 and Figures 3 and 4; Common Exhibit 1 at p. 437
- ³³¹ Common Exhibit 1 at p. 438
- ³³² Common Exhibit 1 at p. 437; ABS, *How Australians Use Their Time, 2006*, Catalogue No. 4153.0
- ³³³ Common Exhibit 1 at p. 437; ABS, *How Australians Use Their Time, 2006*, Catalogue No. 4153.0
- ³³⁴ SDA final submission, 21 March 2016, para. 352; Common Exhibit 1 at p. 437

- ³³⁵ Exhibit ABI 1
- ³³⁶ Exhibit ABI 1 at p. 21
- ³³⁷ Exhibit ABI 1 at p. 22
- ³³⁸ Exhibit Ai Group 26 at p. 3
- ³³⁹ Exhibit Ai Group 26 at p. 13
- ³⁴⁰ Exhibit Ai Group 29. Also referred to in Exhibit ABI 3 at p. 34
- ³⁴¹ Exhibit ABI 3 at pp. 34–35
- ³⁴² Exhibit ABI 3 at p. 35; Exhibit Ai Group 29
- ³⁴³ ACCI, ABI and NSWBC, 2 February 2016, at para. 19.3
- ³⁴⁴ United Voice submission in reply, statistical reports, 28 October 2016 at para. 10
- ³⁴⁵ Fair Work Commission, *Changing work patterns*, material to assist AM2014/305—Penalty rates case, January 2017, p. 27; HILDA survey, Waves 4 and 14
- ³⁴⁶ Exhibit ABI 3 at p. 37
- ³⁴⁷ Exhibit Ai Group 26 at p. 13
- ³⁴⁸ Exhibit Ai Group 26 at p. 7
- ³⁴⁹ Exhibit Ai Group 26 at p. 7; ABS, *Census of Population and Housing*, 2006 and 2011.
- ³⁵⁰ Exhibit ABI 3 at p. 35
- ³⁵¹ Exhibit Ai Group 26 at p. 4
- ³⁵² Exhibit PG 34
- ³⁵³ Exhibit ACTU 2
- ³⁵⁴ Exhibit SDA 33
- ³⁵⁵ Exhibit PG 36
- ³⁵⁶ Exhibit ABI 1
- ³⁵⁷ Exhibit SDA 31
- ³⁵⁸ Exhibit ABI 2
- ³⁵⁹ Exhibit SDA 43
- ³⁶⁰ Exhibit UV26
- ³⁶¹ Exhibit PG34, Annexure B
- ³⁶² Exhibit PG 34 at pp. iii–iv
- ³⁶³ Exhibit PG 36 at p. 9
- ³⁶⁴ Exhibit PG 34 at pp. 27–28
- ³⁶⁵ Exhibit PG 34 at p. 29
- ³⁶⁶ Exhibit PG 34 at p. 29
- ³⁶⁷ Exhibit PG 34 at p. 40
- ³⁶⁸ Exhibit PG 34 at p. 40
- ³⁶⁹ Exhibit PG 34 at p. 30
- ³⁷⁰ Exhibit PG 34 at pp. 36–37
- ³⁷¹ Exhibit SDA 33
- ³⁷² Exhibit SDA 33 at para. 24
- ³⁷³ Exhibit SDA 33 at para. 25
- ³⁷⁴ SDA final submission, 21 March 2016, at para. 205(a); Exhibit SDA 33 at para. 26
- ³⁷⁵ Exhibit UV 27 at p. 2
- ³⁷⁶ Exhibit UV 27 at p. 5
- ³⁷⁷ Exhibit UV 27 at p. 5
- ³⁷⁸ SDA final submission, 21 March 2016, at para. 210(a); Exhibit PG 34 at p. 25; PN25538
- ³⁷⁹ Exhibit ACTU 2 at para. 9

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- ³⁸⁰ The report does not directly address public holidays as the literature is limited – see Exhibit UV 26 at para. 61
- ³⁸¹ Exhibit UV 26 at para. 58
- ³⁸² Exhibit UV 26 at para. 16
- ³⁸³ United Voice final submission, 21 March 2016, at para. 317
- ³⁸⁴ Dr Muurlink Cross Examination, 4 November 2015, PN20844–20855
- ³⁸⁵ Dr Muurlink Cross Examination, 4 November 2015, PN20808–PN20810
- ³⁸⁶ Dr Muurlink Cross Examination, 4 November 2015, PN21285
- ³⁸⁷ SDA final submission, 21 March 2016, at para. 307; United Voice final submission, 21 March 2016, at para. 328
- ³⁸⁸ United Voice final submission, 21 March 2016, at paras 238–309
- ³⁸⁹ Ai Group final submission, 8 February 2016, at paras 257.1–257.7
- ³⁹⁰ AHA and AAA final submission, 3 February 2016, at para. 256
- ³⁹¹ ABI final submission, 2 February 2016, at para. 18.10
- ³⁹² Dr Muurlink Cross Examination, 4 November 2015, PN20979
- ³⁹³ ABI final submission, 2 February 2016, at para. 18.10
- ³⁹⁴ Exhibit ABI 1 at (ii) and p. 44
- ³⁹⁵ Exhibit ABI 1 at p. 45
- ³⁹⁶ Exhibit ABI 1 at (ii)
- ³⁹⁷ Ibid
- ³⁹⁸ Written closing submissions on behalf of ACCI, NSWBC and ABI, 2 February 2015 at [22.4]
- ³⁹⁹ See Exhibit ABI 1 at p. 41
- ⁴⁰⁰ Exhibit SDA 31
- ⁴⁰¹ Exhibit UV 25 at para. [49]–[53]
- ⁴⁰² Transcript at PN9061
- ⁴⁰³ Exhibit SDA 31 at p. 7
- ⁴⁰⁴ Transcript at PN9184–PN9185
- ⁴⁰⁵ Exhibit SDA 31 at pp. 5–6
- ⁴⁰⁶ Exhibit ABI 1 at p. 42
- ⁴⁰⁷ Exhibit SDA 43
- ⁴⁰⁸ Exhibit SDA 43 at para. 3.
- ⁴⁰⁹ Exhibit SDA 43 at para. 4.
- ⁴¹⁰ Exhibit SDA 43 at para 4. The 2014 AWALI survey was funded by an Australian Research Council Linkage grant in partnership with the South Australian Government (through SafeWork SA) and the Commonwealth Government (through the Department of Education).
- ⁴¹¹ Exhibit PG 31 at p. 10
- ⁴¹² Exhibit SDA 45 at p. 9
- ⁴¹³ Professor Charlesworth examination, 15 December 2015, PN23552
- ⁴¹⁴ Professor Charlesworth cross examination, 15 December 2015, PN23829–PN23832.
- ⁴¹⁵ Exhibit SDA 45 at p. 8
- ⁴¹⁶ Exhibit SDA 45 at p. 8
- ⁴¹⁷ Exhibit SDA 45
- ⁴¹⁸ Exhibit SDA 45 at pp. 27–28
- ⁴¹⁹ SDA final submission, 21 March 2016, at para. 363; Exhibit SDA 45 at p. 29
- ⁴²⁰ Exhibit SDA 43 at para. 12; Professor Charlesworth cross examination, 15 December 2015, PN23660
- ⁴²¹ Exhibit SDA 43 at [30]
- ⁴²² Exhibit SDA 43 at para. 30. Statistically significant at the 5 per cent level.
- ⁴²³ Exhibit SDA 43 at para. 11

- ⁴²⁴ Exhibit SDA 43 at paras 33–34
- ⁴²⁵ Exhibit SDA 43 at para. 15
- ⁴²⁶ Exhibit SDA 43 at para. 13
- ⁴²⁷ Charlesworth cross examination, 15 December 2015, PN23652
- ⁴²⁸ Exhibit SDA 43 at para. 12
- ⁴²⁹ Exhibit SDA 45, p. 28, Tables 4-2a–4-2b
- ⁴³⁰ SDA final submission, 21 March 2016, at para. 286; United Voice final submission, 21 March 2016, at para. 332
- ⁴³¹ ARA and others final submission, 12 February 2016, at para. 97
- ⁴³² ARA and others final submission, 12 February 2016, at para. 96(e)
- ⁴³³ SDA final submission, 21 March 2016, at para. 224; Exhibit SDA 43 at para. 15, para. 34
- ⁴³⁴ SDA final submission, 21 March 2016, at para. 225; Exhibit SDA 43 at para. 31
- ⁴³⁵ ABI final submission, 2 February 2016, at para. 20.46
- ⁴³⁶ PGA final submission, 12 February 2016, at para. 134
- ⁴³⁷ PGA final submission, 12 February 2016, at paras 130–131
- ⁴³⁸ PGA final submission, 12 February 2016, at para. 126
- ⁴³⁹ PGA final submission, 12 February 2016, at para. 128
- ⁴⁴⁰ PGA final submission, 12 February 2016, at para. 132
- ⁴⁴¹ PGA final submission, 12 February 2016, at para. 133
- ⁴⁴² Common Exhibit 1 at pp. 439–443
- ⁴⁴³ Common Exhibit 1 at p. 439
- ⁴⁴⁴ Common Exhibit 1 at p. 440
- ⁴⁴⁵ Common Exhibit 1 at pp. 441–443
- ⁴⁴⁶ Common Exhibit 1 at p. 442
- ⁴⁴⁷ SDA final submission, 21 March 2016, at para. 359
- ⁴⁴⁸ SDA final submission, 21 March 2016, at para. 606
- ⁴⁴⁹ Exhibit SDA 43 at [10]–[11]. The 25 employees were the first people who were contacted by telephone and who agreed to participate and included 16 females and 9 males.
- ⁴⁵⁰ Exhibit SDA 43 at para. 20
- ⁴⁵¹ Exhibit SDA 43 at para. 6
- ⁴⁵² Exhibit SDA 43 at para. 25; para. 31
- ⁴⁵³ Exhibit SDA 43 at para. 4
- ⁴⁵⁴ SDA final submission, 21 March 2016, at para. 294; Dr Macdonald cross examination, 15 December 2015, PN24459
- ⁴⁵⁵ SDA final submission, 21 March 2016, at para. 295
- ⁴⁵⁶ SDA final submission, 21 March 2016, at para. 296
- ⁴⁵⁷ ARA and others final submission, 12 February 2016 at para. 41; Exhibit Retail 11 at pp. 8, 28, 63, 94
- ⁴⁵⁸ ARA and others final submission, 12 February 2016, at para. 103(a); Exhibit Retail 11 at pp. 7, 15, 16, 21, 33, 41, 62, 64, 69, 73, 87, 93, 105, 117, 138, 148
- ⁴⁵⁹ ARA and others final submission, 12 February 2016, at para. 125; Exhibit Retail 11 at pp. 10, 11, 22, 28, 34, 44, 63, 96, 105
- ⁴⁶⁰ ARA and others final submission, 12 February 2016, at para. 106; Exhibit Retail 11 at pp. 23, 24, 65, 83
- ⁴⁶¹ ARA and others final submission, 12 February 2016, at para. 126; Exhibit Retail 11 at pp. 17, 23
- ⁴⁶² ARA and others final submission, 12 February 2016, at para. 133; Exhibit Retail 11 at p. 21
- ⁴⁶³ Ai Group final submissions at para 20.52
- ⁴⁶⁴ ABI final submission, 2 February 2016, at para. 20.52(c); PGA final submission, 12 February 2016, at para. 140(b)
- ⁴⁶⁵ ABI final submission, 2 February 2016, at para. 20.52(d); Exhibit Retail 11
- ⁴⁶⁶ ABI final submission, 2 February 2016, at para. 20.52
- ⁴⁶⁷ PGA final submission, 12 February 2016, at para. 140(c)

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- ⁴⁶⁸ PGA final submission, 12 February 2016, at para. 140(d)
- ⁴⁶⁹ Exhibit Retail 2 at p. 75
- ⁴⁷⁰ Exhibit Retail 2 at pp. 65, 68
- ⁴⁷¹ Exhibit Retail 2 at p. 66
- ⁴⁷² Exhibit Retail 2 at pp. 69–70
- ⁴⁷³ Exhibit ABI 3
- ⁴⁷⁴ Exhibit UV 24
- ⁴⁷⁵ Exhibit UV 25
- ⁴⁷⁶ Exhibit ABI 4 and Exhibit ABI 5
- ⁴⁷⁷ Exhibit Retail 12
- ⁴⁷⁸ Exhibit ABI 3 at pp. 23–24
- ⁴⁷⁹ Exhibit ABI 3 at pp. 26–27
- ⁴⁸⁰ Exhibit ABI 3 at pp. 27–28
- ⁴⁸¹ Exhibit ABI 3 at p. 31
- ⁴⁸² SDA final submission of 21 March 2016 at p. 31, para. 87; United Voice final submission of 21 March 2016 at p. 41, para. 131; Exhibit UV 24 at p. 5
- ⁴⁸³ Exhibit UV 25 at p. 6, para. 10
- ⁴⁸⁴ Exhibit UV 25 at p. 6, para. 10
- ⁴⁸⁵ SDA final submission of 21 March 2016 at p. 31, para. 88; United Voice final submission of 21 March 2016 at p. 41, para. 132
- ⁴⁸⁶ SDA final submission of 21 March 2016 at p. 32, para. 89; United Voice final submission of 21 March 2016 at p. 41, para. 133
- ⁴⁸⁷ SDA final submission of 21 March 2016 at p. 31, para. 85; United Voice final submission of 21 March 2016 at p. 40, para. 129
- ⁴⁸⁸ ABI final submission at p. 67, para. 27.10; Exhibit ABI 4 at p. 6
- ⁴⁸⁹ SDA final submission of 21 March 2016 at p. 32, para. 90; United Voice final submission of 21 March 2016 at p. 42, para. 134.
- ⁴⁹⁰ ABI final submission at p. 67, para. 27.11; Exhibit ABI 4 at p. 7.
- ⁴⁹¹ SDA final submission of 21 March 2016 at p. 35, para. 99; United Voice final submission of 21 March 2016 at p. 45, para. 143; Common Exhibit 1 at p. 479, fn 160; Lewis P (2014), ‘Paying the penalty? The high price of penalty rates in Australian restaurants’, *Agenda*, Vol. 21, No. 1, pp. 5–26.
- ⁴⁹² SDA final submission of 21 March 2016 at pp. 38–39, para. 111; United Voice final submission of 21 March 2016 at p. 48, para. 155
- ⁴⁹³ Transcript, 1 October 2016, at PN11192–PN11193
- ⁴⁹⁴ United Voice final submissions at para 164
- ⁴⁹⁵ SDA final submission of 21 March 2016 at para. 121; United Voice final submission of 21 March 2016 at para. 165
- ⁴⁹⁶ Exhibit ABI 3 at p. 30
- ⁴⁹⁷ SDA final submission of 21 March 2016 at p. 46, para. 128; United Voice final submission of 21 March 2016 at p. 56, para. 172; Transcript, 1 October 2015, PN10945, PN10957
- ⁴⁹⁸ Exhibit UV 24 at paras 16–17; Appendix B
- ⁴⁹⁹ Exhibit UV 25 at para. 34
- ⁵⁰⁰ Exhibit UV 25 at para. 34
- ⁵⁰¹ SDA final submission of 21 March 2016 at para. 122; United Voice final submission of 21 March 2016 at para. 166
- ⁵⁰² Exhibit ABI 5 at p. 25
- ⁵⁰³ PC Final Report at p. 475
- ⁵⁰⁴ SDA final submission of 21 March 2016 at p. 44, para. 124; United Voice final submission of 21 March 2016 at p. 54, para. 168; Exhibit UV 24 at p. 7, para. 20
- ⁵⁰⁵ Exhibit UV 25 at p. 17, para. 34

- ⁵⁰⁶ Exhibit SDA 39 at p. 16
- ⁵⁰⁷ Exhibit SDA 39 at p. 8
- ⁵⁰⁸ Exhibit SDA 39 at pp. 3–4
- ⁵⁰⁹ Exhibit SDA 39 at p. 13
- ⁵¹⁰ Exhibit SDA 39 at p. 13
- ⁵¹¹ Exhibit SDA 39 at p. 4
- ⁵¹² Exhibit SDA 39 at p. 4
- ⁵¹³ Exhibit SDA 39 at p. 4
- ⁵¹⁴ Exhibit SDA 39 at p. 28
- ⁵¹⁵ Exhibit Retail 12 at para. 2.2
- ⁵¹⁶ Exhibit Retail 12 at para. 3.5
- ⁵¹⁷ Exhibit Retail 13 at para. 3.3
- ⁵¹⁸ Revisions were made to include time and state-based trends and to disentangle the effects from the introduction of the GST (Exhibit SDA 55 at paras 9–11)
- ⁵¹⁹ Exhibit SDA 55 at para. 13
- ⁵²⁰ Exhibit SDA 55 at para. 14
- ⁵²¹ ABI final submission at para. 27.30
- ⁵²² ABI final submission at para. 27.30
- ⁵²³ Ai Group final submission at paras 262.4–262.5
- ⁵²⁴ ABI final submission at para. 27.34
- ⁵²⁵ ABI final submission at para. 27.42
- ⁵²⁶ Ai Group final submission at para. 262.6
- ⁵²⁷ SDA final submission at para. 270
- ⁵²⁸ ABI final submission at para. 27.35. These factors include sales margins and operating profits between employers; workcover premiums and payroll tax; business confidence; changes in energy costs and changes in any other costs associated with running a business.
- ⁵²⁹ SDA final submission at para. 271
- ⁵³⁰ Exhibit Retail 13 at para. 2.1
- ⁵³¹ SDA final submission at para. 273
- ⁵³² Ai Group final submission at para. 262.3
- ⁵³³ Exhibit SDA 39 at p. 17
- ⁵³⁴ Exhibit SDA 39 at p. 18
- ⁵³⁵ Exhibit UV 25 at p. 18, para. 38
- ⁵³⁶ Exhibit UV 25 at pp. 19–20, paras 40–44
- ⁵³⁷ Exhibit UV 25 at p. 11, para. 22
- ⁵³⁸ Exhibit UV 25 at p. 11, para. 22
- ⁵³⁹ Exhibit UV 25 at p. 11, para. 22
- ⁵⁴⁰ Exhibit ABI 5 at p. 13
- ⁵⁴¹ Transcript PN11288–PN11289
- ⁵⁴² Transcript PN11293–PN11295
- ⁵⁴³ Transcript PN11407–PN11409
- ⁵⁴⁴ PN11693
- ⁵⁴⁵ Common Exhibit 1 at p. 469
- ⁵⁴⁶ Transcript, 1 October 2016, PN11294; PN11693
- ⁵⁴⁷ [2016] FWCFCB 3500 at [492]
- ⁵⁴⁸ Exhibit UV 25 at para. 20
- ⁵⁴⁹ Exhibit ABI 3 at p. 22

- ⁵⁵⁰ We note that while the claims to vary the Fast Food Award were dealt with as part of the Retail group during proceedings, the ABS treats fast food as part of the hospitality sector; accordingly analysis of the fast food industry has been included in this chapter.
- ⁵⁵¹ Award Reliance Survey 2013 data manual: <https://www.fwc.gov.au/documents/sites/wagereview2015/research/AR-data-user-manual.pdf> and [Australian Workplace Relations Study 2014](#)
- ⁵⁵² Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- ⁵⁵³ Fair Work Commission, [Modern awards and relevant ANZSIC classes](#)
- ⁵⁵⁴ ABS, *Australian National Accounts: National Income, Expenditure and Product, Jun 2016*, Catalogue No. 5206; ABS, *Business Indicators, Australia, Jun 2016*, Catalogue No. 5676.0; ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0; ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0; ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁵⁵ ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0
- ⁵⁵⁶ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ⁵⁵⁷ Fair Work Commission, *Australian Workplace Relations Study, 2014*
- ⁵⁵⁸ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁵⁹ Fair Work Commission, *Award Reliance Survey, 2013*
- ⁵⁶⁰ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ⁵⁶¹ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ⁵⁶² The market sector includes all industries except for Public administration and safety, Education and training and Health care and social assistance
- ⁵⁶³ ABS, *Estimates of Industry Multifactor Productivity, 2014–15*, Catalogue No. 5260.0.55.002
- ⁵⁶⁴ ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0
- ⁵⁶⁵ Fair Work Commission, *Australian Workplace Relations Study, 2014*
- ⁵⁶⁶ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁶⁷ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁶⁸ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁶⁹ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁷⁰ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁷¹ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ⁵⁷² ABS, *Participation, Job Search and Mobility, Australia, February 2015*, Catalogue No. 6226.0
- ⁵⁷³ Fair Work Commission, *Australian Workplace Relations Study, 2014*
- ⁵⁷⁴ HILDA survey Wave 15, 2015
- ⁵⁷⁵ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁷⁶ ABS, *Average Weekly Earnings, Australia, May 2016*, Catalogue No. 6302.0
- ⁵⁷⁷ ABS, *Microdata: Employee, Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0.55.001
- ⁵⁷⁸ ABS, *Wage Price Index, Australia, Jun 2016*, Catalogue No. 6345.0
- ⁵⁷⁹ Fair Work Commission, *Australian Workplace Relations Study, 2014*
- ⁵⁸⁰ MA000009; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁸¹ MA000058; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁸² MA000119; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁸³ MA000003; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ⁵⁸⁴ Department of Employment, *Trends in Federal Enterprise Bargaining*, June quarter 2016, <https://www.employment.gov.au/trends-federal-enterprise-bargaining>

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- 585 [\[2008\] AIRCFB 550](#) at [34]
- 586 [\[2008\] AIRCFB 1000](#) at [117]–[119]
- 587 [\[2008\] AIRCFB 1000](#) at [117]
- 588 [AHA National Office submission – 1 August 2008](#), para 81; LHMU – [Draft award 1 August 2008](#), cl. 4.2.1, 5.6
- 589 [AP783479CRV](#)
- 590 Print K3966
- 591 [Exposure Draft—Hospitality Industry \(General\) Award 2010](#)
- 592 [Exposure Draft—Hospitality Industry \(General\) Award 2010](#), cl. 32.1(d)
- 593 [HMAA submissions—regarding exposure draft –10 October 2008](#), p. 7
- 594 [Modern Award—Hospitality Industry \(General\) Award 2010](#), published 19 December 2008, cl. 32.1
- 595 [\[2008\] AIRCFB 1000](#)
- 596 Ibid [7]–[8]
- 597 [United Voice submissions on award modernisation](#) – 3 June 2016, para 26
- 598 [Transcript – 22 June 2008](#), at PN66–PN67
- 599 Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- 600 ABS, *Census of Population and Housing*, 2011
- 601 Note this includes casual employees who work less than 35 hours per week
- 602 [Exhibit AHA 14](#), [Exhibit AHA 15](#)
- 603 [Exhibit AHA 37](#), [Exhibit AHA 38](#)
- 604 [Exhibit AHA 71](#), [Exhibit AHA 72](#)
- 605 [Exhibit AHA 20](#), [Exhibit AHA 21](#)
- 606 [Exhibit AHA 22](#), [Exhibit AHA 23](#)
- 607 [Exhibit AHA 65](#), [Exhibit AHA 66](#)
- 608 [Exhibit AHA 30](#), [Exhibit AHA 31](#)
- 609 [Exhibit AHA 73](#), [Exhibit AHA 74](#)
- 610 [Exhibit AHA 75](#), [Exhibit AHA 76](#)
- 611 [Exhibit AHA 7](#), [Exhibit AHA 8](#)
- 612 [Exhibit AHA 53](#), [Exhibit AHA 54](#)
- 613 [Exhibit AHA 67](#), [Exhibit AHA 68](#)
- 614 [Exhibit AHA 26](#), [Exhibit AHA 27](#)
- 615 [Exhibit AHA 1](#), [Exhibit AHA 2](#)
- 616 [Exhibit AHA 45](#), [Exhibit AHA 46](#)
- 617 [Exhibit AHA 63](#), [Exhibit AHA 64](#)
- 618 [Exhibit AHA 39](#), [Exhibit AHA 40](#)
- 619 [Exhibit AHA 43](#), [Exhibit AHA 44](#)
- 620 [Exhibit AHA 61](#), [Exhibit AHA 62](#)
- 621 [Exhibit AHA 55](#), [Exhibit AHA 56](#)
- 622 [Exhibit AHA 57](#), [Exhibit AHA 58](#)
- 623 [Exhibit AHA 41](#), [Exhibit AHA 42](#)
- 624 [Exhibit AHA 28](#), [Exhibit AHA 29](#)
- 625 [Exhibit AHA 69](#), [Exhibit AHA 70](#)
- 626 [Exhibit AHA 32](#), [Exhibit AHA 33](#)
- 627 [Exhibit AHA 16](#), [Exhibit AHA 17](#)
- 628 [Exhibit AHA 34](#), [Exhibit AHA 35](#), [Exhibit AHA 36](#)

⁶²⁹ [Exhibit AHA 51](#), [Exhibit AHA 52](#)

⁶³⁰ [Exhibit AHA 83](#), [Exhibit AHA 84](#)

⁶³¹ [Exhibit AHA 47](#), [Exhibit AHA 48](#)

⁶³² [Exhibit AHA 77](#), [Exhibit AHA 78](#)

⁶³³ [Exhibit AHA 10](#), [Exhibit AHA 11](#)

⁶³⁴ [Exhibit AHA 59](#), [Exhibit AHA 60](#)

⁶³⁵ [Exhibit AHA 49](#), [Exhibit AHA 50](#)

⁶³⁶ [Exhibit AHA 12](#), [Exhibit AHA 13](#)

⁶³⁷ [Exhibit AHA 3](#), [Exhibit AHA 4](#)

⁶³⁸ [Exhibit AHA 81](#), [Exhibit AHA 82](#)

⁶³⁹ [Exhibit AHA 24](#), [Exhibit AHA 25](#)

⁶⁴⁰ [Exhibit AHA 5](#), [Exhibit AHA 6](#)

⁶⁴¹ [Exhibit AHA 79](#), [Exhibit AHA 80](#)

⁶⁴² [Exhibit AHA 18](#), [Exhibit AHA 19](#)

⁶⁴³ Data in Chart 30 is based on the following Exhibits filed by the Australian Hotels Association (AHA)—AHA62 (W1), AHA31 (W2), AHA18 (W3), AHA81 (W4), AHA56 (W5), AHA6 (W6), AHA81 (W7), AHA66 (W8), AHA44 (W9), AHA64 (W10), AHA48 (W11), AHA13 (W12), AHA70 (W13), AHA17(W14), AHA80 (W15), AHA11(W16), AHA40 (W17), AHA23 (W18) (W19), AHA21 (W20), AHA27 (W21), AHA2 (W22), AHA33 (W23), AHA50 (W24), AHA46 (W25), AHA58 (W26), AHA60 (W27), AHA4 (W28), AHA29 (W29), AHA25 (W30), AHA36 (W31), AHA35 (W32), AHA8 (W33), AHA72 (W34), AHA76 (W35), AHA15 (W36), AHA54 (W37), AHA84 (W38), AHA74 (W39), AHA42 (W40), AHA42(W41)

⁶⁴⁴ Each of the witnesses marked with an asterisk (*) gave evidence that they were responsible for employees across a number of establishments. For the purposes of this graph the average number of employees per establishment has been inserted. W1 gave evidence that he was responsible for 231 employees over 8 establishments with no breakdown per establishment. W2 gave evidence that he was responsible for 500 employees over 12 establishments with no breakdown per establishment. W3 gave evidence that he was responsible for 133 employees over 3 establishments with the following breakdown per establishment 54, 51 and 65. It is noted that this breakdown does not add up to 133. W18 gave evidence that she was responsible for 449 employees over 7 establishments with the following breakdown per establishment: 50, 95, 78, 56, 42, 72 and 56. W20 gave evidence that she was responsible for 64 employees over 3 establishments with no breakdown per establishment. W25 gave evidence that he was responsible for 182 employees over 7 establishments with no breakdown per establishment. Witness 31 gave evidence that he was responsible for 72 employees over 2 establishments with the following breakdown per establishment 26 and 36. Witness 38 gave evidence that he was responsible for 329 employees over 4 establishments with the following breakdown per establishment 76, 62, 36 and 44. Witness 39 gave evidence that he was responsible for 54 employees over 2 establishments with the following breakdown per establishment 29 and 25

⁶⁴⁵ Data in Chart 31 is based on the following Exhibits filed by the Australian Hotels Association (AHA)—AHA62 (W1), AHA31 (W2), AHA18 (W3), AHA81 (W4), AHA56 (W5), AHA6 (W6), AHA81 (W7), AHA66 (W8), AHA44 (W9), AHA64 (W10), AHA48 (W11), AHA13 (W12), AHA70 (W13), AHA17(W14), AHA80 (W15), AHA11(W16), AHA40 (W17), AHA23 (W18) (W19), AHA21 (W20), AHA27 (W21), AHA2 (W22), AHA33 (W23), AHA50 (W24), AHA46 (W25), AHA58 (W26), AHA60 (W27), AHA4 (W28), AHA29 (W29), AHA25 (W30), AHA36 (W31), AHA35 (W32), AHA8 (W33), AHA72 (W34), AHA76 (W35), AHA15 (W36), AHA54 (W37), AHA84 (W38), AHA74 (W39), AHA42 (W40), AHA42(W41)

⁶⁴⁶ Each of the witnesses marked with an asterisk (*) did not provide evidence of their experience.

⁶⁴⁷ Transcript at PN5278–PN5341

⁶⁴⁸ Transcript at PN5365–PN5422

⁶⁴⁹ Transcript at PN3403–PN3561

⁶⁵⁰ United Voice, Outline of Closing Submissions 21 March 2016 at paras 417 and 422

⁶⁵¹ Exhibit AHA1, Witness Statement of Kasie Ferguson at para 15

⁶⁵² Exhibit AHA1, Witness Statement of Kasie Ferguson at para 15

⁶⁵³ Exhibit AHA16 Witness Statement of Fiona McDonald at para 16

⁶⁵⁴ Exhibit AHA 51 Witness Statement of Sue Marie Mitchell at para 17

- ⁶⁵⁵ Exhibit AHA 51 Witness Statement of Sue Marie Mitchell at para 17
- ⁶⁵⁶ Exhibit AHA12 Witness Statement of Dean William Trengove at para 12c
- ⁶⁵⁷ Exhibit AHA12 Witness Statement of Dean William Trengove at para 12c
- ⁶⁵⁸ Employed 28 staff covered by the Award as at 30 June 2015: see Exhibit AHA6 Supplementary Statement of Colin Waller at para 3
- ⁶⁵⁹ Exhibit AHA5 Witness Statement of Colin Waller at para 19
- ⁶⁶⁰ Exhibit AHA5 Witness Statement of Colin Waller at para 19
- ⁶⁶¹ Witness Statement of Helen Sergi AHA10 para 12
- ⁶⁶² Exhibit AHA32 Witness Statement of Keith McCallum para 10
- ⁶⁶³ Exhibit AHA26 Witness Statement of John Andrew Dowd paras 15 and 20
- ⁶⁶⁴ Exhibit AHA37 Witness Statement of Graham Annovazzi para 16
- ⁶⁶⁵ Exhibit AHA39 Witness Statement of Ian Green paras 7 and 12
- ⁶⁶⁶ Exhibit AHA53 Statement of Will Cordwell paras 9–10
- ⁶⁶⁷ Exhibit AHA59 Witness Statement of Peter Sullivan para 6
- ⁶⁶⁸ Exhibit AHA3 Witness Statement of David Gibson para 9
- ⁶⁶⁹ Exhibit AHA73 Witness Statement of Michael Burke paras 8 and 12
- ⁶⁷⁰ Exhibit AHA77 Witness Statement of Jim Ryan para 17
- ⁶⁷¹ Exhibit AHA79 Witness Statement of Peter Williams paras 10–11
- ⁶⁷² Exhibit AHA30 Witness Statement of Andrew Bullock at para 12
- ⁶⁷³ Exhibit AHA26 Witness Statement of John Andrew Dowd at paras 16, 18
- ⁶⁷⁴ Exhibit AHA51 Witness Statement of Sue Marie Mitchell at paras 12, 16
- ⁶⁷⁵ Exhibit AHA7 Witness Statement of Susan Cameron paras 4 and 15
- ⁶⁷⁶ Exhibit AHA71 Witness Statement of Timothy Bilston at para 13
- ⁶⁷⁷ Exhibit AHA7 Witness Statement of Susan Cameron at para 15
- ⁶⁷⁸ Exhibit AHA67 Witness Statement of Daniel Cronin at para 15 and 16
- ⁶⁷⁹ Exhibit AHA18 Witness Statement of Ashleigh Winn
- ⁶⁸⁰ Transcript, at PN1649
- ⁶⁸¹ Exhibit AHA30 Witness Statement of Andrew Bullock para 16
- ⁶⁸² Ibid at para 17
- ⁶⁸³ Employed 120 staff covered by the Award as at 30 June 2015: see Exhibit AHA48 Supplementary Statement of David Ovenden at para 3
- ⁶⁸⁴ Transcript at PN6085
- ⁶⁸⁵ Exhibit AHA61 Witness Statement of Albert Hakfoort para 5
- ⁶⁸⁶ Exhibit AHA75 Witness Statement of Tony Cakmar para 12
- ⁶⁸⁷ Exhibit AHA37 Witness Statement of Graham Annovazzi at paras 18 and 19
- ⁶⁸⁸ Exhibit AHA71 Witness Statement of Timothy Michael Fletcher Bilston at para 12
- ⁶⁸⁹ Ibid at para 13
- ⁶⁹⁰ Ibid at para 14
- ⁶⁹¹ Ibid at para 17
- ⁶⁹² Exhibit AHA30 Witness Statement of Andrew Bullock at para 15
- ⁶⁹³ Exhibit AHA75 Witness Statement of Tony Cakmar at para 10
- ⁶⁹⁴ Exhibit AHA26 Witness Statement of John Andrew Dowd at para 16, 18
- ⁶⁹⁵ Exhibit AHA45 Witness Statement of Patrick Gallagher at para 8
- ⁶⁹⁶ Exhibit AHA61 Witness Statement of Albert Hakfoort at paras 6–9.
- ⁶⁹⁷ Exhibit AHA51 Witness Statement of Sue Marie Mitchell at para 12
- ⁶⁹⁸ Exhibit AHA83 Witness Statement of Michelle Morrow at para 37 and 38.
- ⁶⁹⁹ Exhibit AHA12 Witness Statement of Dean Trengove at para 12a
- ⁷⁰⁰ Ibid at para 12b

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- ⁷⁰¹ Exhibit AHA10 Witness Statement of Helen Sergi paras 8 and 9
- ⁷⁰² Exhibit AHA 73 Witness Statement of Michael Burke paras 15–19
- ⁷⁰³ Exhibit AHA3 Witness Statement of Philip Tudor at para 13
- ⁷⁰⁴ Exhibit AHA24 Witness Statement of Samantha Walder at para 11 and 12
- ⁷⁰⁵ Exhibit AHA79 Witness Statement of Peter Rodney Williams at para 11
- ⁷⁰⁶ Exhibit AHA 14 Witness Statement of Vanessa Anderson paras 12–13
- ⁷⁰⁷ Exhibit AHA28 Witness Statement of Rick Lovell para 17–18
- ⁷⁰⁸ Exhibit AHA41 Witness Statement of Michael Karney paras 6 and 13
- ⁷⁰⁹ Exhibit AHA45 Witness Statement of Patrick Gallagher paras 8–14
- ⁷¹⁰ Exhibit AHA 67 Witness Statement of Daniel Cronin paras 17–20
- ⁷¹¹ Exhibit AHA 73 Witness Statement of Michael Burke paras 15–19
- ⁷¹² Exhibit AHA51 Witness Statement of Sue Mitchell paras 12–13
- ⁷¹³ Exhibit AHA59 Witness Statement of Peter Sullivan paras 6–9
- ⁷¹⁴ Ibid at para 11
- ⁷¹⁵ Exhibit AHA65 Witness Statement of Darren Lea Brown paras 17–20
- ⁷¹⁶ Exhibit AHA79 Witness Statement of Peter Williams paras 8, 11–12
- ⁷¹⁷ Exhibit AHA81 – Witness Statement of Belinda Usher para 13
- ⁷¹⁸ Exhibit AHA1 Witness Statement of Kasie Ferguson at para 18; Transcript 8 September 2015, PN734
- ⁷¹⁹ Exhibit AHA10 Witness Statement of Helen Sergi at para 13; Transcript 8 September 2015, PN1211
- ⁷²⁰ Transcript 8 September 2015, PN1217
- ⁷²¹ Transcript 22 September 2015, PN7974
- ⁷²² Transcript 8 September 2015, PN1011
- ⁷²³ Transcript 8 September 2015, PN997–1000
- ⁷²⁴ Exhibit AHA79 Witness Statement of Peter Rodney Williams at para 13
- ⁷²⁵ Exhibit AHA73 Witness Statement of Michael Burke paras 21 and 24
- ⁷²⁶ Exhibit AHA53 Statement of Will Cordwell para 15–16
- ⁷²⁷ Exhibit AHA79 Witness Statement of Peter Williams para 13
- ⁷²⁸ Transcript 16 September 2015, PN6085
- ⁷²⁹ Exhibit AHA49 Witness Statement of Mel Tait para 16
- ⁷³⁰ Transcript 8 September 2015, PN1089
- ⁷³¹ Exhibit AHA61 Witness Statement of Albert Hakfoort at para 16
- ⁷³² Exhibit AHA 20 Witness Statement of Joanne Blair para 15
- ⁷³³ Exhibit AHA45 Witness Statement of Patrick Gallagher para 16
- ⁷³⁴ Exhibit AHA81 Witness Statement of Belinda Usher para 15
- ⁷³⁵ Exhibit AHA14 Witness Statement of Vanessa Anderson at para 18
- ⁷³⁶ Exhibit AHA20 Witness Statement of Joanne Blair at para 15
- ⁷³⁷ Exhibit AHA75 Witness Statement T Cakmar at para 14
- ⁷³⁸ Transcript 22 September 2015, PN7782–PN7784
- ⁷³⁹ Transcript 17 September 2015, PN6589
- ⁷⁴⁰ Exhibit AHA59 Witness Statement of Peter Sullivan at para 18
- ⁷⁴¹ Exhibit AHA30 Witness Statement of Andrew Bullock para 19 and 20
- ⁷⁴² Statement of Susan Cameron Exhibit AHA7
- ⁷⁴³ PN1144
- ⁷⁴⁴ Exhibit AHA41 Witness Statement of Michael Karney para 14
- ⁷⁴⁵ Exhibit AHA12 Witness Statement of Dean William Trengove at para 14; Transcript 9 September 2015, PN1363 and PN1380

- ⁷⁴⁶ Transcript 9 September 2015, PN1849–PN1850
- ⁷⁴⁷ Transcript 16 September 2015, PN6085
- ⁷⁴⁸ Exhibit AHA12 Witness Statement of Dean William Trengove at para 14; Transcript 9 September 2015, PN1363 and PN1380
- ⁷⁴⁹ Exhibit AHA7 Witness Statement of Susan Cameron para 21
- ⁷⁵⁰ Exhibit AHA43 Witness Statement of Darren Gunn at para 23
- ⁷⁵¹ Exhibit AHA49 Witness Statement of Mel Tait para 18
- ⁷⁵² Exhibit AHA43 Witness Statement of Darren Gunn at para 20
- ⁷⁵³ Exhibit AHA16 Witness Statement of Fiona McDonald at para 24; Transcript 9 September 2015, PN1555
- ⁷⁵⁴ Exhibit AHA34 Witness Statement of Samuel McInnes para 28
- ⁷⁵⁵ Exhibit AHA51 Witness Statement of Sue Mitchell para 22
- ⁷⁵⁶ Exhibit AHA57 Witness Statement of Peter Johnston para 16
- ⁷⁵⁷ Transcript 22 September 2015 , PN7305
- ⁷⁵⁸ Exhibit AHA61 Witness Statement of Albert Hakfoort at para 16
- ⁷⁵⁹ Ibid para 12
- ⁷⁶⁰ [Exhibit UV 11](#)
- ⁷⁶¹ [Exhibit UV 18](#)
- ⁷⁶² [Exhibit UV 9](#)
- ⁷⁶³ [Exhibit UV 19](#)
- ⁷⁶⁴ [Exhibit UV 16](#)
- ⁷⁶⁵ [Exhibit UV 17](#)
- ⁷⁶⁶ [Exhibit UV 20](#)
- ⁷⁶⁷ Exhibit UV11 Witness Statement of Sean Davis at para 20
- ⁷⁶⁸ Transcript, 23 September 2015, PN8576–PN8577
- ⁷⁶⁹ Exhibit UV11 Witness Statement of Sean Davis at para 21–28
- ⁷⁷⁰ Exhibit UV 11 at para 38
- ⁷⁷¹ Transcript, 23 September 2015, PN8512–PN8517
- ⁷⁷² Transcript, 23 September 2015, PN8525–PN8528. Also see PN8579 where Mr Davis says that he makes it known that he is available for weekend and public holiday shifts.
- ⁷⁷³ Transcript, 23 September 2015, PN8585–PN8586
- ⁷⁷⁴ Exhibit UV18 Witness Statement of Steven Petrov at paras 15–16
- ⁷⁷⁵ Exhibit UV18 Witness Statement of Steven Petrov at paras 22–27
- ⁷⁷⁶ Exhibit UV18 at paras 35–36
- ⁷⁷⁷ Ex.UV9 Witness Statement of Steven Petrov at paras 19.
- ⁷⁷⁸ Exhibit UV9, Witness Statement of Andrew Sanders at para 33
- ⁷⁷⁹ Exhibit UV9, Witness Statement of Andrew Sanders at paras 24–26
- ⁷⁸⁰ Exhibit UV9 Witness Statement of Andrew Sanders at para 35–36, 38.
- ⁷⁸¹ Transcript at PN8145–PN8146, PN8150 and PN8174–PN8176
- ⁷⁸² Exhibit UV19 Witness Statement of Jan Syrek at paras 10–12
- ⁷⁸³ Exhibit UV19 Witness Statement of Jan Syrek at paras 20–30
- ⁷⁸⁴ Exhibit UV19 Witness Statement of Jan Syrek at paras 24
- ⁷⁸⁵ Exhibit UV19 Witness Statement of Jan Syrek at paras 43–44
- ⁷⁸⁶ Exhibit UV16 Witness Statement of Carol Gordon at paras 22
- ⁷⁸⁷ Exhibit UV17 Witness Statement of Amit Gounder at paras 8–10
- ⁷⁸⁸ Exhibit UV17 Witness Statement of Amit Gounder at paras 14–15
- ⁷⁸⁹ Exhibit UV17 Witness Statement of Amit Gounder at paras 23

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- ⁷⁹⁰ Exhibit UV20 Witness Statement of Rachel-Lee Louise Zwarts at paras 4, 7
- ⁷⁹¹ Exhibit UV20 Witness Statement of Rachel-Lee Louise Zwarts at paras 13–14
- ⁷⁹² Exhibit UV20 Witness Statement of Rachel-Lee Louise Zwarts at paras 15–18
- ⁷⁹³ Exhibit UV 20 at paras 26–28
- ⁷⁹⁴ United Voice final written submissions, dated 21 March 2016 at para 121
- ⁷⁹⁵ Exhibit UV16 Witness Statement of Carol Gordon
- ⁷⁹⁶ Exhibit UV16 Witness Statement of Carol Gordon at paras 19, 28, 36–37
- ⁷⁹⁷ Exhibit UV16 at paras 39, 40
- ⁷⁹⁸ AHA/AAA written submissions, 3 February 2016 at para 337
- ⁷⁹⁹ United Voices final submissions, at para 417
- ⁸⁰⁰ United Voice Final Submissions at para 216
- ⁸⁰¹ *Ibid*, at para 218
- ⁸⁰² (1959) 101 CLR 298 at 321, at [312] per Menzies J
- ⁸⁰³ *Café v. Australian Portland Cement Pty Ltd* (1965) 83 WN (Pt 1) (NSW) 280, at [287]
- ⁸⁰⁴ *Jones v. Dunkel*, *op. cit.*, at 308, WN (Pt 1) (NSW) 557 at [582]; *Whitehorn v. R* (1983) 152 CLR 657 at 690 per Dawson J.
- ⁸⁰⁵ See generally *Tamayo v AlSCO Linen Service Pty Ltd*, Print P1859, 4 November 1997.
- ⁸⁰⁶ [2014] FWCFB 1996 (citations omitted)
- ⁸⁰⁷ (1959) 101 CLR 298 at 321
- ⁸⁰⁸ *Ibid* at 321
- ⁸⁰⁹ *Ibid* at 312
- ⁸¹⁰ *Ibid* at 321
- ⁸¹¹ Card D, ‘Do minimum wages reduce employment? A case study of California, 1987–1989’, *Industrial and Labor Relations Review*, vol. 46, no. 1, 1992, pp. 38–54
- ⁸¹² Draft Report, p. 821–822 and Appendix C
- ⁸¹³ at p. 23
- ⁸¹⁴ *Ibid* at para 344
- ⁸¹⁵ United Voice Outline of Closing Submissions, at para 8
- ⁸¹⁶ SDA, Submissions, 21 March 2016, at para 636, also see para 645
- ⁸¹⁷ Productivity Commission Report, Effects on Business Profitability, pp. 466–467
- ⁸¹⁸ AHA/AAA final written submissions dated 3 February 2016 at para 46
- ⁸¹⁹ PC Final Report at p. 496
- ⁸²⁰ AHA/AAA final written submissions, 3 February 2016, at para 26
- ⁸²¹ Print K7601, 6 May 1993
- ⁸²² *Re: Metal, Engineering and Associated Industries Award* (2000) 110 IR 247
- ⁸²³ *Ibid* at [196]
- ⁸²⁴ United Voice, Outline of Closing Submissions, 21 March 2016 at paras 426–427
- ⁸²⁵ [2008] AIRCFB 1000 at [113]
- ⁸²⁶ [2008] AIRCFB 1000 at [113]
- ⁸²⁷ See Clubs Australia’s [submission](#) at pp. 4–5.
- ⁸²⁸ [2009] AIRCFB 450 at [100]–[101]
- ⁸²⁹ [2009] AIRCFB 826
- ⁸³⁰ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report’, Research Report 2/2012 Fair Work Australia
- ⁸³¹ ABS, *Census of Population and Housing*, 2011
- ⁸³² Note this includes casual employees who work less than 35 hours per week

- ⁸³³ Exhibit CAI1; Transcript at PN2663–PN2803
- ⁸³⁴ Exhibit CAI2 and CAI3; Transcript at PN2845–PN2939. Also see Exhibit UV1; Transcript at [2893]
- ⁸³⁵ Exhibit CAI4; Transcript at [2947]
- ⁸³⁶ Exhibits CAI5 and CAI6; Transcript at [2951]–[3029]
- ⁸³⁷ Exhibits CAI7 and CAI8; Transcript at [3043]–[3166]. Also see Exhibit UV3 at [3106]
- ⁸³⁸ We note that Annexure C is also relevant, but it is specific to NSW and is based on essentially the same survey instrument which provided the national data set out in Annexure B).
- ⁸³⁹ Transcript PN2729
- ⁸⁴⁰ Exhibit CAI1, Annexure B, p. 109
- ⁸⁴¹ *Ibid*, pp. 103–104
- ⁸⁴² *Ibid*, pp. 22–23; Figure 2.8
- ⁸⁴³ *Ibid*, pp. 26–27; Figure 2.14
- ⁸⁴⁴ *Ibid*, Table 3.2, p. 31
- ⁸⁴⁵ *Ibid*, p. 41–42
- ⁸⁴⁶ *Ibid*, p. 42
- ⁸⁴⁷ The figure of 96,000 in [937] differs from the figure in [919] as the scope of the ‘clubs’ industry as defined by the ABS is different to that used in the KPMG report.
- ⁸⁴⁸ Exhibit CAI1 Annexure B
- ⁸⁴⁹ KPMG analysis of Club Census 2011 responses
- ⁸⁵⁰ *Ibid*, p. 86; Table 6.6
- ⁸⁵¹ *Ibid*, Table 6.7, p. 87
- ⁸⁵² *Ibid*, Table 6.12, p. 91
- ⁸⁵³ Exhibit CAI4
- ⁸⁵⁴ Exhibit CAI4 at paras 4 and 5
- ⁸⁵⁵ Transcript PN2240–PN2256
- ⁸⁵⁶ Exhibit CAI5, at para 3
- ⁸⁵⁷ Exhibit CAI5, at paras 7 and 13
- ⁸⁵⁸ Exhibit CAI5, at paras 14 and 16
- ⁸⁵⁹ [2015] FWCA 5786
- ⁸⁶⁰ *Coffs Ex Services Memorial and Sporting Club Enterprise Agreement 2015*, at clause 4.1
- ⁸⁶¹ Exhibit UV3; Transcript PN3063–PN3106
- ⁸⁶² Exhibit CAI7, at para 14
- ⁸⁶³ See Transcript PN3108–PN3137. Also see Mr Casu’s re-examination at PN3141–PN3160
- ⁸⁶⁴ Exhibit CAI2, at para 2
- ⁸⁶⁵ Exhibit CAI3 at paras 2-3
- ⁸⁶⁶ Transcript [2902]–[2905]; Exhibit CAI2
- ⁸⁶⁷ Transcript [2932]–[2934]
- ⁸⁶⁸ Exhibit CAI2, at para 16; Transcript PN2913–PN2922
- ⁸⁶⁹ Transcript [2912]–[2916]
- ⁸⁷⁰ Exhibit UV5; Transcript PN3561–PN3645
- ⁸⁷¹ Exhibit UV6; Transcript PN3656–PN3746
- ⁸⁷² Exhibit UV7; Transcript PN3748–PN3856
- ⁸⁷³ Exhibit UV5
- ⁸⁷⁴ Transcript, at PN3603–PN3607
- ⁸⁷⁵ Exhibit UV5, at paras 9 and 10
- ⁸⁷⁶ Transcript, at PN3623–PN3627

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- ⁸⁷⁷ Exhibit UV5, at para 18
- ⁸⁷⁸ Exhibit UV6
- ⁸⁷⁹ Exhibit UV6, at para 19
- ⁸⁸⁰ Exhibit UV6, para 20
- ⁸⁸¹ Exhibit UV6, paras 29–34
- ⁸⁸² Exhibit U7
- ⁸⁸³ Exhibit UV7, paras 18–26
- ⁸⁸⁴ Transcript at PN26756–PN26759]
- ⁸⁸⁵ See para 24 of the Outline of Final Submissions on behalf of Clubs Australia Industrial, dated 14 October 2015
- ⁸⁸⁶ Ibid at para [8](b)
- ⁸⁸⁷ Transcript at PN26729, Exhibit CA11 para 5
- ⁸⁸⁸ Productivity Commission (2015), *Productivity Commission Inquiry Report: Workplace Relations Framework*, vol.1, no. 76, at p. 493
- ⁸⁸⁹ Ibid at p. 495
- ⁸⁹⁰ [2014] FWCFB 1996, at [65]–[87]
- ⁸⁹¹ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- ⁸⁹² Note this includes casual employees who work less than 35 hours per week
- ⁸⁹³ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ⁸⁹⁴ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ⁸⁹⁵ Exhibit ABI 3 at p. 15; derived from ABS (2008), *Café, Restaurant and Catering Services, Australia*, Catalogue No. 8655.0, Gargano (2015), *Restaurants in Australia Industry Report*, IBISWorld, and Gargano (2015), *Café and Coffee Shops in Australia Industry Report*, IBISWorld
- ⁸⁹⁶ [Confidentiality Order](#), Vice President Catanzariti, 25 February 2016
- ⁸⁹⁷ [Exhibit RCI 7](#)
- ⁸⁹⁸ [Exhibit RCI 18](#)
- ⁸⁹⁹ [Exhibit RCI 19](#)
- ⁹⁰⁰ Exhibits RCI 8 and 9; Transcript at PN3881–PN3995
- ⁹⁰¹ Transcript at PN3902–PN3906
- ⁹⁰² Transcript at PN3907–PN3908
- ⁹⁰³ Exhibit RCI 8, paras 10–12
- ⁹⁰⁴ Transcript at PN3956–3959
- ⁹⁰⁵ Transcript at PN3962
- ⁹⁰⁶ Transcript at PN3962–PN3964
- ⁹⁰⁷ Transcript at PN3977–3983 and 3988
- ⁹⁰⁸ Transcript at PN3989
- ⁹⁰⁹ Exhibit RCI 10 and 11; Transcript at PN3996–PN4065
- ⁹¹⁰ Transcript at PN4028–4036
- ⁹¹¹ Exhibit RCI 11 at paras 5–7
- ⁹¹² Transcript at PN4044–PN4053
- ⁹¹³ Transcript at PN4055–PN4058
- ⁹¹⁴ Transcript at PN4059–PN4061
- ⁹¹⁵ Exhibits RCI 12 and 13, Transcript at PN4084–PN4147
- ⁹¹⁶ Exhibit RCI 13 at para 10
- ⁹¹⁷ Transcript at PN4117–PN4121
- ⁹¹⁸ Exhibit RCI 13 at para 12

- ⁹¹⁹ Transcript at PN4105–PN4111
- ⁹²⁰ Transcript at PN4122–4128
- ⁹²¹ Exhibit RCI 14 and 15; Transcript at PN4167–4243
- ⁹²² Transcript at paras 4179–4191
- ⁹²³ Transcript at paras 4210–4211
- ⁹²⁴ Transcript at para 4216
- ⁹²⁵ Ibid at paras 4221–4223
- ⁹²⁶ Ibid at paras 4224–4227 and 4233
- ⁹²⁷ Exhibits RCI 16 and 17; Transcript at paras 4259–4497
- ⁹²⁸ Exhibit RCI 16, Transcript at paras 4366–4379
- ⁹²⁹ Transcript at paras 4453–4456
- ⁹³⁰ Exhibit RCI 17 at paras 10, 12 and 13
- ⁹³¹ See Transcript at paras 4434–4447
- ⁹³² RCI Final Written Submissions 3 February 2016 at para 51
- ⁹³³ Exhibit RCI 18 at Appendix 1, p. 6
- ⁹³⁴ Ibid at Appendix 1, p. 7
- ⁹³⁵ Ibid at Appendix 1, p. 11
- ⁹³⁶ Ibid at Appendix 1, p. 12
- ⁹³⁷ Ibid at Appendix 1, p. 13
- ⁹³⁸ Ibid at Appendix 1, p. 14
- ⁹³⁹ Ibid at Appendix 1, p. 12
- ⁹⁴⁰ Ibid at Appendix 1, p. 13
- ⁹⁴¹ Ibid at Appendix 1, p. 15
- ⁹⁴² Ibid at Appendix 1, p. 16
- ⁹⁴³ Statement of James Parker, para 15(j)
- ⁹⁴⁴ Transcript at PN4525
- ⁹⁴⁵ Transcript at PN4597
- ⁹⁴⁶ Transcript at PN4597
- ⁹⁴⁷ Transcript at PN467–PN4672
- ⁹⁴⁸ Transcript at PN4673
- ⁹⁴⁹ Transcript at PN4676
- ⁹⁵⁰ Transcript at PN4685–4686
- ⁹⁵¹ Transcript at PN4699–PN4705
- ⁹⁵² PC Final Report at p. 473
- ⁹⁵³ Transcript at PN4861
- ⁹⁵⁴ Transcript at PN4862
- ⁹⁵⁵ Transcript at PN4871
- ⁹⁵⁶ Exhibit RCI 19 at para. 6
- ⁹⁵⁷ Transcript at PN4934
- ⁹⁵⁸ Transcript at PN4941
- ⁹⁵⁹ See Exhibit SDA 33
- ⁹⁶⁰ Exhibit SDA 33 at para. 43.1
- ⁹⁶¹ Exhibit SDA 33 at para. 43.2
- ⁹⁶² Exhibit SDA 33 at para. 43.4
- ⁹⁶³ Exhibit SDA 33 at para. 43.5
- ⁹⁶⁴ Exhibit SDA 33 at para. 45

- ⁹⁶⁵ UV final submission at paras 223–224
- ⁹⁶⁶ UV final submission at para. 227
- ⁹⁶⁷ UV final submission at para. 237
- ⁹⁶⁸ PC Final Report p. 473
- ⁹⁶⁹ PC Final Report at p. 473
- ⁹⁷⁰ PC Final Report at p. 473
- ⁹⁷¹ PC Final Report at pp. 473–474
- ⁹⁷² Exhibit RCI5
- ⁹⁷³ Exhibit RCI5 at p70
- ⁹⁷⁴ Exhibit RCI5 at p72
- ⁹⁷⁵ Exhibit RCI5 at p72
- ⁹⁷⁶ [Exhibit UV 10](#)
- ⁹⁷⁷ [Exhibit UV 12](#)
- ⁹⁷⁸ [Exhibit UV 13](#)
- ⁹⁷⁹ [Exhibit UV 14](#)
- ⁹⁸⁰ Exhibit UV 10 at paras 15–17
- ⁹⁸¹ Exhibit UV 10 at para 27
- ⁹⁸² Transcript at PN8412
- ⁹⁸³ Transcript at PN8408
- ⁹⁸⁴ Transcript at PN8468
- ⁹⁸⁵ Transcript at PN8415–PN8417
- ⁹⁸⁶ Transcript, at PN8430–PN8433
- ⁹⁸⁷ Exhibit UV 12 at para 35, also see paras 23–38
- ⁹⁸⁸ Transcript at PN8662–PN8663
- ⁹⁸⁹ Transcript at PN8665–PN8668
- ⁹⁹⁰ Exhibit UV 15 at paras 44–45
- ⁹⁹¹ Exhibit UV13, at [8]–[13]
- ⁹⁹² Exhibit UV 13 at paras 17–21
- ⁹⁹³ Transcript at PN8777–PN8778
- ⁹⁹⁴ Transcript at PN8784
- ⁹⁹⁵ Exhibit UV 13 at paras 35, 36 and 38
- ⁹⁹⁶ Transcript at PN8797
- ⁹⁹⁷ Transcript at PN8798
- ⁹⁹⁸ Exhibit UV 14 at paras 14–15
- ⁹⁹⁹ Transcript at PN8865–PN8867
- ¹⁰⁰⁰ Exhibit UV 14 at paras 21–25
- 1001

1. Meat Industry Award 2010 [MA000059]; Waste Management Award 2010 [MA000043]; Racing Industry Ground Maintenance Award 2010 [MA000014]

2. Aquaculture Industry Award 2010 [MA000114]; Poultry Processing Award 2010 [MA000074]; Silviculture Award 2010 [MA000040]; Wine Industry Award 2010; Wool Storage, Sampling and Testing Award 2010 [MA000044]

3. Aged Care Award 2010 [MA000018]; Aluminium Industry Award 2010 [MA000060]; Animal Care and Veterinary Services Award 2010 [MA000118]; Asphalt Industry Award 2010 [MA000054]; Broadcasting and Recorded Entertainment Award 2010 [MA000091]; Cement and Lime Award 2010 [MA000055]; Children’s Services Award 2010 [MA000120]; Coal Export Terminals Award 2010 [MA000045]; Concrete Products Award 2010 [MA000056]; Corrections and Detention (Private Sector) Award 2010 [MA000110]; Cotton Ginning Award 2010 [MA000024]; Dredging Industry Award 2010 [MA000085]; Educational Services (Schools) General Staff Award 2010 [MA000076]; Fitness Industry Award 2010 [MA000094]; Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]; Gardening and Landscaping Services Award 2010 [MA000101]; Health Professionals and Support Services Award 2010 [MA000027]; Higher Education Industry—General Staff—Award 2010 [MA000007]; Horticulture Award 2010 [MA000028]; Hydrocarbons Industry (Upstream) Award 2010 [MA000062]; Joinery and Building Trades Award 2010 [MA000029]; Journalists Published Media Award 2010 [MA000067]; Labour Market Assistance Industry Award 2010 [MA000099]; Local Government Industry Award 2010 [MA000112]; Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]; Marine Tourism and Charter Vessels Award 2010 [MA000093]; Meat

Industry Award 2010 [MA000059]; Medical Practitioners Award 2010 [MA000031]; Mining Industry Award 2010 [MA000011]; Mobile Crane Hiring Award 2010 [MA000032]; Nursery Award 2010 [MA000033]; Oil Refining and Manufacturing Award 2010 [MA000072]; Pastoral Award 2010 [MA000035]; Pest Control Industry Award 2010 [MA000097]; Port Authorities Award 2010 [MA000051]; Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052]; Premixed Concrete Award 2010 [MA000057]; Professional Diving Industry (Industrial) Award 2010 [MA000108]; Rail Industry Award 2010 [MA000015]; Salt Industry Award 2010 [MA000107]; Seafood Processing Award 2010 [MA000068]; Security Services Industry Award 2010 [MA000016]; Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]; Sporting Organisations Award 2010 [MA000082]; Sugar Industry Award 2010 [MA000087]; Supported Employment Services Award 2010 [MA000103]; Surveying Award 2010 [MA000066]; Transport (Cash in Transit) Award 2010 [MA000042]; Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]; Water Industry Award 2010 [MA000113]; Wine Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010 [MA000025]

4. Airport Employees Award 2010 [MA000049]; Ambulance and Patient Transport Industry Award 2010 [MA000098]; Business Equipment Award 2010 [MA000021]; Educational Services (Schools) General Staff Award 2010 [MA000076]; Higher Education Industry—General Staff—Award 2010 [MA000007]; Quarrying Award 2010 [MA000037]; Road Transport and Distribution Award 2010 [MA000038]; Timber Industry Award 2010 [MA000071]; Racing Industry Ground Maintenance Award 2010 [MA000014]

5. Aboriginal Community Controlled Health Services Award 2010 [MA000115]; Airline Operations—Ground Staff Award 2010 [MA000048]; Banking, Finance and Insurance Award 2010 [MA000019]; Building and Construction General On-site Award 2010 [MA000020]; Car Parking Award 2010 [MA000095]; Cemetery Industry Award 2010 [MA000070]; Clerks—Private Sector Award 2010 [MA000002]; Contract Call Centres Award 2010 [MA000023]; Dry Cleaning and Laundry Industry Award 2010 [MA000096]; Educational Services (Post-Secondary Education) Award 2010 [MA000075]; Electrical Power Industry Award 2010 [MA000088]; Fire Fighting Industry Award 2010 [MA000111]; Funeral Industry Award 2010 [MA000105]; Gas Industry Award 2010 [MA000061]; General Retail Industry Award 2010 [MA000004]; Graphic Arts, Printing and Publishing Award 2010 [MA000026]; Hair and Beauty Industry Award 2010 [MA000005]; Health Professionals and Support Services Award 2010 [MA000027]; Higher Education Industry—General Staff—Award 2010 [MA000007]; Hospitality Industry (General) Award 2010 [MA000009]; Legal Services Award 2010 [MA000116]; Mannequins and Models Award 2010 [MA000117]; Marine Towage Award 2010 [MA000050]; Medical Practitioners Award 2010 [MA000031]; Miscellaneous Award 2010 [MA000104]; Pharmacy Industry Award 2010 [MA000012]; Plumbing and Fire Sprinklers Award 2010 [MA000036]; Registered and Licensed Clubs Award 2010 [MA000058]; Restaurant Award 2010 [MA000119]; Stevedoring Industry Award 2010 [MA000053]; Storage Services and Wholesale Award 2010 [MA000084]; Telecommunications Services Award 2010 [MA000041]; Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]; State Government Agencies Award 2010 [MA000121]

6. Health Professionals and Support Services Award 2010 [MA000027]; Pastoral Award 2010 [MA000035]

7. Pharmaceutical Industry Award 2010 [MA000069]

8. Architects Award 2010 [MA000079]; Higher Education Industry—General Staff—Award 2010 [MA000007]; Market and Social Research Award 2010 [MA000030]

9. Cotton Ginning Award 2010 [MA000024]

¹⁰⁰² RCI Outline of Closing Submissions at [110]

¹⁰⁰³ Transcript at PN26890–26891

¹⁰⁰⁴ [2014] FWCFB 1996 at [10]

¹⁰⁰⁵ *Ibid* at [18]

¹⁰⁰⁶ [\[2014\] FWCFB 1996](#)

¹⁰⁰⁷ [2014] FWCFB 1996 at [90]–[92]

¹⁰⁰⁸ *Ibid* at [138] and [140]–[144]

¹⁰⁰⁹ [\[2008\] AIRCFB 550](#) at [31]

¹⁰¹⁰ [\[2008\] AIRCFB 550](#) at [83]

¹⁰¹¹ [Ai Group draft Fast Food Award](#) at cl. 7.6

¹⁰¹² [Ai Group submission](#), 1 August 2008 at [102.3]

¹⁰¹³ [SDA submission](#), 1 August 2008, pp. 1–2

¹⁰¹⁴ [SDA draft award](#), 1 August 2008, cl. 55

¹⁰¹⁵ *Ibid*, cl. 58.10

¹⁰¹⁶ [Exposure Draft – Retail Industry Award 2010](#) – 12 September 2008, cl.29.2

¹⁰¹⁷ [\[2008\] AIRCFB 717](#) at [84]–[92]

¹⁰¹⁸ [Ai Group submission](#) – 10 October 2008 at [84.6]

¹⁰¹⁹ [\[2008\] AIRCFB 1000](#) at [283]–[286]

¹⁰²⁰ [Fast Food Industry Award 2010](#) – published 19 December 2008

¹⁰²¹ [\[2009\] AIRCFB 645](#)

¹⁰²² [\[2010\] FWAFB 379](#)

¹⁰²³ [\[2010\] FWAFB 379](#) at [26]

¹⁰²⁴ [Submission – Ai Group – award modernisation proceedings](#)

¹⁰²⁵ [Submission – SDA – award modernisation proceedings](#)

¹⁰²⁶ SDA Final Submission, 21 March 2016 at [683]

¹⁰²⁷ *Ibid* at [682]

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- ¹⁰²⁸ Exhibits Ai Group 7 and Ai Group 8 at [19062]–[19152]. Also see Exhibits SDA27 and SDA28
- ¹⁰²⁹ Exhibit Ai Group 6; PN18729–PN18825
- ¹⁰³⁰ Exhibits Ai Group 11, Ai Group 32 and Ai Group 33; Transcript at PN19252– PN19357; Transcript at PN28436–PN28519
- ¹⁰³¹ Exhibits Ai Group 1 and 2; Transcript at PN18458–PN18564. Also see Exhibits SDA23 and MFI 1
- ¹⁰³² Exhibits Ai Group 9 and Ai Group 10. Transcript at PN19157–PN19230. Also see Exhibits SDA29 and SDA30
- ¹⁰³³ Exhibit Ai Group 23; Transcript at PN23168–PN23170
- ¹⁰³⁴ Exhibit Ai Group 5; Transcript at PN18664–PN18710 . Also see Exhibits SDA24 and SDA25
- ¹⁰³⁵ Exhibits Ai Group 21 and Ai Group 22; Transcript at PN23168–PN23170
- ¹⁰³⁶ Exhibit Ai Group 20; Transcript at PN23168–PN23170
- ¹⁰³⁷ Exhibits Ai Group 3, Ai Group 4 and Ai Group 30; Transcript at PN18590–PN18645; PN28236–28301
- ¹⁰³⁸ Exhibit Ai Group 31; Transcript at PN28321–PN28426
- ¹⁰³⁹ Exhibit Ai Group 17; Transcript at PN21494
- ¹⁰⁴⁰ Exhibits Ai Group 24 and Ai Group 25; Transcript at PN23168–PN23170
- ¹⁰⁴¹ Exhibit RCI20, Transcript at PN18838–PN18911. Also see Exhibit SDA26
- ¹⁰⁴² Exhibit RCI21, Transcript at PN19812–PN19851
- ¹⁰⁴³ Affidavit of Marek Kopias, Exhibit Ai Group 21 at [13], and [5]–[10]
- ¹⁰⁴⁴ Witness Statement of Gina Feast, Exhibit Ai Group 22 at [2], and [9]–[16]
- ¹⁰⁴⁵ Exhibit Ai Group 11 at [16]
- ¹⁰⁴⁶ Transcript, Ms Deasy’s evidence at PN19310–PN19312
- ¹⁰⁴⁷ Ibid at PN19314–PN19317
- ¹⁰⁴⁸ Exhibit Ai Group 11
- ¹⁰⁴⁹ Exhibit Ai Group 21
- ¹⁰⁵⁰ Exhibit Ai Group 23
- ¹⁰⁵¹ Exhibit Ai Group 11
- ¹⁰⁵² Exhibit Ai Group 17 and Transcript at PN21477–PN21663
- ¹⁰⁵³ Exhibit SDA 33 and Transcript at PN21760–PN21813 and PN22073–PN22122
- ¹⁰⁵⁴ Transcript at PN19272–PN19297
- ¹⁰⁵⁵ Ibid at PN19349–PN19355
- ¹⁰⁵⁶ Exhibit SDA34 at [8]
- ¹⁰⁵⁷ Ibid at [14]
- ¹⁰⁵⁸ Ibid at [19]
- ¹⁰⁵⁹ Transcript at PN21628–PN21629 and PN21637
- ¹⁰⁶⁰ Transcript at PN19316–PN19319 and PN19342–PN19348
- ¹⁰⁶¹ Transcript at PN19312–PN19313
- ¹⁰⁶² Exhibit SDA at [19]
- ¹⁰⁶³ See generally Annexure AP 5 to Exhibit Ai Group 12 at [110]–[119]
- ¹⁰⁶⁴ Ibid at [121]
- ¹⁰⁶⁵ Exhibit Ai Group 11, Annexure AP 5
- ¹⁰⁶⁶ Transcript at PN21785, PN21792 and PN21804
- ¹⁰⁶⁷ Ibid at PN21805–PN21806
- ¹⁰⁶⁸ Transcript at PN21623, PN21627 and PN21653
- ¹⁰⁶⁹ Transcript, at PN19320–PN19322
- ¹⁰⁷⁰ Transcript, at PN19322; Exhibit Ai Group 11, Annexure PAD 3 at [3]
- ¹⁰⁷¹ Exhibit SDA 34 at 20.1–20.2
- ¹⁰⁷² Transcript at PN21798

- ¹⁰⁷³ Transcript at PN19323
- ¹⁰⁷⁴ Transcript at PN19323
- ¹⁰⁷⁵ Ibid at PN19331
- ¹⁰⁷⁶ Annexure PAD3 to Exhibit Ai Group 11
- ¹⁰⁷⁷ Annexure PAD4 to Exhibit Ai Group 33
- ¹⁰⁷⁸ Exhibit Ai Group 30 at [11], [13] and [15]
- ¹⁰⁷⁹ Exhibit Ai Group 31 at [31], [33] and [35]
- ¹⁰⁸⁰ A point conceded by Ms Deasy during cross-examination, see Transcript at PN28502.
- ¹⁰⁸¹ See Exhibit Ai Group 30 at 11, 13 and 15 and Exhibit Ai Group 31 at 31, 33 and 35
- ¹⁰⁸² SDA written submission 21 March 2016 at [658]
- ¹⁰⁸³ Ibid at [660]
- ¹⁰⁸⁴ Ibid at [661]–[662]
- ¹⁰⁸⁵ SDA written submissions 21 March 2016 at [661]
- ¹⁰⁸⁶ Ibid at [662]
- ¹⁰⁸⁷ Exhibit SDA 56
- ¹⁰⁸⁸ Ai Group’s submission in reply 1 April 2016 at [17]
- ¹⁰⁸⁹ Transcript at PN21609
- ¹⁰⁹⁰ Exhibit SDA 56
- ¹⁰⁹¹ Annexure AP3 to Exhibit Ai Group 17
- ¹⁰⁹² Ibid at [105], also see [131]
- ¹⁰⁹³ Ibid at [106]
- ¹⁰⁹⁴ Ibid at [169]
- ¹⁰⁹⁵ Exhibit Ai Group 34
- ¹⁰⁹⁶ Transcript at PN21516
- ¹⁰⁹⁷ Exhibit Ai Group 17 Annexure AP-5 at [159]
- ¹⁰⁹⁸ Ibid at [161]–[168] and Tables 1 and 2
- ¹⁰⁹⁹ Ibid, see the notes to Table 2
- ¹¹⁰⁰ Ibid at [17]
- ¹¹⁰¹ Ibid at [172]–[174] and [178]–[179]
- ¹¹⁰² Ibid at [175] and [184]
- ¹¹⁰³ Ibid at [176] and [185]
- ¹¹⁰⁴ Transcript at PN21595–PN21603
- ¹¹⁰⁵ Ibid at PN21659–PN21661
- ¹¹⁰⁶ Transcript at PN21763
- ¹¹⁰⁷ Ai Group submission 1 April 2016 at [15]
- ¹¹⁰⁸ Submissions of the SDA on Exhibit Ai Group 34 dated 9 November 2016
- ¹¹⁰⁹ Submissions of Ai Group in Reply to Submissions of the SDA on Exhibit Ai Group 34, dated 16 November 2016
- ¹¹¹⁰ Exhibit Ai Group 17
- ¹¹¹¹ Submissions of the SDA on Exhibit Ai Group 34 dated 9 November 2016 at paras 8 and 10–13
- ¹¹¹² Pratley Affidavit, Exhibit Ai Group 17, p. 58 Table 2
- ¹¹¹³ Ibid at para 155; SDA/Ai Group Aide Memoire Exhibit SDA 56
- ¹¹¹⁴ Dunn Amended Witness Statement (Exhibit Ai Group 1), par 18; Agostino First Witness Statement (Exhibit Ai Group 7), par 23; Dando Amended Witness Statement (Exhibit Ai Group 6), par 16; Eagles First Witness Statement (Exhibit Ai Group 9) para 18
- ¹¹¹⁵ Exhibit SDA 56
- ¹¹¹⁶ Exhibit Ai Group 3 at para 23

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- ¹¹¹⁷ see Dando Amended Witness Statement (Exhibit Ai Group 6), par 34; Dando Cross-examination, 26 October 2015, PN18734; Haydar Cross-examination, 26 October 2015, PN18667)
- ¹¹¹⁸ see Limbrey First Witness Statement (Exhibit Ai Group 3), par 11 and Confidential Exhibit KTL-2; see also par 170 and Confidential Exhibit KTL-3
- ¹¹¹⁹ see Limbrey First Witness Statement (Exhibit Ai Group 3), par 12 and Confidential Exhibit KTL-2; see also Limbrey First Witness Statement (Exhibit Ai Group 3), par 172 and Confidential Exhibit KTL-3
- ¹¹²⁰ see Eagles First Witness Statement, par 41; see also Agostino First Witness Statement (Exhibit Ai Group 7), par 45
- ¹¹²¹ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- ¹¹²² Note this includes casual employees who work less than 35 hours per week
- ¹¹²³ *Labour Force, Australia, Detailed – Electronic Delivery, Aug 2016*, Catalogue No. 6291.0.55.001; ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003; Deasy affidavit 10 August 2015.
- ¹¹²⁴ Exhibit ACTU 3. Also see transcript at PN23281–PN23445
- ¹¹²⁵ Exhibit ACTU 3 Table 1.13 on p21
- ¹¹²⁶ Exhibit ACTU 3 at para 6
- ¹¹²⁷ Ibid at para 11
- ¹¹²⁸ Ibid at para 37
- ¹¹²⁹ Ibid at para 42
- ¹¹³⁰ Ibid at pp. 28–29
- ¹¹³¹ Ibid at para 53
- ¹¹³² Ibid, Table 3.5 on p. 31
- ¹¹³³ ABS, *Characteristics of Employment Australia*, August 2015, Catalogue No. 6333.0, Table 7.1
- ¹¹³⁴ Exhibit Ai Group 11, Annexure PAD3, Table 11B
- ¹¹³⁵ Ibid, Table 12
- ¹¹³⁶ Ibid at Table 13
- ¹¹³⁷ Exhibit Ai Group 3 at paras 180–190
- ¹¹³⁸ See Exhibit Ai Group 31 at paras 46 and 56; Transcript at PN28371–PN28372
- ¹¹³⁹ Exhibit Ai Group 11, Annexure PAD3, Chart 20
- ¹¹⁴⁰ Ibid Chart 24
- ¹¹⁴¹ Ibid Table 20A
- ¹¹⁴² Ibid Table 24A
- ¹¹⁴³ Ibid Chart 25
- ¹¹⁴⁴ Ibid Table 14
- ¹¹⁴⁵ Ibid Chart 14A
- ¹¹⁴⁶ Ibid Tables 16 and 17
- ¹¹⁴⁷ See Exhibit Ai Group 33, Charts 201 and 202
- ¹¹⁴⁸ Ibid, Table 203
- ¹¹⁴⁹ [2016] FWCFB 6460
- ¹¹⁵⁰ Exhibit Ai Group 3 at [24]–[27]
- ¹¹⁵¹ Exhibit Ai Group 31 at [11]
- ¹¹⁵² Exhibit Ai Group 30 at [6]
- ¹¹⁵³ Exhibit Ai Group 31 at [30]
- ¹¹⁵⁴ Exhibit Ai Group 30, 8
- ¹¹⁵⁵ Exhibit Ai Group 31, 30
- ¹¹⁵⁶ Exhibit Ai Group 30, 11, 13 and 15
- ¹¹⁵⁷ Exhibit Ai Group 31, 31, 33 and 35

- ¹¹⁵⁸ Exhibit Ai Group 30, paras 11, 13 and 15; Exhibit Ai Group 30, paras 31, 33 and 35.
- ¹¹⁵⁹ See Transcript at PN28554–PN28557
- ¹¹⁶⁰ Derived from Table 14A, Annexure PAD3 to Exhibit Ai Group 11
- ¹¹⁶¹ Derived from Table 24A, Annexure PAD3 to Exhibit Ai Group 11
- ¹¹⁶² Table 17C, Annexure PAD3 to Exhibit Ai Group 11
- ¹¹⁶³ *Ibid*, Table 14D
- ¹¹⁶⁴ See Dunn: Exhibit Ai Group 1 at [29]–[30] and [48]–[49]; Haydar: Exhibit Ai Group 5 at [30] and [35A]; Dando: Exhibit Ai Group 6 at [24] and [32]; Agostino: Exhibit Ai Group 7 at [32] and [42]; and Eagles: Exhibit Ai Group 9 at [26] and [37]
- ¹¹⁶⁵ See Dunn: Exhibit Ai Group 1 at [32]–[33] and [50]–[51]; Haydar: Exhibit Ai Group 5 at [31] and [36]; Dando: Exhibit Ai Group 6 at [25] and [32]; Agostino: Exhibit Ai Group 7 at [33]–[34] and [43]–[44]; and Eagles: Exhibit Ai Group 9 at [28]–[29] and [39]–[40]
- ¹¹⁶⁶ Exhibit Ai Group 3 at [168]–[173]
- ¹¹⁶⁷ See Exhibit Ai Group 3 at [174]–[176]
- ¹¹⁶⁸ See Annexure KTL 10 to Exhibit Ai Group 3
- ¹¹⁶⁹ Exhibit Ai Group 3 at [179]
- ¹¹⁷⁰ Also see Dunn: Exhibit Ai Group 1 at [63]; Haydar: Exhibit Ai Group 5 at [40] to [42]; Dando Exhibit Ai Group 6 at [40]; Agostino: Exhibit Ai Group 7 at [51]–[52]; and Eagles: Exhibit Ai Group 9 at [47].
- ¹¹⁷¹ See Transcript at PN18511–PN18516
- ¹¹⁷² Exhibit SDA24
- ¹¹⁷³ Transcript at PN18789
- ¹¹⁷⁴ Exhibit SDA23 and MFI 1
- ¹¹⁷⁵ Exhibit SDA29 and 30, Transcript at PN19206
- ¹¹⁷⁶ Exhibit SDA 27 and 28, Transcript at PN19103
- ¹¹⁷⁷ Transcript at PN18696–PN18697
- ¹¹⁷⁸ Exhibit Ai Group 3 at paras 191–192
- ¹¹⁷⁹ Exhibit Ai Group 3 at para 192
- ¹¹⁸⁰ Dunn: Exhibit Ai Group 1 at [70]; Haydar: Exhibit Ai Group 5 at [47]–[48]; Dando: Exhibit Ai Group 6 at [43]; Agostino: Exhibit Ai Group 7 at [56]–[57]; and Eagles: Exhibit Ai Group 9 at [53]–[54]
- ¹¹⁸¹ Exhibit Ai Group 1 at paras 69–70
- ¹¹⁸² Exhibit SDA 56
- ¹¹⁸³ Exhibit Ai Group 3 at para 23; Exhibit Ai Group 31 at para 21
- ¹¹⁸⁴ see Dando Amended Witness Statement (Exhibit Ai Group 6), par 34; Dando Cross-examination, 26 October 2015, PN18734; Haydar Cross-examination, 26 October 2015, PN18667)
- ¹¹⁸⁵ see Limbrey First Witness Statement (Exhibit Ai Group 3), par 11 and Confidential Exhibit KTL-2; see also par 170 and Confidential Exhibit KTL-3
- ¹¹⁸⁶ see Limbrey First Witness Statement (Exhibit Ai Group 3), par 12 and Confidential Exhibit KTL-2; see also Limbrey First Witness Statement (Exhibit Ai Group 3), par 172 and Confidential Exhibit KTL-3
- ¹¹⁸⁷ see Eagles First Witness Statement, par 41; see also Agostino First Witness Statement (Exhibit Ai Group 7), par 45
- ¹¹⁸⁸ Note this includes casual employees who work less than 35 hours per week
- ¹¹⁸⁹ *Ibid* at Table 13
- ¹¹⁹⁰ ABS, *Characteristics of Employment Australia*, August 2015, Catalogue No. 6333.0, Table 7.1
- ¹¹⁹¹ Exhibit RCI 20 at para 8
- ¹¹⁹² Transcript see para 18879
- ¹¹⁹³ Exhibit RCI 21 at para 8
- ¹¹⁹⁴ Transcript at para 19848
- ¹¹⁹⁵ Transcript at para 19849
- ¹¹⁹⁶ *Ibid* at para 190

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- ¹¹⁹⁷ RCI Final Submissions 3 February 2016 at para 101
- ¹¹⁹⁸ Exhibits RCI 20 and RCI 21
- ¹¹⁹⁹ A point raised by United Voice in closing oral submissions: Transcript at PN27844.
- ¹²⁰⁰ Also see Dunn: Exhibit Ai Group 1 at [63]; Haydar: Exhibit Ai Group 5 at [40] to [42]; Dando Exhibit Ai Group 6 at [40]; Agostino: Exhibit Ai Group 7 at [51]–[52]; and Eagles: Exhibit Ai Group 9 at [47].
- ¹²⁰¹ Derived from Table 14A, Annexure PAD3 to Exhibit Ai Group 11
- ¹²⁰² Derived from Table 24A, Annexure PAD3 to Exhibit Ai Group 11
- ¹²⁰³ Table 17C, Annexure PAD3 to Exhibit Ai Group 11
- ¹²⁰⁴ *Ibid*, Table 14D
- ¹²⁰⁵ Exhibit Ai Group 3 at para 196
- ¹²⁰⁶ *Ibid* at para 201
- ¹²⁰⁷ NRA Final Submissions, 8 February 2016, at p. 25
- ¹²⁰⁸ Exhibit SDA 35
- ¹²⁰⁹ Exhibit SDA 36
- ¹²¹⁰ Fair Work Commission, *Award Reliance Survey*, 2013, data manual: <https://www.fwc.gov.au/documents/sites/wagereview2015/research/AR-data-user-manual.pdf> and Fair Work Commission, *Australian Workplace Relations Study*, 2014: <https://www.fwc.gov.au/creating-fair-workplaces/research/australian-workplace-relations-study>
- ¹²¹¹ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia
- ¹²¹² Fair Work Commission, [Modern awards and relevant ANZSIC classes](#)
- ¹²¹³ ABS, *Australian National Accounts: National Income, Expenditure and Product, Jun 2016*, Catalogue No. 5206; ABS, *Business Indicators, Australia, Jun 2016*, Catalogue No. 5676.0; ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0; ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0; ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²¹⁴ ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0
- ¹²¹⁵ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ¹²¹⁶ Fair Work Commission, *Australian Workplace Relations Study*, 2014
- ¹²¹⁷ Productivity Commission (2015) *Workplace Relations Framework Final Report (Vol 1)* p. 433
- ¹²¹⁸ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ¹²¹⁹ Fair Work Commission, *Award Reliance Survey*, 2013
- ¹²²⁰ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ¹²²¹ ABS, *Australian Industry, 2014–15*, Catalogue No. 8155.0
- ¹²²² ABS, *Estimates of Industry Multifactor Productivity, 2014–15*, Catalogue No. 5260.0.55.002
- ¹²²³ ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, Catalogue No. 8165.0
- ¹²²⁴ Fair Work Commission, *Australian Workplace Relations Study*, 2014
- ¹²²⁵ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²²⁶ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²²⁷ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²²⁸ Exhibit SDA 36, p. 21
- ¹²²⁹ Exhibit SDA 36, Table 13 on p. 10
- ¹²³⁰ Exhibit SDA 36 at p. 12
- ¹²³¹ *Ibid* at pp. 12–13
- ¹²³² *Ibid* at p. 20
- ¹²³³ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²³⁴ Exhibit SDA 35, p. 68

- ¹²³⁵ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²³⁶ ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003
- ¹²³⁷ ABS, *Participation, Job Search and Mobility, Australia, February 2015*, Catalogue No. 6226.0
- ¹²³⁸ Fair Work Commission, *Australian Workplace Relations Study*, 2014
- ¹²³⁹ HILDA survey Wave 15, 2015
- ¹²⁴⁰ Exhibit SDA 36, at pp. 7 and pp. 17–18
- ¹²⁴¹ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ¹²⁴² Exhibit SDA 35, p. 29
- ¹²⁴³ ABS, *Average Weekly Earnings, Australia, May 2016*, Catalogue No. 6302.0
- ¹²⁴⁴ Exhibit SDA 35, p. 25
- ¹²⁴⁵ ABS, *Microdata: Employee, Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0.55.001
- ¹²⁴⁶ Exhibit SDA 35, p. 34
- ¹²⁴⁷ ABS, *Wage Price Index, Australia, Jun 2016*, Catalogue No. 6345.0
- ¹²⁴⁸ Fair Work Commission, *Australian Workplace Relations Study*, 2014
- ¹²⁴⁹ Exhibit SDA 35, ‘Key Findings’ at vi and vii; also see Table 3.3 and Figure 3.2 (on p. 13) and see generally the summary on pp. 29–30; section 5.1 at pp. 41–46 and section 6.3 at pp. 57–59
- ¹²⁵⁰ MA000004; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ¹²⁵¹ MA000012; ABS, *Characteristics of Employment, Australia, August 2015*, Catalogue No. 6333.0 ABS, *Survey of Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
- ¹²⁵² Department of Employment, *Trends in Federal Enterprise Bargaining*, June quarter 2016, <https://www.employment.gov.au/trends-federal-enterprise-bargaining>.
- ¹²⁵³ [\[2008\] AIRCFB 550](#) at [83]
- ¹²⁵⁴ [SDA submission](#) – 1 August 2008, pp. 1–2
- ¹²⁵⁵ [SDA draft award](#) – 1 August 2008, cl. 55
- ¹²⁵⁶ *Ibid*, cl. 58.10
- ¹²⁵⁷ *Ibid*, Recommendation 13 and Recommendation 14, page 48
- ¹²⁵⁸ [Submissions—Australian Retailers Association](#), 1 August 2008 at para 17.1
- ¹²⁵⁹ *Ibid*, para 17.3 and Recommendation 15, page 49
- ¹²⁶⁰ [Submissions—Master Grocers Australia](#), 1 August 2008 at para 2
- ¹²⁶¹ *Ibid*
- ¹²⁶² [Submissions—NRA and ANRA](#), 1 August 2008 at para 58
- ¹²⁶³ [Exposure Draft – Retail Industry Award 2010](#) – 12 September 2008, cl.29.2
- ¹²⁶⁴ [\[2008\] AIRCFB 717](#) at [84]–[92]
- ¹²⁶⁵ [\[2008\] AIRCFB 1000](#) at [283]–[286]
- ¹²⁶⁶ [\[2009\] AIRCFB 645](#)
- ¹²⁶⁷ [\[2010\] FWAFB 305](#) at [18]
- ¹²⁶⁸ [\[2010\] FWAFB 305](#) at [18]–[19]
- ¹²⁶⁹ [Award Modernisation Request Variation](#) – 26 August 2009
- ¹²⁷⁰ [2009] AIRCFB 835 at [12]
- ¹²⁷¹ [AP796250](#)CRV
- ¹²⁷² \$2 and under (No 1) [PR926620](#) at [88]
- ¹²⁷³ [PR926620](#), 17 January 2003 (Giudice J, Watson SDP and Raffaelli C)
- ¹²⁷⁴ *Ibid* at [78] and [100]–[101]
- ¹²⁷⁵ *Ibid* at [89]
- ¹²⁷⁶ [PR941526](#), 3 December 2003, (Giudice J, Watson SDP and Raffaelli C)
- ¹²⁷⁷ *Ibid* at [98], [116] and [119]

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- 1278 Ibid at [93]–[96]
- 1279 Ibid at [92]
- 1280 Ibid at [28]
- 1281 Ibid
- 1282 [Submissions of SDA on Award Modernisation](#) – 10 June 2016, at [19]
- 1283 Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012, Fair Work Australia.
- 1284 n.e.c. refers to not elsewhere classified
- 1285 ABS, *Census of Population and Housing*, 2011
- 1286 Note this includes casual employees who work less than 35 hours per week
- 1287 [Exhibit ABI 3](#), Transcript at PN10566
- 1288 [Exhibit ABI 1](#), Transcript at PN8973
- 1289 [Exhibit ABI 9](#), Transcript at PN17432
- 1290 [Exhibit Retail 3](#)
- 1291 [Exhibit Retail 4](#)
- 1292 [Exhibit Retail 5](#)
- 1293 [Exhibit Retail 8](#)
- 1294 [Exhibit Retail 6](#)
- 1295 [Exhibit Retail 7](#)
- 1296 [Exhibit Retail 2](#)
- 1297 Exhibit Retail 3.
- 1298 Exhibit Retail 3 at para 10
- 1299 Exhibit Retail 3 at paras 11–14
- 1300 Transcript, at PN16008–PN16012
- 1301 Exhibit Retail 3 at [19]
- 1302 Transcript, at PN16160–PN16165
- 1303 See Exhibit Retail 3 at paras 20–21 and Attachments BB2
- 1304 Transcript, at PN16225
- 1305 Transcript, at PN16180
- 1306 Transcript, at PN16234
- 1307 Exhibit Retail 3 at [14]–[15]
- 1308 Ibid at para 15
- 1309 Exhibit Retail 3 at paras 11 and 28
- 1310 Transcript, at PN16072–PN16080
- 1311 Transcript, at PN16084–PN16096 and Exhibit SDA 12
- 1312 Ibid, at PN16264–PN16271
- 1313 [2012] FWAA 8612
- 1314 Transcript, at PN16283–PN16285
- 1315 Transcript at PN16253–PN16254
- 1316 Exhibit Retail 4
- 1317 Exhibit Retail 4 at para 13
- 1318 Exhibit Retail 4 at para 26
- 1319 Ibid at para 27
- 1320 Ibid at para 24
- 1321 Exhibit Retail 4 at para 25

- ¹³²² Ibid at para 28
- ¹³²³ Exhibit Retail 4 at paras 31–32
- ¹³²⁴ Transcript, at PN16423
- ¹³²⁵ Transcript, at PN16437
- ¹³²⁶ Exhibit Retail 5
- ¹³²⁷ Ibid at para 7
- ¹³²⁸ Transcript, at PN16618–PN16622
- ¹³²⁹ Exhibit Retail 5 at para 19
- ¹³³⁰ Transcript, at PN16679–PN16680
- ¹³³¹ Exhibit Retail 5
- ¹³³² Transcript, at PN16681
- ¹³³³ Transcript, at PN16682–PN16684
- ¹³³⁴ Transcript, at PN16687 and PN16692
- ¹³³⁵ Transcript, at PN16690
- ¹³³⁶ Exhibit Retail 8
- ¹³³⁷ Exhibit Retail 8 at paras 6 and 9
- ¹³³⁸ Ibid at para 12
- ¹³³⁹ Ibid at paras 7 and 8
- ¹³⁴⁰ Ibid at para 11
- ¹³⁴¹ Ibid at paras 15 and 16
- ¹³⁴² Exhibit Retail 8 at para 18
- ¹³⁴³ Transcript at PN17192
- ¹³⁴⁴ Exhibit Retail 8 at paras 14, 20 and 21
- ¹³⁴⁵ Transcript at PN17132–PN17138 and PN17147–17148
- ¹³⁴⁶ Exhibit Retail 6
- ¹³⁴⁷ Exhibit Retail 6 at para 7
- ¹³⁴⁸ Ibid at paras 16–17
- ¹³⁴⁹ Ibid at para 18
- ¹³⁵⁰ Ibid at para 19
- ¹³⁵¹ Transcript, at PN16973–PN16977
- ¹³⁵² Exhibit Retail 7
- ¹³⁵³ Exhibit Retail 7 at paras 15–18
- ¹³⁵⁴ Ibid at para 19
- ¹³⁵⁵ Ibid at para 21. Also see transcript, at PN17038
- ¹³⁵⁶ Transcript, at PN17063–PN17064
- ¹³⁵⁷ Ibid at para 22
- ¹³⁵⁸ Transcript, at PN17053
- ¹³⁵⁹ SDA’s Final Submissions, 21 March 2016, at para 237
- ¹³⁶⁰ Exhibit ABI 9
- ¹³⁶¹ Exhibit ABI 9 at [5]
- ¹³⁶² Baxter Cross-examination, 20 October 2015, PN17433
- ¹³⁶³ Exhibit ABI 9 at [22]–[27]; ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 27.50
- ¹³⁶⁴ Exhibit ABI 9 at [29]
- ¹³⁶⁵ Exhibit ABI 9 at [32]
- ¹³⁶⁶ Exhibit ABI 9 at [35(a)]
- ¹³⁶⁷ Exhibit ABI 9 at [35(b)]

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- 1368 To be put into this category, respondents did not need to state “wages” (see PN17528–PN17529)
- 1369 Exhibit ABI 9 at [44]
- 1370 Exhibit ABI 9 at [59]
- 1371 Exhibit ABI 9 at [60]
- 1372 ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 27.46
- 1373 ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 27.47
- 1374 ARA and others final submission, 2 February 2016, at para. 84(b)
- 1375 ARA and others final submission, 2 February 2016, at para. 84(d)
- 1376 ARA and others final submission, 2 February 2016, at para. 92
- 1377 SDA final submission, 21 March 2016, at para. 228
- 1378 SDA final submission, 21 March 2016, at para. 229
- 1379 SDA final submission, 21 March 2016, at paras 229–230
- 1380 SDA final submission, 21 March 2016, at para. 232; [2013] FWCFCB 4000 at [441]
- 1381 SDA final submission, 21 March 2016, at para. 233
- 1382 SDA final submission, 21 March 2016, at para. 234
- 1383 SDA final submission, 21 March 2016, at para. 235
- 1384 SDA final submission, 21 March 2016, at para. 236
- 1385 [2013] FWCFCB 4000 at [441]
- 1386 [Exhibit SDA 32](#)
- 1387 [Exhibit SDA 33](#), [Exhibit SDA 34](#)
- 1388 [Exhibit SDA 31](#)
- 1389 [Exhibit SDA 35](#), [Exhibit SDA 36](#)
- 1390 [Exhibit SDA 36](#)
- 1391 [Exhibit SDA 39](#), [Exhibit SDA 40](#)
- 1392 [Exhibit SDA 43](#)
- 1393 [Exhibit SDA 43](#)
- 1394 Exhibit Retail 2
- 1395 Exhibit Retail 2
- 1396 Exhibit Retail 2
- 1397 Exhibit Retail 2 at p. 95
- 1398 Exhibit Retail 2
- 1399 Exhibit SDA 32
- 1400 SDA final submission, 21 March 2016, at para. 326
- 1401 Exhibit SDA 32 at pp. 19–22
- 1402 Exhibit SDA 32 at p. 27
- 1403 Exhibit SDA 32 at pp. 27–28
- 1404 Exhibit SDA 32 at pp. 27–29
- 1405 Exhibit SDA 32 at pp. 29–33
- 1406 Exhibit SDA 32 at pp. 33–36
- 1407 Exhibit SDA 32 at pp. 37–38
- 1408 ARA and others final submission, 12 February 2016, at para. 85(a); Exhibit Retail 2 at pp. 29–30
- 1409 ARA and others final submission, 12 February 2016, at para. 85(b); Exhibit Retail 2 at p. 86
- 1410 ARA and others final submission, 12 February 2016, at para. 85(c); Exhibit Retail 2 at p. 87
- 1411 ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 16.2; Exhibit Retail 2 at p. 12
- 1412 ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 16.3; Exhibit Retail 2 at p. 12
- 1413 SDA final submission, 21 March 2016, at paras 192–193

- ¹⁴¹⁴ Common Exhibit 1 at p. 425, Figure 11.1
- ¹⁴¹⁵ Common Exhibit 1 at p. 425; unpublished data provided to the Productivity Commission from the ABS and based on Campbell J & Chen L (2015), *Improved Time varying Day Adjustment in SEASABS*, ABS, Canberra
- ¹⁴¹⁶ Common Exhibit 1 at p. 426, Figure 11.2
- ¹⁴¹⁷ Common Exhibit 1 at p. 426; data from Aztec (2014) and information provided by the Shopping Centre Council of Australia (sub. DR342, p. 1) for supermarkets and shopping centres respectively
- ¹⁴¹⁸ Common Exhibit 1 at p. 462
- ¹⁴¹⁹ Common Exhibit 1 at p. 463
- ¹⁴²⁰ Common Exhibit 1 at p. 462
- ¹⁴²¹ Exhibit Retail 2 at pp. 60, 73
- ¹⁴²² Exhibit Retail 2 at p. 59
- ¹⁴²³ Exhibit Retail 2 at p. 82
- ¹⁴²⁴ Exhibit Retail 2 at p. 57
- ¹⁴²⁵ Exhibit Retail 2 at p. 77
- ¹⁴²⁶ Exhibit Retail 2 at p. 75
- ¹⁴²⁷ ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 17.9; Exhibit Retail 2 at pp. 63, 65
- ¹⁴²⁸ ARA and others final submission, 12 February 2016, at paras 103(a), 104; Exhibit Retail 2 at pp. 63–72
- ¹⁴²⁹ ARA and others final submission, 12 February 2016, at para. 103(f); Exhibit Retail 2 at p. 60
- ¹⁴³⁰ ARA and others final submission, 12 February 2016, at para. 106; Exhibit Retail 2 at pp. 76, 91
- ¹⁴³¹ ARA and others final submission, 12 February 2016, at para. 107; Exhibit Retail 2 at pp. 77–78. Also ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 22.5
- ¹⁴³² ARA and others final submission, 12 February 2016, at para. 109; Exhibit Retail 2 at p. 75
- ¹⁴³³ ARA and others final submission, 12 February 2016, at para. 116; Exhibit Retail 2 at p. 69
- ¹⁴³⁴ ACCI, ABI and NSWBC final submission, 2 February 2016, at para. 17.10; Exhibit Retail 2 at p. 63
- ¹⁴³⁵ ACCI, ABI and NSWBC final submission, 2 February 2016, at paras 17.12–17.13; Exhibit Retail 2 at p. 63
- ¹⁴³⁶ ARA and others final submission, 12 February 2016, at paras. 133–134; Exhibit Retail 2 at pp. 64–65
- ¹⁴³⁷ ARA and others final submission, 12 February 2016, at paras 38–39; Exhibit Retail 2 at p. 74, Figure 52
- ¹⁴³⁸ ARA and others final submission, 12 February 2016, at para. 41; Exhibit Retail 2 at p. 67
- ¹⁴³⁹ ARA and others final submission, 12 February 2016, at para. 42; Exhibit Retail 2 at p. 66
- ¹⁴⁴⁰ Sands Cross-examination, 25 September 2015, PN9907
- ¹⁴⁴¹ Sands Cross-examination, 25 September 2015, PN9917–PN9924
- ¹⁴⁴² Sands Cross-examination, 25 September 2015, PN10028
- ¹⁴⁴³ Sands Cross-examination, 25 September 2015, PN10031–PN10033
- ¹⁴⁴⁴ See SDA Final Submissions, 21 March 2016 at paras 186–198; Also note that some of these submissions were subsequently withdrawn: see Transcript at para 27526
- ¹⁴⁴⁵ SDA final submission, 21 March 2016, at para. 190
- ¹⁴⁴⁶ SDA final submission, 21 March 2016, at para. 191
- ¹⁴⁴⁷ SDA final submission, 21 March 2016, at para. 196; Sands Cross-examination, 25 September 2015, PN10034–PN10035
- ¹⁴⁴⁸ SDA final submission, 21 March 2016, at para. 197
- ¹⁴⁴⁹ SDA final submission, 21 March 2016, at para. 194
- ¹⁴⁵⁰ Exhibit Retail 2 at p. 62
- ¹⁴⁵¹ Exhibit Retail 2 at p. 75
- ¹⁴⁵² Exhibit Retail 2 at pp. 65, 68
- ¹⁴⁵³ Exhibit Retail 2 at p. 66
- ¹⁴⁵⁴ Exhibit Retail 2 at pp. 69–70
- ¹⁴⁵⁵ Exhibit Retail 2 at p. 85
- ¹⁴⁵⁶ Exhibit Retail 2 at p. 86

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- ¹⁴⁵⁷ Exhibit Retail 2 at p. 86
- ¹⁴⁵⁸ Exhibit Retail 2 at p. 86
- ¹⁴⁵⁹ Exhibit Retail 2 at p. 87
- ¹⁴⁶⁰ Exhibit Retail 2 at pp. 87–88
- ¹⁴⁶¹ Exhibit Retail 2 at p. 88
- ¹⁴⁶² ARA and others final submission, 12 February 2016, at para. 84(a); Exhibit Retail 2 at pp. 85–86
- ¹⁴⁶³ ARA and others final submission, 12 February 2016, at para. 84(b); Exhibit Retail 2 at p. 86
- ¹⁴⁶⁴ ARA and others final submission, 12 February 2016, at para. 84(c); Exhibit Retail 2 at p. 86
- ¹⁴⁶⁵ ARA and others final submission, 12 February 2016, at para. 84(d); Exhibit Retail 2 at p. 86
- ¹⁴⁶⁶ ARA and others final submission, 12 February 2016, at para. 84(e); Exhibit Retail 2 at pp. 86, 92–93
- ¹⁴⁶⁷ ARA and others final submission, 12 February 2016, at para. 84(f); Exhibit Retail 2 at p. 86
- ¹⁴⁶⁸ ARA and others final submission, 12 February 2016, at para. 84(g); Exhibit Retail 2 at p. 86
- ¹⁴⁶⁹ ARA and others final submission, 12 February 2016, at para. 84(g); Exhibit Retail 2 at p. 73
- ¹⁴⁷⁰ ARA and others final submission, 12 February 2016, at para. 84(h); Exhibit Retail 2 at pp. 61, 86, 89
- ¹⁴⁷¹ ARA and others final submission, 12 February 2016, at para. 90; Exhibit Retail 2 at p. 91
- ¹⁴⁷² ARA and others final submission, 12 February 2016, at paras 92–93; Exhibit Retail 2 at pp. 90–91
- ¹⁴⁷³ ARA and others final submission, 12 February 2016, at para. 95; Exhibit Retail 2 at p. 81
- ¹⁴⁷⁴ ACCI, ABI and NSWBC final submission, 2 February 2016, at paras 27.64; Exhibit Retail 2 at p. 60–61
- ¹⁴⁷⁵ Transcript, at PN9890–PN9891
- ¹⁴⁷⁶ Transcript, at PN9943–PN9952
- ¹⁴⁷⁷ See Common Exhibit 1 at pp. 424–425; Barron: Exhibit Retail 3, at paras 14 and 15; Goddard: Exhibit Retail 4, at paras 19 and 21; d’Oreli: Exhibit 8, at para 13
- ¹⁴⁷⁸ For example, Goddard: Exhibit Retail 4 at paras 11 and 12; Gough: Exhibit Retail 5 at para 11, Antonieff: Exhibit Retail 6 at para 9, Daggett: Exhibit Retail 7 at para 9; and d’Oreli: Exhibit Retail 8 at para 11.
- ¹⁴⁷⁹ For example, Barron: Exhibit Retail 3 at para 12; Goddard: Exhibit Retail 4 at para 13, and d’Oreli: Exhibit Retail 8 at para 12
- ¹⁴⁸⁰ For example, Barron: Exhibit Retail 3 at paras 12 and 18; Daggett: Exhibit Retail 7 at para 19(b)
- ¹⁴⁸¹ Exhibit ABI 9 at [29]
- ¹⁴⁸² To be put into this category, respondents did not need to state “wages” (see PN17528–PN17529)
- ¹⁴⁸³ For example, Barron: Exhibit Retail 3 at para 12; Gough: Exhibit Retail 5 at para 19(b) and Daggett: Exhibit Retail 7 at para 19(a)
- ¹⁴⁸⁴ For example, Barron: Exhibit Retail 3 at para 26; Antonieff: Exhibit Retail 6 at para 18(b)
- ¹⁴⁸⁵ For example, Antonieff: Exhibit Retail 6 at para 17 and Daggett: Exhibit Retail 7 at para 19(f)
- ¹⁴⁸⁶ For example, Barron: Exhibit Retail 3 at paras 12, 13 and 28; d’Oreli: Exhibit Retail 8 at para 14
- ¹⁴⁸⁷ For example, Barron: Exhibit Retail 3 at paras 15 and 18; Goddard: Exhibit Retail 4 at paras 13 and 14; and d’Oreli: Exhibit Retail 8 at para 21
- ¹⁴⁸⁸ See Antonieff: Exhibit Retail 6 at para 19 and Daggett: exhibit Retail 7 at para 21
- ¹⁴⁸⁹ For example, Barron: Exhibit Retail 3 at paras 13, 27 and 28; Goddard: Exhibit Retail 4 at paras 31–32
- ¹⁴⁹⁰ Transcript at PN17208
- ¹⁴⁹¹ [Order of Catanzariti VP](#), 3 March 2016
- ¹⁴⁹² [Exhibit SDA 32](#)
- ¹⁴⁹³ [Exhibit SDA 33](#), [Exhibit SDA 34](#)
- ¹⁴⁹⁴ [Exhibit SDA 31](#)
- ¹⁴⁹⁵ [Exhibit SDA 35](#), [Exhibit SDA 36](#)
- ¹⁴⁹⁶ [Exhibit SDA 36](#)
- ¹⁴⁹⁷ [Exhibit SDA 39](#), [Exhibit SDA 40](#)
- ¹⁴⁹⁸ [Exhibit SDA 43](#)

- ¹⁴⁹⁹ [Exhibit SDA 43](#)
- ¹⁵⁰⁰ Exhibit SDA 16
- ¹⁵⁰¹ Exhibit SDA 16 at para 14
- ¹⁵⁰² Exhibit SDA 16 at paras 13, 15 and 16
- ¹⁵⁰³ Transcript at PN17946; also see PN17879–PN17918
- ¹⁵⁰⁴ Exhibit SDA 17
- ¹⁵⁰⁵ Exhibit SDA 17 at paras 4, 8 and 9
- ¹⁵⁰⁶ Transcript at PN18003–PN18004
- ¹⁵⁰⁷ Transcript at PN18034–PN18038
- ¹⁵⁰⁸ Exhibit SDA 17 at 4 and 10
- ¹⁵⁰⁹ Exhibit SDA 18
- ¹⁵¹⁰ Transcript at PN17991–17993
- ¹⁵¹¹ Exhibit SDA 18
- ¹⁵¹² Transcript at PN18087
- ¹⁵¹³ Transcript at PN18088
- ¹⁵¹⁴ Exhibit SDA 18 at para 6, 12 and 13
- ¹⁵¹⁵ Exhibit SDA 19
- ¹⁵¹⁶ Transcript at PN18146–PN18153
- ¹⁵¹⁷ Exhibit SDA 19 at paras 11, 12 and 16
- ¹⁵¹⁸ Transcript at PN18193
- ¹⁵¹⁹ Exhibit SDA 19 at paras 14 and 15
- ¹⁵²⁰ Transcript at PN18156
- ¹⁵²¹ Exhibit SDA 20
- ¹⁵²² Transcript at PN18229
- ¹⁵²³ *Ibid* at PN18232
- ¹⁵²⁴ Exhibit SDA 20 at paras 7, 8, 12 and 13
- ¹⁵²⁵ Transcript at PN18252–PN18254
- ¹⁵²⁶ Exhibit SDA 21
- ¹⁵²⁷ Transcript at PN18278
- ¹⁵²⁸ Exhibit SDA 21 at para 11
- ¹⁵²⁹ Transcript at PN18282
- ¹⁵³⁰ Exhibit SDA 21 at para 12 and 13
- ¹⁵³¹ Exhibit SDA 22
- ¹⁵³² Transcript at PN18337–PN18339
- ¹⁵³³ Exhibit SDA 22 at paras 10–12
- ¹⁵³⁴ See para [1628] above
- ¹⁵³⁵ ABI writing closing submissions, 2 February 2016, at para 32.5
- ¹⁵³⁶ For example, Barron: Exhibit Retail 3 at para 12; Goddard: exhibit Retail 4 at para 13, and d’Oreli: Exhibit Retail 8 at para 12
- ¹⁵³⁷ For example, Barron: Exhibit Retail 3 at paras 12 and 18; Daggett: Exhibit Retail 7 at para 19(b)
- ¹⁵³⁸ Exhibit ABI 9 at [29]
- ¹⁵³⁹ To be put into this category, respondents did not need to state “wages” (see PN17528–PN17529)
- ¹⁵⁴⁰ For example, Barron: Exhibit Retail 3 at para 12; Gough: Exhibit Retail 5 at para 19(b) and Daggett: Exhibit Retail 7 at para 19(a)
- ¹⁵⁴¹ For example, Barron: Exhibit Retail 3 at para 26; Antonieff: Exhibit Retail 6 at para 18(b)
- ¹⁵⁴² For example, Antonieff: Exhibit Retail 6 at para 17 and Daggett: Exhibit Retail 7 at para 19(f)

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- 1543 For example, Barron: Exhibit Retail 3 at paras 12, 13 and 28; d'Oreli: Exhibit Retail 8 at para 14
- 1544 For example, Barron: Exhibit Retail 3 at paras 15 and 18; Goddard: Exhibit Retail 4 at paras 13 and 14; and d'Oreli: Exhibit Retail 8 at para 21
- 1545 See Antonieff: Exhibit Retail 6 at para 19 and Daggett: exhibit Retail 7 at para 21
- 1546 For example, Barron: Exhibit Retail 3 at paras 13, 27 and 28; Goddard: Exhibit Retail 4 at paras 31–32
- 1547 Exhibit SDA 36, at p. 7 and pp. 17–18
- 1548 See [1567]
- 1549 Exhibit Retail 2 at p. 75
- 1550 Exhibit Retail 2 at pp. 65, 68
- 1551 Exhibit Retail 2 at p. 66
- 1552 Exhibit Retail 2 at pp. 69–70
- 1553 ABI written closing submissions, 2 February 2016, at para 39
- 1554 Transcript at PN26991–PN26994
- 1555 ABI Additional Submission, 2 May 2016 at para 2(a)
- 1556 Common Exhibit 1 at p. 497
- 1557 Common Exhibit 1, Vol 1, p. 497
- 1558 [2008] AIRCFB 550 at [83]
- 1559 [SDA submission](#) – 1 August 2008, pp. 1–2
- 1560 [SDA draft award](#) – 1 August 2008, cl. 55
- 1561 *Ibid.*, cl. 58.10
- 1562 [PGA submission](#) – 1 August 2008
- 1563 [PGA draft award](#) – 1 August 2008, cl. 16.1
- 1564 [Exposure Draft – Retail Industry Award 2010](#) – 12 September 2008, cl.29.2
- 1565 [\[2008\] AIRCFB 717](#) at [84]–[92]
- 1566 [APESMA submission](#) – 10 October 2008, para 11
- 1567 [PGA submission](#) – 10 October 2008, para 39–40
- 1568 [PGA further submission](#) – 23 October 2008
- 1569 *Ibid.*, table 1 p. 4
- 1570 *Ibid.*, para 7
- 1571 [\[2008\] AIRCFB 1000](#) at [283]–[286]
- 1572 [Pharmacy Industry Award 2010](#) – published 19 December 2008
- 1573 [PGA submissions](#) – 29 May 2009, Part 1 – p. 4
- 1574 [PGA submissions](#) – 29 May 2009
- 1575 [Award Modernisation Request Variation](#) – 26 August 2009
- 1576 [2009] AIRCFB 835 at [12]
- 1577 [2009] AIRCFB 978 at [2]
- 1578 [2009] AIRCFB 978 at [17] and [23]
- 1579 [2010] FWAFB 662 at [10]–[12]
- 1580 [SDA submission - award modernisation proceedings](#) – 10 June 2016, para 38
- 1581 [PGA submissions - award modernisation proceedings](#) – 9 June 2016
- 1582 Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012, Fair Work Australia
- 1583 ABS, *Census of Population and Housing*, 2011
- 1584 Exhibit PG 35
- 1585 Exhibit PG 35 at p. 9
- 1586 IBISWorld (2014), *Pharmacy in Australia: in search of a remedy*, IBISWorld Industry report G4271a

- ¹⁵⁸⁷ Exhibit PG 35 at p. 11
- ¹⁵⁸⁸ Exhibit [PG 2](#)
- ¹⁵⁸⁹ Exhibit [PG 3](#)
- ¹⁵⁹⁰ Exhibit [PG 4](#)
- ¹⁵⁹¹ Exhibit [PG 5](#)
- ¹⁵⁹² Exhibit [PG 6](#)
- ¹⁵⁹³ Exhibit [PG 7](#)
- ¹⁵⁹⁴ Exhibit [PG 8](#)
- ¹⁵⁹⁵ Exhibit [PG 9](#)
- ¹⁵⁹⁶ Exhibit [PG 10](#)
- ¹⁵⁹⁷ Exhibit [PG 11](#)
- ¹⁵⁹⁸ Exhibit [PG 12](#)
- ¹⁵⁹⁹ Exhibit [PG 13](#)
- ¹⁶⁰⁰ Exhibit [PG 14](#)
- ¹⁶⁰¹ Exhibit [PG 15](#)
- ¹⁶⁰² Exhibit [PG 16](#)
- ¹⁶⁰³ Exhibit [PG 17](#)
- ¹⁶⁰⁴ Exhibit [PG 18](#)
- ¹⁶⁰⁵ Exhibit [PG 19](#)
- ¹⁶⁰⁶ Exhibit [PG 20](#)
- ¹⁶⁰⁷ Exhibit [PG 22](#)
- ¹⁶⁰⁸ Exhibit [PG 23](#)
- ¹⁶⁰⁹ Exhibit [PG 24](#)
- ¹⁶¹⁰ Exhibit [PG 25](#)
- ¹⁶¹¹ Exhibit PG 22
- ¹⁶¹² Mr Heffernan, PN13334, PN13338. Mr Chong, PN13946–13948, Logan PN15234, El-Ahmad PN14350–PN14351
- ¹⁶¹³ See for example: PN14552 and PN15162
- ¹⁶¹⁴ See for example: Transcript at PN12928–PN12929, PN12291–122293, PN14915–PN14916, PN14919–PN14926, PN15149, PN15175 and PN15220.
- ¹⁶¹⁵ See cross-examination of Mr Da Rui Transcript at PN13064; Mr Heffernan at PN13313; Mr Quinn On at PN13413; Mr Tassone at PN12167; Ms Spiro at PN14673.
- ¹⁶¹⁶ SDA submissions, 21 March 2016 at para 518
- ¹⁶¹⁷ Ibid at para 563
- ¹⁶¹⁸ Exhibit PG 15 at para 11
- ¹⁶¹⁹ Exhibit PG 9 at paras 28–29
- ¹⁶²⁰ See Annexure C to the PGA’s Submissions in reply and Exhibits PG 15, 18, 20, 22 and 23
- ¹⁶²¹ Exhibit PG 22 at para 5
- ¹⁶²² Exhibit PG 6 at paras 12–13
- ¹⁶²³ Exhibit PG 9 at paras 12–13 and 17
- ¹⁶²⁴ Exhibit PG 12 at paras 14 and 22
- ¹⁶²⁵ Exhibit PG 13 at para 18
- ¹⁶²⁶ Exhibit PG 18 at paras 10 and 12
- ¹⁶²⁷ Exhibit PG 19 at para 19
- ¹⁶²⁸ Exhibit PG 3 at paras 12 and 16
- ¹⁶²⁹ Exhibit PG 4 at paras 37 and 39
- ¹⁶³⁰ Exhibit PG 5 at paras 15 and 21

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- ¹⁶³¹ Exhibit PG 7 at para 21
¹⁶³² PN13532
¹⁶³³ Exhibit PG 10 at paras 11–12
¹⁶³⁴ Exhibit PG 12 at para 21
¹⁶³⁵ Exhibit PG 14 at para 30
¹⁶³⁶ Exhibit PG 18 at para 24
¹⁶³⁷ Exhibit PG 22 at paras 12–13
¹⁶³⁸ Exhibit PG 8 at paras 30–31
¹⁶³⁹ Exhibit PG 12 at para 26
¹⁶⁴⁰ Exhibit PG 13 at para 19
¹⁶⁴¹ Exhibit PG 14 at para 31
¹⁶⁴² Exhibit PG 20 at paras 17 and 19
¹⁶⁴³ Exhibit PG 2 at paras 27–29 and 19 and PN12146
¹⁶⁴⁴ PN12441
¹⁶⁴⁵ Exhibit PG 3 at paras 19–20
¹⁶⁴⁶ Transcript at PN12615–12616
¹⁶⁴⁷ Transcript at PN12531
¹⁶⁴⁸ Exhibit PG 4 at paras 31, 45 and 47
¹⁶⁴⁹ PN12977 and PN12978
¹⁶⁵⁰ Exhibit PG 6 at paras 17–18
¹⁶⁵¹ Exhibit PG 8 at paras 33–35
¹⁶⁵² Exhibit PG 9 at paras 32–34
¹⁶⁵³ Exhibit PG 10 at para 21 and 27
¹⁶⁵⁴ Exhibit PG 11 at paras 25–26 and PN14297
¹⁶⁵⁵ Exhibit PG 12 at paras 32 and 34
¹⁶⁵⁶ PN14684
¹⁶⁵⁷ Exhibit PG 15 at paras 24–25
¹⁶⁵⁸ Exhibit PG 16 at para 30
¹⁶⁵⁹ PN14921
¹⁶⁶⁰ Exhibit PG 17 at para 17
¹⁶⁶¹ Exhibit PG 19 at paras 22–23
¹⁶⁶² Exhibit PG 20 at paras 2223
¹⁶⁶³ Exhibit PG 22 at paras 17–18
¹⁶⁶⁴ Exhibit PG 5 at paras 23–24
¹⁶⁶⁵ Exhibit PG 6 at paras 17–18
¹⁶⁶⁶ Exhibit PG 8 at paras 33–35
¹⁶⁶⁷ Exhibit PG 10 at para 21 and 27
¹⁶⁶⁸ Exhibit PG 12 at paras 32 and 34
¹⁶⁶⁹ Exhibit PG 14 at paras 36–37
¹⁶⁷⁰ Exhibit PG 19 at paras 22–23
¹⁶⁷¹ Exhibit PG 20 at paras 2223
¹⁶⁷² Exhibit PG 22 at paras 17–18
¹⁶⁷³ Exhibit PG 25 at p. 5
¹⁶⁷⁴ Exhibits [PG 29](#) and [PG 30](#)
¹⁶⁷⁵ Exhibit [PG 35](#)
¹⁶⁷⁶ Exhibit [PG 34](#)

- ¹⁶⁷⁷ Exhibit PG 29 at para 33
- ¹⁶⁷⁸ See Transcript at PN22292
- ¹⁶⁷⁹ Annexure A to Exhibit PG 29
- ¹⁶⁸⁰ Transcript at PN22314
- ¹⁶⁸¹ PN22323–PN22324; Exhibit SDA-37
- ¹⁶⁸² PN22330
- ¹⁶⁸³ PN22268
- ¹⁶⁸⁴ Exhibit SDA 38.
- ¹⁶⁸⁵ Transcript at PN22374–PN22377
- ¹⁶⁸⁶ PN22299–PN22317; PN22401–PN22431
- ¹⁶⁸⁷ Exhibit PG29
- ¹⁶⁸⁸ Also see Mr Armstrong’s evidence at Transcript PN22478
- ¹⁶⁸⁹ SDA Submissions, 21 March 2016, at para 472
- ¹⁶⁹⁰ Exhibit PG 35
- ¹⁶⁹¹ Exhibit SDA 33
- ¹⁶⁹² Exhibit SDA 41
- ¹⁶⁹³ Exhibit PG 36
- ¹⁶⁹⁴ Exhibit PG 36 at p. 19
- ¹⁶⁹⁵ SDA final submission at p. 180, para. 543
- ¹⁶⁹⁶ SDA final submission at p. 180, para. 545
- ¹⁶⁹⁷ Transcript at PN24749
- ¹⁶⁹⁸ Transcript at PN24753
- ¹⁶⁹⁹ [Order of Catanzariti VP](#), 25 February 2016
- ¹⁷⁰⁰ Exhibit SDA 15
- ¹⁷⁰¹ Exhibit SDA 15 at para 8
- ¹⁷⁰² Exhibit SDA 15 at paras 7 and 8
- ¹⁷⁰³ [Order of Catanzariti VP](#), 9 March 2016
- ¹⁷⁰⁴ Exhibit APESMA 1
- ¹⁷⁰⁵ Exhibit APESMA 1
- ¹⁷⁰⁶ Exhibit APESMA 1 at paras 8–9
- ¹⁷⁰⁷ Transcript at para 19789
- ¹⁷⁰⁸ Exhibit APESMA 1, at paras 11–12
- ¹⁷⁰⁹ Transcript at para 19798
- ¹⁷¹⁰ Transcript at para 19799
- ¹⁷¹¹ PGA Final Submissions at para 171
- ¹⁷¹² PGA Final Submissions at para 174
- ¹⁷¹³ *Ibid* at para 177
- ¹⁷¹⁴ PC Final Report at p. 465
- ¹⁷¹⁵ See Exhibits PG 2, PG 4, PG 5, PG 7–PG 15 and PG 18–PG 25
- ¹⁷¹⁶ See Exhibits PG 3, PG 6, PG 13, PG 16, PG 17, PG 18–PG 20 and PG 23
- ¹⁷¹⁷ PGA Final Submissions at para 179
- ¹⁷¹⁸ Exhibit PG 2 at para 20
- ¹⁷¹⁹ Shiftwork provisions are set out in clause 30 of the *Retail Award*
- ¹⁷²⁰ *Public Holidays Act 1981* (NT), s.6
- ¹⁷²¹ *Statutory Holidays Act 2000* (Tas), s.5
- ¹⁷²² *Holidays Act 1983* (Qld), s.4

- ¹⁷²³ Queensland Government, ‘2017 Show Holiday Dates’, *Public, School and Show Holidays*, <<https://www.qld.gov.au/recreation/travel/holidays/show/>>, accessed 20 January 2017.
- ¹⁷²⁴ See Fair Work Ombudsman, ‘List of Public Holidays’, <<https://www.fairwork.gov.au/leave/public-holidays/list-of-public-holidays>>, accessed: 20 January 2017.
- ¹⁷²⁵ [1990] AR (NSW) 305
- ¹⁷²⁶ *Ibid*, at [318]
- ¹⁷²⁷ *Ibid*, at [321]
- ¹⁷²⁸ McCallum, R, Moore, M and Edwards, J (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Australian Government, Canberra.
- ¹⁷²⁹ McCallum, R, Moore, M and Edwards, J (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Australian Government, Canberra, at p. 103.
- ¹⁷³⁰ *Ibid*, pp. 102–103
- ¹⁷³¹ The report recommended that existing State and Territory holidays should be grandfathered: Australian Government Productivity Commission (2015), *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1*, No. 76, at p. 21.
- ¹⁷³² Australian Government Productivity Commission (2015), *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1*, No. 76, at p. 55, Recommendation 16.2; also at p. 540, Recommendation 16.2.
- ¹⁷³³ The report recommended that sick, annual or other forms of existing leave entitlements that applied on the date of the new State public holiday should still apply: Australian Government Productivity Commission (2015), *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1*, No. 76, at p. 21.
- ¹⁷³⁴ Exhibit AB11, at [45]
- ¹⁷³⁵ *Ibid*
- ¹⁷³⁶ AHA and AAA submissions, 3 February 2016, at [48]
- ¹⁷³⁷ AHA and AAA submissions, 3 February 2016, at [333]–[334]
- ¹⁷³⁸ United Voice closing submissions, 21 March 2016, at [415]
- ¹⁷³⁹ Common Exhibit 1 at p. 503
- ¹⁷⁴⁰ Common Exhibit 1
- ¹⁷⁴¹ Print K7601, 6 May 1993
- ¹⁷⁴² [2013] FWCFCB 2168
- ¹⁷⁴³ [2013] FWCFCB 2168 at [109]–[112]
- ¹⁷⁴⁴ Print L4534, 4 August 1994 (Hancock ADP, MacBean SDP and O’Shea C) on p. 19
- ¹⁷⁴⁵ Written closing submissions filed on behalf of ACCI, NSWBC and ABI, 2 February 2016
- ¹⁷⁴⁶ See transcript at PN26445–PN26455 and PN26829
- ¹⁷⁴⁷ *Re: Metal, Engineering and Associated Industries Award* (2000) 110 IR 247
- ¹⁷⁴⁸ *Ibid* at [196]
- ¹⁷⁴⁹ Common Exhibit 1 at p. 496
- ¹⁷⁵⁰ Given that their skills and patterns of work are identical
- ¹⁷⁵¹ SDA Final Submissions – 21 March 2016, para 42
- ¹⁷⁵² \$2 and under (No 1) PR926620; \$2 and under (No 2) PR941526
- ¹⁷⁵³ *Workplace Relations Act 1996, Part XV*
- ¹⁷⁵⁴ \$2 and under (No 1) PR926620
- ¹⁷⁵⁵ *Shop, Distributive & Allied Employees’ Association – Victorian Shops Interim Award 2000*
- ¹⁷⁵⁶ \$2 and under (No 2) PR941526, at [123]
- ¹⁷⁵⁷ SDA Final submissions – 21 March 2016, at paras 69–72
- ¹⁷⁵⁸ Transcript at PN26991–PN26999 and PN27564–PN27568
- ¹⁷⁵⁹ SDA submission – [SDA submissions – right to refuse to work on a Sunday – 16 May 2016](#) at [3]
- ¹⁷⁶⁰ Submissions of United Voice on the Right to Refuse Sunday Work, 16 May 2016 at para 5
- ¹⁷⁶¹ Common Exhibit 1 at pp. 480–481

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- ¹⁷⁶² Common Exhibit 1 at p. 495
- ¹⁷⁶³ Federal Opposition Submission to the Fair Work Commission Review of Modern Awards – Penalty Rates, 21 March 2016 at paras 17 and 18
- ¹⁷⁶⁴ [2009] AIRCFB 800 at [39] and [243]
- ¹⁷⁶⁵ [2009] AIRCFB 800 at [28]–[30]
- ¹⁷⁶⁶ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5 pt 3A item 13A(1), as modified by the TP Regulations, reg 3B.04(2)
- ¹⁷⁶⁷ [2014] FWCFB 9412 at [16]
- ¹⁷⁶⁸ 126 applications under Schedule 5, Item 9; 3 applications under Schedule 5, Item 12 and 11 applications under Schedule 5, item 13B. The majority of these applications have been made by an individual while others were made by unions on behalf of a class of employees.
- ¹⁷⁶⁹ *Melinda Hunt v Interchange Australia* [2013] FWC 8813. The most recent decision was issued on 29 March 2016; it dismissed 5 applications on the basis that the applicants had not suffered a modernisation-related reduction in take-home pay, [2016] FWC 1884.
- ¹⁷⁷⁰ See Industry Profile – Accommodation and food services, pp. 31–32, Figure 5.2 and Industry Profile – Retail trade, p. 43, Figure 5.2
- ¹⁷⁷¹ Exhibit SDA 36 at p. 20
- ¹⁷⁷² We note that there is some doubt about the outer limit of the span of hours in the *Fast Food Award*, see [1335]
- ¹⁷⁷³ See [Industry Profile – Accommodation and food services](#), pp. 31–32, Figure 5.2 and [Industry Profile – Retail trade](#), p. 43, Figure 5.2
- ¹⁷⁷⁴ [Exhibit SDA 36](#) at p. 20
- ¹⁷⁷⁵ PC Final Report at p. 406
- ¹⁷⁷⁶ [\[2013\] FWCFB 1635](#)
- ¹⁷⁷⁷ *Ibid* at [329]–[331]
- ¹⁷⁷⁸ [2013] FWC 3712 at [5]
- ¹⁷⁷⁹ See Table 17 at [698] and Table 50 at [1417]
- ¹⁷⁸⁰ [\[2015\] FWCFB 3406](#) at [299]–[300]
- ¹⁷⁸¹ ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0
- ¹⁷⁸² Fair Work Ombudsman, ‘*National Hospitality Campaign 2012–2015: Accommodation, pubs, taverns and bars*’, November 2013, <http://www.fairwork.gov.au/ArticleDocuments/714/National-hospitality-campaign-report.pdf.aspx>
- ¹⁷⁸³ Fair Work Ombudsman, ‘*National hospitality industry campaign report 2014–2015: Restaurants, Cafes and Catering (Wave 2 Report)*’, June 2015, <http://www.fairwork.gov.au/ArticleDocuments/714/wave-2-restaurants-cafes-catering-industries-national-hospitality-industry-campaign-report.docx.aspx>
- ¹⁷⁸⁴ Fair Work Ombudsman, ‘*National hospitality industry campaign report 2015–2016: Takeaway foods (Wave 3 Report)*’, March 2016, <http://www.fairwork.gov.au/ArticleDocuments/714/hospitality-campaign-wave-3-takeaway-foods-report.docx.aspx>
- ¹⁷⁸⁵ Fair Work Ombudsman, ‘*National retail industry campaign report 2010–2011*’, November 2011, <http://www.fairwork.gov.au/ArticleDocuments/714/Retail-Industry-Campaign-Final-Report.pdf.aspx>
- ¹⁷⁸⁶ Fair Work Ombudsman, ‘*National pharmacy campaign report 2012–2013*’ December 2013, <http://www.fairwork.gov.au/ArticleDocuments/714/National-Pharmacy-Campaign-Report.docx.aspx>

Attachment A—List of Witnesses

Party/witness	Exhibit no.	Transcript reference	Notes
Australian Business Industrial and the New South Wales Business Chamber			
<i>Expert witnesses</i>			
Emily Baxter	ABI 9	PN17432	
Professor John Rose	ABI 1; ABI 2	PN8973	
Professor Phil Lewis	ABI 3; ABI 4; ABI 5; ABI 6	PN10566	
Australian Industry Group			
<i>Expert witnesses</i>			
Patricia Deasy	Ai Group 11; Ai Group 32; Ai Group 33	PN19252; PN28457; PN28458	
Dr Andrew Pratley	Ai Group 17	PN21494	
<i>Lay witnesses</i>			
Julie Toth	Ai Group 24; Ai Group 25	PN23168-23170	Not required for cross-examination
Marcus Dunn	Ai Group 1; Ai Group 2	PN18458	
Krista Limbrey	Ai Group 3; Ai Group 4; Ai Group 30	PN18590; PN28236	
Ayman Haydar	Ai Group 5	PN18664	
Adam Dando	Ai Group 6	PN18729	
Nicola Agostino	Ai Group 7; Ai Group 8	PN19062	
David Eagles	Ai Group 9; Ai Group 10	PN9172	
Mallika Krishnamurthy	Ai Group 20	PN23168-23170	Not required for cross-examination
Marek Kopias	Ai Group 21; Ai Group 22	PN23168-23170	Not required for cross-examination
Gina Feast	Ai Group 23	PN23168-23170	Not required for cross-examination
Domit Makhoul	Ai Group 31	PN28321	

Party/witness	Exhibit no.	Transcript reference	Notes
Australian Hotels Association			
<i>Lay witnesses</i>			
Kasie Ferguson	AHA 1; AHA 2	PN700	
Philip Tudor	AHA 3; AHA 4	PN779	
Colin Waller	AHA 5; AHA 6	PN896	
Susan Cameron	AHA 7; AHA 8	PN1078	
Helen Sergi	AHA 10; AHA 11	PN1197	
Dean Trengove	AHA 12; AHA 13	PN1346	
Vanessa Anderson	AHA 14; AHA 15	PN1456-1457	
Fiona McDonald	AHA 16; AHA 17	PN1511-1512	
Ashleigh Winn	AHA 18; AHA 19	PN1645-1646	
Joanne Lesley Blair	AHA 20; AHA 21	PN1787	
Jackie Booth	AHA 22; AHA 23	PN 1890-1891	
Samantha Walder	AHA 24; AHA 25	PN2023	
John Andrew Dowd	AHA 26; AHA 27	PN3195-3196	
Richard Lovell	AHA 28; AHA 29	PN3042	
Andrew Bullock	AHA 30; AHA 31	PN5274-5275	
Keith McCallum	AHA 32; AHA 33	PN5360	
Samuel McInnes	AHA 34; AHA 35; AHA36	PN5461-5463	
Graham Annovazzi	AHA 37; AHA 38	PN5582	
Ian Green	AHA 39; AHA 40	PN5631-5632	
Michael Kearney	AHA 41; AHA 42	PN5683	
Darren Gunn	AHA 43; AHA 44	PN5754	
Patrick Gallagher	AHA 45; AHA 46	PN5822	
David Oviden	AHA 47; AHA 48	PN6032	
Mel Tait	AHA 49; AHA 50	PN6114	
Sue Mitchell	AHA 51; AHA 52	PN6202	
Will Cordwell	AHA 53; AHA 54	PN6255	
Colin Johnson	AHA 55; AHA 56	PN6293	
Peter Johnston	AHA 57; AHA 58	PN6357	
Peter Sullivan	AHA 59; AHA 60	PN6411	

Party/witness	Exhibit no.	Transcript reference	Notes
Albert Hakfoort	AHA 61; AHA 62	PN6452	
David Gibson	AHA 63; AHA 64	PN6614	
Darren Lea Brown	AHA 65; AHA 66	PN7211	
Daniel Cronin	AHA 67; AHA 68	PN7258	
Dennis Madden	AHA 69; AHA 70	PN7334-7335	
Timothy Bilston	AHA 71; AHA 72	PN7557	
Michael Burke	AHA 73; AHA 74	PN7623	
Tony Cakmar	AHA 75; AHA 76	PN7698	
Jim Ryan	AHA 77; AHA 78	PN7812-7813	
Peter Williams	AHA 79; AHA 80	PN7853	
Belinda Usher	AHA 81; AHA 82	PN7933	
Michelle Morrow	AHA 83; AHA 84	PN8038; 8039	
Clubs Australia Industrial			
<i>Lay witnesses</i>			
Richard Tait	CAI 1	PN2676	
John Dellar	CAI 2; CAI 3	PN2845	
Gwyn Rees	CAI 4	PN2947	Not required for cross-examination
Jeffrey Cox	CAI 5; CAI 6	PN2970	
Anthony Casu	CAI 7; CAI 8	PN3060	
Pharmacy Guild of Australia			
<i>Expert witness</i>			
Lynne Pezzullo	PG 34; PG 35; PG 36	PN24505-24507; PN24513-24520	
<i>Lay witnesses</i>			
Sharlene Wellard	PG 1	PN6802	
Anthony Tassone	PG 2	PN12161	
Paul Keane	PG 3	PN12496	
Angelo Pricolo	PG 4	PN12854	
Gregory Da Rui	PG 5	PN13020	
David Heffernan	PG 6	PN13296	

Party/witness	Exhibit no.	Transcript reference	Notes
Quinn On	PG 7	PN13404	
Samantha Kourtis	PG 8	PN13617	
Kin Chong	PG 9	PN13745	
Lia Mahony	PG 10	PN14132	
Hassan El-Ahmad	PG 11	PN14258	
Michael Farrell	PG 12	PN14394	
Trent Playford	PG 13	PN14528	
Craig Bird	PG 14	PN14574	
Michelle Spiro	PG 15	PN14660	
Peter Crothers	PG 16	PN14867	
John Cagney	PG 17	PN14975	
Dean Pollock	PG 18	PN15060	
Timothy Logan	PG 19	PN15200	
Patrick Costigan	PG 20	PN15287	
Maria Xynias	PG 22	PN15740	
Ian Lewellin	PG 23	PN15855	
Georgina Twomey	PG 24	PN16463	
Andrew Topp	PG 25	PN17245	
Stephen Armstrong	PG 29; PG 30	PN22256	
Australian Retailers Association , National Retail Association and the Master Grocers Association			
<i>Expert witness</i>			
Dr Sean Sands	Retail 1; Retail 2	PN6914; PN9881	
<i>Lay witnesses</i>			
Barry Barron	Retail 3	PN15974	
Heath Goddard	Retail 4	PN16315	
Graeme Gough	Retail 5	PN16603	
Chris Antonieff	Retail 6	PN16711	
Belinda Daggart	Retail 7	PN16992	
Jorge-Daniel Leroy d'Oreli	Retail 8	PN17123	

Party/witness	Exhibit no.	Transcript reference	Notes
Restaurant and Catering Industrial			
<i>Expert witnesses</i>			
John Hart	RCI 7	PN3339	Not required for cross-examination
James Parker	RCI 18	PN4510	
Carlita Warren	RCI 19	PN4826	
<i>Lay witnesses</i>			
RCI Witness 1*			
RCI Witness 2*			
RCI Witness 3*			
RCI Witness 4*			
RCI Witness 5*			
RCI fast food witness 1*			
RCI fast food witness 2*			
ACTU			
<i>Expert witness</i>			
Professor Raymond Markey	ACTU 2	PN19910	
Dr Martin O'Brien	ACTU 3	PN23295	
APESMA			
<i>Lay witness</i>			
APESMA Witness 1	APESMA 1	PN19763	
SDA			
<i>Expert witnesses</i>			
Kevin Kirchner	SDA 32	PN21460	Not required for cross-examination
Helen Bartley	SDA 33; SDA 34	PN21703; PN21717	
Professor Morris Altman	SDA 31	PN19370	
Dr Ian Watson	SDA 35; SDA 36	PN22153; PN22164	
Professor David Peetz	SDA 36	PN22164	Not required for cross-examination
Serena Yu	SDA 34; SDA 40 SDA 55	PN22542-22548; PN25877	

Party/witness	Exhibit no.	Transcript reference	Notes
Dr Martin O'Brien	SDA 41; SDA 42	PN23270; PN23280	
Professor Sara Charlesworth	SDA 43; SDA 44	PN23498; PN23514	
Dr Fiona Macdonald	SDA 43	PN23498	

Lay witnesses

SDA witness 1*			
SDA witness 2*			
SDA witness 3*			
SDA witness 4*			
SDA witness 5*			
SDA witness 6*			
SDA witness 7*			
SDA witness 8*			

United Voice*Expert witnesses*

Keith Harvey	UV 15	PN8904	Not required for cross-examination
Professor Jeff Borland	UV 25	PN11586	
Professor John Quiggin	UV 24	PN11253	
Dr Olav Muurlink	UV 26; UV 27	PN20709; PN20727	
Professor Damien Oliver	UV 28	PN21346	

Lay witnesses

Mary Quirk	UV 5	PN3561	
Wayne Jones	UV 6	PN3707	
Damien Cooper	UV 7	PN3773	
Andrew Sanders	UV 9	PN8130	
William King	UV 10	PN8368	
Sean Davis	UV 11	PN8505	
Angus Lonergan	UV 12	PN8653	
Jennifer Miller	UV 13	PN8735	
Alexandra Kindness	UV 14	PN8855	

Party/witness	Exhibit no.	Transcript reference	Notes
Carol Gordon	UV 16	PN8906	Not required for cross-examination
Amit Gounder	UV 17	PN8908	Not required for cross-examination
Steven Petrov	UV 18	PN8912	Not required for cross-examination
Jan Syrek	UV 19	PN8916	Not required for cross-examination
Rachel-Lee Zwarts	UV 20	PN8920	Not required for cross-examination

* Subject of confidentiality order.

Attachment B—Research reference list

Includes material available at 21 December 2015

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Attachment C—Penalty rates in pre-reform instruments

1. Hospitality Group

1.1 *Hospitality Industry (General) Award 2010* [[MA000009](#)]

		Sunday	Public holiday	
		All employees	F/T &P/T	Casual
Modern	Hospitality Industry (General) Award 2010 [MA000009]	175	250	275
Federal	The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 AP783479CRV	175	250	275
NSW	Hotel Employees (State) Award AN120249	200	300	300
Qld	Hotels, Resorts and Accommodation Industry Award - State - South-Eastern Division 2002 AN140147	175	250	250
	Hotels, Motels, Resorts and Accommodation Award - State (Excluding South-East Queensland) 2005 AN140146	150	250	250
SA	Hotels, Clubs, Etc., Award AN150066	Front of house - 200 Back of house - 175	250	150 ¹
Tas	Hotels, Resorts, Hospitality and Motels Award AN170047	175	250	250
WA	Hotel and Tavern Workers' Award 1978 AN160174	150	250	225

¹ Note casual employees under this award are paid a standard loading of 50% for all time worked Monday to Sunday (other than overtime).

1.2 *Restaurant Industry Award 2010* [[MA000119](#)]

		Sunday			Public holiday	
		F/T & P/T	Casual L1-2	Casual L3-6	F/T & P/T	Casual
Modern	Restaurant Industry Award 2010 [MA000119]	150	150	175	250	250
Federal	Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998 AP787213CRV	175	175	175	250	275
NSW	Restaurants, &c., Employees (State) Award AN120468	150	-	-	250	-
Qld	Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2002 AN140144	150	123	123	250*	173
	Cafe Restaurant and Catering Award - State (Excluding South-East Queensland) 2003 AN140052	150	200	200	250*	250
SA	Cafes and Restaurants (SA) Award AN150025	200	220	220	200 after 8 hrs-300-	200
	Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc Award AN150170	200	220	220	200	200
Tas	Restaurant Keepers Award AN170086	175	175	175	250	250
WA	Restaurant, Tearoom and Catering Workers' Award, 1979 AN160276	150	150	150	250	225

* Labour Day – different rate cl. 7.6.2

1.3 Registered and Licensed Clubs Award 2010 [MA000058]

		Saturday		Sunday	Public holiday	
		F/T & P/T	Casual	All e/ees	F/T & P/T	Casuals
Modern	Registered and Licensed Clubs Award 2010 [MA000058]	150	150	175	250	–
Federal	AP787060CRV - Licensed Clubs (Victoria) Award 1998	150	150	175	250 (all e/ees)	150
NSW	Club Employees (State) Award AN120136	150	150	175	250 (all e/ees)	–
	Club Managers' (State) Award 2006 AN120138	–	–	–	250 (all e/ees)	–
Qld	Club Employees' Award - State (Excluding South-East Queensland) 2003 AN140072	150	150	150 Casual stewards/ stewardesses chief stewards, stewards/ stewardesses, cellarpersons – 200	250 (all e/ees)* (labour day – different rate cl. 7.6.2)	–
	Clubs Etc. Employees' Award - South East Queensland 2003 AN140073	125	150	175	250 (all e/ees)* (labour day – different rate cl. 7.6.2)	

		Saturday		Sunday	Public holiday	
		F/T & P/T	Casual	All e/ees	F/T & P/T	Casuals
Modern	Registered and Licensed Clubs Award 2010 [MA000058]	150	150	175	250	–
SA	Hotels, Clubs, Etc., Award AN150066	150	Casual- 150 See cl. 4.2 re casual employees	Casual – 150 F/T & P/T Front of house: 200 Back of house: 175	Casual–150 Other employees- 250 Front of house F/T & P/T on Good Friday or Christmas Day – 300	150
Tas	Licensed Clubs Award AN170057	125 (Employed after 1 Dec 94, 150% if employed prior)	150	175	250	250
WA	Club Workers’ Award, 1976 AN160082	150	150	150	250 (all e/ees)	225

* Labour Day – different rate cl. 7.6.2

2. Retail Group

2.1 *General Retail Industry Award 2010* [[MA000004](#)]

		Sunday	Public Holiday	
		All e/ees	F/T & P/T	Casual
Modern	<i>General Retail Industry Award 2010</i> [MA000004]	200	250	250
Federal	Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 AP796250	200	250	250
	Retail, Wholesale and Distributive Employees (NT) Award 2000 AP794741	200	250	250
	Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000 AP794740	150	250	250
NSW	Retail Services Employees (State) Award AN120470	Propagators and/or Gardeners and Garden Hands and Shiftworkers— 200 Other employees—150	250	250
Qld	Retail Industry Award - State 2004 AN140257	Non-Exempt shops—200 Independent Retail Shops and Exempt Shops—150 Other employees—175	250 of the part-time hourly rate	250 of the casual rate

		Sunday	Public Holiday	
		All e/ees	F/T & P/T	Casual
Modern	<i>General Retail Industry Award 2010</i> [MA000004]	200	250	250
SA	Retail Industry (SA) Award AN150130	Retail Outdoor Salespersons: 200 Establishments open after 12.30pm on Sat: Casual—170 of the min casual rate Full-time & part-time—160 Cafés, canteens and restaurants: Casual—220 (overtime) Full-time & part-time—200 (overtime)	200	200
Tas	Retail Trades Award AN170088	200	250	270 (excl transport workers)
WA	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977, The AN160292	200	250	250

2.2 *Fast Food Industry Award 2010* [[MA000003](#)]

		Sunday		Public Holiday	
		F/T & P/T	Casual	F/T & P/T	Casual
Modern	Fast Food Industry Award 2010 [MA000003]	150	175	250	275
Federal	National Fast Food Retail Award 2000 AP806313	NSW – 150 Other states – 175	NSW – 150 Other states – 175	250	250 plus casual loading in cl.12.1
NSW	Shop Employees (State) Award AN120499	150	150	250 Except Melbourne Cup day	250 Except Melbourne Cup day
Qld	Fast Food Industry Award - South Eastern Division 2003 AN140113	Full-time – 125	123	250	273
	Fast Food Industry Award - State (Excluding South- East Queensland) 2003 AN140114	Full-time – 150	175	250 (Labour Day – different rate cl. 7.6.2)	250
SA	Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc Award AN150170	200	220	200	200
Tas	Restaurant Keepers Award AN170086	175	175	250	250
WA	Fast Food Outlets Award 1990 AN160127	200 (see cl.9(2))	200 (see cl.9(2))	200	200

2.3 Pharmacy Industry Award 2010 [[MA000012](#)]

		Sunday			Public Holiday	
		Time	F/T & P/T	Casual	F/T & P/T	Casual
Modern	Pharmacy Industry Award 2010 [MA000012]	All hours	200	225	250	275
Federal	Community Pharmacy Award 1998 AP773671	7am - midnight	VIC; SA – 200 NSW; QLD; TAS; WA – 150	VIC; SA – 220 NSW; QLD; TAS; WA – 170	VIC; SA – 200 NSW; ACT; QLD – 250 TAS; WA – 150	VIC; SA – 220 NSW; ACT; QLD – 270 TAS; WA – 170
		7am - 8.30 am; 6pm - midnight	ACT – 200	ACT – 220	–	–
		8.30am – 6pm	ACT – 150	ACT – 170		
	Chemists (Australian Capital Territory) Award 2000 AP772207	8.30am – 6pm	150	150	250	125
		6am – 8.30am; 6pm - midnight	200			
	Shop, Distributive and Allied Employees Association - Victorian Pharmacy Assistants Award 2000 AP796289	All time	200	See table in cl.11.3.2(b)	300	See table in cl.11.3.2(c)&(d)
S.D.A Western Australian Community Pharmacy - Pharmacy Assistants Award 2000 AP806529	All time	–	–	200	222	
NSW	Community Pharmacy (State) Award 2001 AN120152	7am – midnight	150	170	250	270
Qld	Pharmacy Assistants' Award - State 2003 AN120416	All time	200	125	250	125

		Sunday			Public Holiday	
		Time	F/T & P/T	Casual	F/T & P/T	Casual
SA	Retail Pharmaceutical Chemists Award AN150131	All time	200	220	200	220
Tas	Retail Pharmacy Award AN170087		150	170	150	170
WA	Retail Pharmacists' Award, 2004 AN160277	7am- midnight	125	145	150	170

Attachment D—Terms of reference for Productivity Commission inquiry— Workplace Relations Framework

The terms of reference was stated as follows:

The Productivity Commission will assess the performance of the workplace relations framework, including the *Fair Work Act 2009*, focussing on key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people. A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy.

In particular, the review will assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net
- small businesses
- productivity, competitiveness and business investment
- the ability of business and the labour market to respond appropriately to changing economic conditions
- patterns of engagement in the labour market
- the ability for employers to flexibly manage and engage with their employees
- barriers to bargaining
- red tape and the compliance burden for employers
- industrial conflict and days lost due to industrial action
- appropriate scope for independent contracting.

In addition to assessing the overall impact of the workplace relations framework on these matters, the review should consider the Act's performance against its stated aims and objects, and the impact on jobs, incomes and the economy. The review should examine the impact of the framework according to business size, region, and industry sector. It should also examine the experience of countries in the Organisation for Economic Co-operation and Development.

The workplace relations framework encompasses the *Fair Work Act 2009*, including the institutions and instruments that operate under the Act; and *the Independent Contractors Act 2006*.

The review will make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.

The Productivity Commission will identify and quantify, as far as possible, the full costs and benefits of its recommendations.

An overarching principle for any recommendations should be the need to ensure a framework to serve the country in the long term, given the level of legislative change in this area in recent years.

In conducting the review, the Productivity Commission will draw on the full spectrum of evidence sources including, but not limited to:

- Australian Bureau of Statistics data and publications
- data sources maintained by other relevant Government bodies, including but not limited to the Department of Employment, Fair Work Commission and Fair Work Ombudsman
- employers or their representatives
- employees or their representatives
- academia
- special interest groups.

The review should also identify gaps in the evidence base where further collection may assist in the analysis of the overall performance and impact of the system.

Source: PC Final Report, pp. v–vii

Attachment E—List of Cases

1947 Weekend Penalty Rates Case [1947] 58 CAR 610

1994 Public Holidays Test Case decision Print L4534, 4 August 1994

4 yearly review of modern awards – Annual leave [2015] FWCFB 3406

4 yearly review of modern awards – Annual leave [2016] FWCFB 3177

4 yearly review of modern awards – Award flexibility [2016] FWCFB 6178

4 yearly review of modern awards – Award stage – Group 1A and 1B awards – [2014] FWC 8575

4 yearly review of modern awards – Award stage – Group 3 and 4 awards – [2014] FWC 9412

4 yearly review of modern awards – Common issue – Award flexibility [2015] FWCFB 4466

4 yearly review of modern awards – Common issues [2014] FWC 1790

4 yearly review of modern awards – Common issues [2014] FWC 7742

4 yearly review of modern awards – Issues paper [2014] FWCFB 916

4 yearly review of modern awards – Penalty rates [2014] FWC 9175

4 yearly review of modern awards – Penalty rates [2015] FWC 1482

4 yearly review of modern awards – Penalty rates [2015] FWCFB 5357

4 yearly review of modern awards – Penalty rates [2016] FWCFB 285

4 yearly review of modern awards – Penalty rates [2016] FWCFB 965

4 yearly review of modern awards – Penalty rates [2016] FWCFB 6460

4 yearly review of modern awards – Penalty rates [2016] FWCFB 7285

4 yearly review of modern awards: Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788

Alcan (NT) Alumina Pty Ltd v Commissioner for Territory Revenue (Northern Territory) (2009) 239 CLR 27

ALDI Foods Pty Ltd v Transport Workers’ Union of Australia (2012) 227 IR 120

Annual Wage Review 2011-12 [2012] FWAFB 5000

Annual Wage Review 2012-13 [2013] FWCFB 4000

Annual Wage Review 2013-14 [2014] FWCFB 3500

Annual Wage Review 2013-14 [2015] FWCFB 3500

Annual Wage Review 2015-16 [2016] FWCFB 3500

Australian Competition and Consumer Commission v Leelee Pty Ltd [1999] FCA 1121

Australian Education Union v Department of Education and Children’s Services (2012) 285 ALR 27

Award modernisation [2008] AIRCFB 387

Award modernisation [2008] AIRCFB 550
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Award modernisation [2008] AIRCFB 1000
Award modernisation [2009] AIRCFB 345
Award modernisation [2009] AIRCFB 645
Award modernisation [2009] AIRCFB 835
Award modernisation – Stage 2 modern awards [2009] AIRCFB 800
Award modernisation – Stage 3 modern awards [2009] AIRCFB 450
Award modernisation – Stage 3 modern awards [2009] AIRCFB 462
Bowling v General Motors Holden Ltd (1980) 33 ALR 297
Café v. Australian Portland Cement Pty Ltd (1965) 83 WN (Pt 1) (NSW) 280
Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (2003) 127 IR 205
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 272 ALR 750
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union (2012) 219 IR 139
Commissioner of Stamp Duties v Permanent Trustee Co. Ltd (1987) 9 NSWLR 719
Commissioner of Stamps v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2015) 230 FCR 298
Construction, Forestry, Mining and Energy Union v Deputy President Hamberger (2011) 195 FCR 74
Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16
Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd (2013) 248 CLR 619
Corporation of the City of Enfield v Development Assessment Corporation (2000) 199 CLR 135
Dix v Crimes Compensation Tribunal [1993] 1 VR 297
Donohoe v The Director of Public Prosecutions (WA) [2011] WASCA 239
Edwards v Giudice [1999] FCA 1836
Elias v Federal Commissioner of Taxation (2002) 123 FCR 499
Equal Remuneration Decision 2015 [2015] FWCFB 8200
Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors [2015] FWCFB 210
Evans v Bartlam [1937] AC 473
Friends of Hinchinbrook Society Inc v Minister for Environment (No 3) (1997) 77 FCR 153
Gardner v Jay (1885) 29 Ch D 50

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National Retail Association v Fair Work Commission [2014] FCAFC 118
Nestle Australia Ltd v Federal Commissioner of Taxation (1987) 16 FCR 167
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[2014] FWCFB 2042
Premier Pet Pty Ltd trading as Bay Fish v Brown (No 2) [2013] FCA 167
Prior v Sherwood (1906) 3 CLR 1054
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
R v L (1994) 49 FCR 534
R v Refshauge (1976) 11 ALR 471
*Re Australian Industrial Relations Commission; Ex parte Metal Trades Industry Association
of Australia* (1995) 62 IR 306
Re Clarkson; ex parte Australian Telephone and Phonogram Officers’ Association (1982)
148 CLR 600
Re Engine Drivers and General (State) Interim Award [1950] AR (NSW) 260
Re Fast Food Industry Award 2010 [2010] FWAFB 305
Re Fast Food Industry Award 2010 [2010] FWAFB 379
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Re: Metal, Engineering and Associated Industries Award (2000) 110 IR 247
Re Metal Industry Award 1984 – Foreman and Supervisors and Other Awards (No2) (1994)
56 IR 234
Re Noel Bartone [2014] FWC 2402

Re Owens and Ors [2016] FWC 1884

Re Pharmacy Industry Award 2010 [2010] FWAFB 662

Re Pharmacy Industry Award 2010 [2009] AIRCFB 978

Re R v Moore; ex parte Australian Telephone and Phonogram Officers' Association (1982) 148 CLR 600

Re Restaurant and Catering Association of Victoria [2014] FWCFB 1996

Re Restaurant and Catering Australia and Ors [2013] FWC 7840

Re Security Services Industry Award [2015] FWCFB 620

Re Shop, Distributive and Allied Employees Association [2011] FWAFB 6251

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Re Stevedoring Industry Award [2015] FWCFB 1729

Review of Wage Fixing Principles – August 1994 (1994) 55 IR 144

Ross v R (1979) 141 CLR 432

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294

Sagona v R & C Piccoli Investments Pty Ltd [2014] FCCA 875

Schweppes Australia Pty Ltd v United Voice – Victoria Branch [2012] FWAFB 7858

Shop, Distributive and Allied Employees Association v \$2 and Under and Ors (2003) 135 IR 18200

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Attachment F—List of figures, charts and tables

List of tables

Table 1	Weekend Penalty Rates
Table 2	Proposed public holiday penalty rates in the Hospitality and Retail awards
Table 3A	Proportion of employees who work on weekends, by industry
Table 3B	Structure and operations, 2014
Table 4	Penalty rate arrangements for selected modern awards
Table 5	Days of the week and number of days worked in all jobs, employees, November 2008, November 2013, and August 2015
Table 6	Who works on weekends?, November 2013
Table 7	Whether usually worked weekends, all employed persons
Table 8	Type of work schedule
Table 9	Proportion of employees who work on weekends, by industry
Table 10	Proportion of employees who work on weekends, by selected industry subdivisions and groups
Table 11	Average time spent on leisure activities, 2006, minutes per day
Table 12	Frequency of attendance at religious services
Table 13	Most valuable weekend day – all weekend workers
Table 14	AWALI scores and Sunday work, all and retail employees
Table 15	Modern awards ‘mapped’ to ANZSIC class
Table 16	Economic indicators of Accommodation and food services
Table 17	Percentage of businesses by business size, June 2015
Table 18	Wages and salaries, sales and service income, and industry value added by business size, 2014–15
Table 19	Market and competition, 2014

Table 20	Methods of setting pay, non-managerial employees, May 2016
Table 21	Top 10 modern awards used in Accommodation and food services, percentage of award-reliant organisations, 2013
Table 22	Structure and operations, 2014
Table 23	Average annual growth rate of employed persons, by full/part-time status, August 2–11 to August 2016
Table 24	Composition of employed persons, August 2016
Table 25	Employed persons by age, August 2016
Table 26	Average hours actually worked in all jobs, by full/part-time status, August 2016
Table 27	Employed persons by employment type in main job, August 2016
Table 28	Employees with and without paid leave, August 2016
Table 29	Prevalence and types of shiftwork arrangements, 2014
Table 30	Current work schedule in main job, employed persons, 2015
Table 31	Employees by rate of pay, May 2016
Table 32	Average weekly earnings, May 2016
Table 33	Percentage of employees who receive penalty rates, by method of setting pay, 2014
Table 34	Labour force characteristics of the Hospitality industry (general), ABS Census, 9 August 2011
Table 35	Profits and losses in selected industries
Table 36	Labour force characteristics of the Clubs (Hospitality) industry class, ABS Census, 9 August 2011
Table 37	Distribution of employment type
Table 38	Volunteer type
Table 39	Comparison of the <i>Clubs Award</i> and the <i>Hospitality Award's</i> Classifications
Table 40	Penalty rate arrangements in <i>Hospitality</i> and <i>Clubs Awards</i>

Table 41	Labour force characteristics of the Cafes and restaurants industry class, ABS Census 9 August 2011
Table 42	Cafes and restaurant industry, 2014–15
Table 43	McDonald's and Hungry Jack's – employee by level and status
Table 44	Labour force characteristics of the Takeaway food services industry class, ABS Census 9 August 2011
Table 45	Comparison between Ai Group employee survey and all industries from the ABS Labour Force survey, July 2015
Table 46	Renting Situation and Financial Hardship (percentage)
Table 47	Number of McDonald's and Hungry Jack's employees by age and classification
Table 48	Modern awards 'mapped' to ANZSIC class
Table 49	Economic indicators of the Retail sector
Table 50	Percentage of businesses by business size, June 2015
Table 51	Wages and salaries, sales and service income, and industry value added by business size, 2014–15
Table 52	Market and competition, 2014
Table 53	Methods of setting pay, May 2016
Table 54	Top 10 modern awards used in the Retail sector, percentage of award-reliant organisations, 2013
Table 55	Structure and operations, 2014
Table 56	Average annual growth rate of employed persons, by full/part-time status and industry group of main job, August 2011 to August 2016
Table 57	Composition of employed persons, August 2016
Table 58	Employed persons by age, August 2016
Table 59	Average hours actually worked in all jobs, by industry group of main job and full/part-time status, August 2016
Table 60	Employed persons by employment type in main job, August 2016

Table 61	Employees with and without paid leave, August 2016
Table 62	Prevalence and types of shiftwork arrangements, 2014
Table 63	Current work schedule in main job, employees, 2015
Table 64	Employees by rate of pay, May 2016
Table 65	Average weekly earnings, May 2016
Table 66	Percentage of employees who receive penalty rates, by method of setting pay, 2014
Table 67	Labour force characteristics of General retail industry, ABS Census 9 August 2011
Table 68	Allocated labour hours
Table 69	Turnover per labour hour
Table 70	Labour force characteristics of the Pharmaceutical, cosmetic and toiletry goods retailing industry class, ABS Census 9 August 2011
Table 71	Comparison of the Pharmacy Award and Retail Award wage rates
Table 72	Public Holidays listed by State and Territory 2017
Table 73	Current public holiday penalty rates in the <i>Hospitality and Retail Awards</i>
Table 74	Summary of public holiday penalty rates claims
Table 75	Proposed public holiday penalty rates in the <i>Hospitality and Retail Awards</i>

List of charts

Chart 1	Participation rate—male and female, per cent, 1978–2014
Chart 2	Composition of employment, per cent of total employed, 1978–2014
Chart 3	Proportion of employment by full-time and part-time status and average monthly hours worked, August 1991 to August 2016
Chart 4	Proportion of total employment by employment type, 1995, 2005 and 2011
Chart 5	Casual employment, per cent of employees
Chart 6	Proportion of total employment by employment type, 1995, 2005 and 2015
Chart 6	Proportion of total employment by industry, 1975 to 2014
Chart 7	Proportion of total employment by industry, 1990–91, 2000–01 and 2015–16
Chart 8	Patterns of working weekends over time, employees, 1993 to 2013
Chart 9	Patterns of work by the day, share of the employed working on given days, per cent, November 2013
Chart 10	Relative growth in Saturday and Sunday work, percentage change in numbers employed, 2008 to 2013
Chart 11	Who do people spend time with, deviation of hours per day on weekend from the average weekday, per cent
Chart 12	What do people do with their time, deviation of hours per day on weekend from the average weekday, per cent
Chart 13	Regular church attenders, per cent of population
Chart 14	Change in proportion of people reporting no religion between 2006 and 2011 by age group in 2011
Chart 15	Degree to which employees ‘often’ or ‘almost always’ experience impacts work
Chart 16	A model of the scale effect
Chart 17	Profit margins, 2012–13 to 2014–15
Chart 18	Wages and salaries as a percentage of total expenses, 2012–13 to 2014–15
Chart 19	Average annual growth rates of labour and multifactor productivity, 2003–04 to 2014–15

Chart 20	Business survival rates, by employment size, June 2011 to June 2015
Chart 21	Duration of employment with current employer/business in Accommodation and food services, February 2015
Chart 22	Distribution of hourly total cash earnings, adult employees, May 2014
Chart 23	Annual growth in Wage Price Index, June quarter 2011 to June quarter 2016
Chart 24	Comparison of minimum weekly wages in the <i>Hospitality Industry (General) Award 2010</i> and two-thirds of median full-time earnings
Chart 25	Comparison of minimum weekly wages in the <i>Registered and Licensed Clubs Award 2010</i> and two-thirds of median full-time earnings
Chart 26	Comparison of minimum weekly wages in the <i>Restaurant Industry Award 2010</i> and two thirds of median full-time earnings
Chart 27	Comparison of minimum weekly wages in the <i>Fast Food Industry Award 2010</i> and two-thirds of median full-time earnings
Chart 28	Average annualised wage increases for federal enterprise agreements approved in the quarter, June quarter 2011 to June quarter 2016
Chart 29	Hospitality Employers' evidence – size of enterprises by location
Chart 30	Hospitality Employers' Witnesses: Employees per establishment
Chart 31	Hospitality Employers' Witnesses: Years of experience
Chart 32	Types of clubs in Australia
Chart 33	Spread of clubs across Australia
Chart 34	Average employees per club
Chart 35	Modern awards with spread of hours – start times
Chart 36	Cumulative percentage of sample versus population
Chart 37	Impact of working on a Saturday on spending time with family/friends
Chart 38	Impact of working on a Sunday on spending time with family/friends
Chart 39	Impact of working on Saturdays on spending time with family/friends by age (group brackets)
Chart 40	Impact of working on Sundays on spending time with family/friends by age (group brackets)

Chart 41	How travelling to work on a Sunday compares to other days of the week
Chart 42	Preferred days to work by age (individual brackets)
Chart 43	Willingness to work some or more hours on a Sunday, if offered
Chart 44	Number of McDonald's and Hungry Jack's employees by age and classification
Chart 45	Reported Incident Data by Day of the Week: 1 May 2014 to 17 May 2015
Chart 46	NA book numbers by day of the week, Jasie Pty Ltd 1 May 2015 – 31 July 2015
Chart 47	Profit margins, 2012-13 to 2014-15
Chart 48	Wages and salaries as a percentage of total expenses by subdivision, 2012-13 to 2014-15
Chart 49	Average annual growth rates of labour and multifactor productivity, 2003-04 to 2014-15
Chart 50	Business survival rates, by employment size, June 2011 to June 2015
Chart 51	Duration of employment with current employer/business in the Retail sector, February 2015
Chart 52	Distribution of hourly total cash earnings, adult employees, May 2014
Chart 53	Annual growth in Wage Price Index, June quarter 2011 to June quarter 2016
Chart 54	Comparison of minimum weekly wages in the <i>General Retail Industry Award 2010</i> and two-thirds of median full-time earnings
Chart 55	Comparison of minimum weekly wages in the <i>Pharmacy Industry Award 2010</i> and two-thirds of median full-time earnings
Chart 56	Average annualised wage increases for federal enterprise agreements approved in the quarter, June quarter 2011 to June quarter 2016
Chart 57	Retailing trends by the weekday, share of weekly retail sales, 1982 to 2014
Chart 58	Growth and significance of shopping by weekdays
Chart 59	Longer weekend opening hours, Victoria and Western Australia, 2012–2013
Chart 60	PGA evidence – size and location of pharmacies

Chart 61	PGA Witnesses: Employees per establishment
Chart 62	Number of Pharmacies
Chart 63	Proportion of employees with their pay set by method of setting pay and business size—May 2014

CORRIGENDUM:

This published decision incorporates the following corrections to the document issued on 23 February 2017:

1. At [55] and [2002], the current Sunday penalty rate for a casual employee under the *Pharmacy Award* has been corrected to show **225** per cent (instead of 200 per cent).
2. At [1889] the reference to clause 1.1(b) has been corrected to clause **27.2(b)**.
3. The appearances for the Pharmacy Guild of Australia on page 463 have been corrected.
4. The chart references in Endnotes 643 and 645 have been corrected.

Dated 8 March 2017